COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1003-CR

Cir. Ct. No. 2012CF3

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER M. GIBSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Menominee County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Christopher Gibson appeals a judgment of conviction and an order denying his motion for postconviction relief. Gibson argues: (1) the circuit court erroneously exercised its discretion by giving a *falsus in uno* jury instruction over defense counsel's objection; and (2) his trial counsel

was ineffective by questioning Gibson about prior bad acts, failing to object to the State's subsequent introduction of other acts evidence, and failing to request a limiting instruction regarding the other acts evidence. We conclude the circuit court did not err by giving a *falsus in uno* jury instruction. We further conclude Gibson was not prejudiced by counsel's alleged deficiencies. We therefore affirm.

BACKGROUND

¶2 Gibson was charged with one count of substantial battery and four counts of misdemeanor battery based on a fight that occurred between two groups of people who were rafting on the Wolf River in Menominee County. Gibson was part of one group, and the five victims—J.R.V., J.G., J.K.V., C.W., and R.Q.—were part of the other group. Individuals in both groups had been consuming alcohol prior to the fight. The complaint alleged that, during the fight, Gibson struck each of the five victims with a rafting paddle, causing a laceration to J.R.V.'s head and less serious injuries to the other victims.

¶3 At trial, J.R.V. testified that, toward the end of the rafting trip, he was floating in an inner tube with his cousin, J.G. J.R.V. was teasing J.G. about his appearance—specifically, the fact that he was losing his hair—when J.R.V. saw a man who was later identified as Gibson. After J.R.V. pointed out that Gibson resembled J.G., J.G. said to Gibson, "Cheers buddy, you look just like me." At that point, Gibson got out of his tube and ran toward J.R.V. and J.G., saying, "I'm going to kick your ass!" and "I'm going to beat the hell out of you!" J.R.V. testified J.G. tried to use a paddle to hold Gibson back, but Gibson took the paddle and began swinging it at J.R.V., ultimately hitting J.R.V.'s head and causing a seven-inch laceration.

¶4 Other members of J.R.V.'s group similarly testified that Gibson approached J.R.V. and J.G.'s raft, took J.G.'s paddle, and then used the paddle to strike J.R.V.'s head. In addition, J.G., J.K.V., C.W., and R.Q. each testified Gibson hit them during the ensuing fight, causing them injury. After the fight broke up, J.R.V. and other members of his group continued floating down the river. J.R.V. testified Gibson followed them "saying stuff like, 'If you guys want to look like your buddy … come on back, I'll kick your ass.'" Each of the victims testified they had not seen or had contact with Gibson's group at any time prior to the fight.

¶5 Conversely, Gibson and members of his group testified several incidents occurred between the two rafting groups before the fight. Jake Olson and Amanda Farley testified J.R.V. and J.G.—whom they described as intoxicated, rambunctious, and belligerent—had verbally harassed them earlier that day by "shouting vulgar words" at them. Gibson, Jason Waychoff, and Jacqueline Stoll testified to a separate incident in which J.G. poured a beer over Gibson's head. In addition, Gibson and Justin Friberg testified the two groups had exchanged words about litter left behind by J.R.V.'s group.

¶6 Gibson testified he again encountered J.R.V. and J.G. near the end of the rafting trip. According to Gibson, J.R.V. told J.G., "There's that guy that kind of looks like you," and J.G. responded, "Fuck that. I don't look like that fat fucking piece of shit." When Gibson told J.R.V. and J.G. to "shut the hell up," they replied, "Why don't you come over here and make us?" Gibson testified he and "Kurt," another member of his group, then walked over to J.R.V. and J.G.'s raft and exchanged words with them. At some point, J.R.V. began swinging his paddle at Gibson and Kurt and hit Gibson's arm twice. Thereafter, while Gibson was exchanging punches with J.G., he heard "a loud crack," turned to look at

J.R.V., and saw that J.R.V. was bleeding from the head. Gibson denied swinging a paddle at anyone and testified he did not see who hit J.R.V. with the paddle.

¶7 Other members of Gibson's group similarly testified that Gibson never swung a paddle at anyone during the fight. Stoll testified she saw "tons of paddles being swung," and she believed it was Kurt who hit J.R.V. with a paddle. Olson and Farley likewise testified they saw Kurt, not Gibson, use a paddle to hit J.R.V.

¶8 Sergeant Colin Isom testified that, following the fight, dispatch provided "a description of a full size white van that was leaving the area that possibly had the suspect we were looking for … in it." Isom saw a vehicle matching that description as he approached the scene, so he radioed officer Levi O'Kimosh, who was also on his way to the river, and "notified him to be on the lookout for [the van] heading south." When Isom arrived at the scene, he spoke to four witnesses, including J.K.V. The witnesses described the person who struck J.R.V. as a "larger white male" who was "balding" and "wearing swimming trunks that were white with blue flowering on them." The witnesses also alerted Isom to two individuals hiding in nearby bushes. When Isom ordered those individuals to come out and speak to him, they ran away. However, one of the individuals ultimately stopped and identified himself as James Benson. Benson told Isom the man who continued running was named "Kurtis Bryhan."[1]

¶9 O'Kimosh testified he observed a white van that matched the description provided by dispatch while he was on his way to the river. O'Kimosh

[1] Neither Benson nor Bryhan testified at Gibson's trial.

activated his vehicle's emergency lights to stop the van, and as the van came to a stop, an individual (later identified as Gibson) attempted to flee. O'Kimosh chased Gibson and ultimately found him "lying in some tall grass appearing to be hiding." O'Kimosh testified Gibson was wearing a pair of blue and white swimming trunks.

¶10 On direct examination, Gibson testified he "started to run" when he saw O'Kimosh, but when he "got to the edge of the woods" he "realized [he] wasn't doing the right thing" and sat down. When asked why he ran, Gibson responded, "You know, I'd just been into that altercation, and before I left to go rafting, I promised my daughter that I would be back for her birthday, which was the next day, and that's really all I thought about." On cross-examination, Gibson testified he ran because he thought he was going to be blamed for J.R.V.'s injuries due to the fact that Kurt "wasn't around."

¶11 On redirect examination, defense counsel asked Gibson, "Have you ever been in a fight like this?" and Gibson responded, "No." Counsel then asked Gibson what was "going through [his] head after this happened," and Gibson replied, "I really didn't know what to think of it. Especially after seeing all that blood. That was pretty scary and I just really wanted to be away from it."

¶12 The following exchange then occurred between Gibson and the prosecutor on recross-examination:

> Q. You said you have never been in a fight like this?
>
> A. No.
>
> Q. You have been in fights before?
>
> A. I have.

> Q. You have been in trouble because of fights before, haven't you?
>
> A. I've gotten a disorderly conduct in my life, many years ago.
>
> Q. You were charged with battery, weren't you?
>
> A. I thought I was charged with disorderly conduct, ma'am.
>
> Q. Rock County Case 00-CM-2646, you were charged with battery, correct?
>
> A. I can't recall. I mean how many years ago was that?
>
> Q. So you have been in fights before?
>
> A. I don't even know what that was. I mean, was it a fight? What was it?
>
> Q. You were the one that was charged in it, sir. Who would know better than you?
>
> A. I can't recall it. So that's why I'm asking you, you got it in front of you.

Defense counsel did not object during this exchange.

¶13 At the close of trial, defense counsel failed to request a limiting instruction regarding the other acts evidence related to Gibson's prior battery charge and disorderly conduct conviction. Over defense counsel's objection, the circuit court gave the jury WIS JI—CRIMINAL 305 (2001), entitled "Falsus in Uno."

¶14 The jury ultimately found Gibson guilty of all five of the charged counts. Gibson moved for postconviction relief, asserting his trial attorney was ineffective by failing to object to the introduction of evidence that Gibson had

previously been charged with battery and convicted of disorderly conduct.[2] The circuit court held a ***Machner***[3] hearing, during which Gibson further asserted trial counsel was ineffective by asking Gibson about past fighting and by failing to request a limiting instruction regarding Gibson's prior charge and conviction. The circuit court concluded trial counsel's performance was neither deficient nor prejudicial and therefore denied Gibson's postconviction motion. Gibson now appeals.

DISCUSSION

I. *Falsus in uno* instruction

¶15 Gibson argues the circuit court erred by giving the jury a *falsus in uno* instruction, over defense counsel's objection. A circuit court has broad discretion in instructing the jury. ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). We will not reverse "as long as the instructions adequately cover the applicable law" and the court's decision is "the result of a rational mental process and [is] reasoned and reasonable." ***Id.***

¶16 Wisconsin's *falsus in uno* instruction derives from the Latin maxim "*falsus in uno, falsus in omnibus*," meaning "false as to one thing, false as to all things." ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 658, 505 N.W.2d 399 (Ct. App. 1993). The pattern instruction informs the jury that, if it becomes satisfied from the evidence that any witness "has willfully

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[2] In the alternative, Gibson's postconviction motion sought a new trial in the interest of justice. Gibson does not renew that argument on appeal.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testified falsely as to any material fact," it "may disregard all the testimony of the witness which is not supported by other credible evidence in the case." WIS JI—CRIMINAL 305 (2001).

¶17 *Falsus in uno* instructions are generally disfavored. *See* ***State v. Plude***, 2008 WI 58, ¶71, 310 Wis. 2d 28, 750 N.W.2d 42 (Ziegler, J., concurring); ***State v. Williamson***, 84 Wis. 2d 370, 395, 267 N.W.2d 337 (1978), *abrogated on other grounds by* ***Manson v. State***, 101 Wis. 2d 413, 304 N.W.2d 729 (1981); ***State v. Lagar***, 190 Wis. 2d 423, 433, 526 N.W.2d 836 (Ct. App. 1994); ***Ollman***, 178 Wis. 2d at 659; ***Robinson***, 145 Wis. 2d at 281. In fact, the pattern *falsus in uno* instruction is preceded by the bracketed phrase: "USE OF THIS INSTRUCTION IS NOT FAVORED." WIS JI—CRIMINAL 305 (2001). In addition, the comment to the instruction states the criminal jury instruction committee "recommends that the instruction not be routinely given." Comment, WIS JI—CRIMINAL 305 (2001). However, while *falsus in uno* instructions are disfavored, their use "is not foreclosed if the appropriate circumstances are present." ***Robinson***, 145 Wis. 2d at 281.

¶18 In ***Pumorlo v. City of Merrill***, 125 Wis. 102, 110, 103 N.W. 464 (1905), our supreme court explained that, before a circuit court may give a *falsus in uno* instruction, "there must be a sufficient basis in the evidentiary facts and circumstances … to show that there was willfully false swearing." Accordingly, before ruling on a request for the instruction, the court must "determine whether, under the facts and circumstances, there is any evidence tending to show that a witness or witnesses whose evidence is to be submitted to the jury did willfully swear falsely." ***Id.*** at 110-11. When making this determination, the court "must take into consideration that willfully false swearing is not to be imputed to a witness when it clearly appears that discrepancies, conflicts, and contradictions in

the evidence are manifestly honest mistakes, due to faulty observation, imperfect recollection, or mistaken impressions of facts." ***Id.*** at 111. Instead,

> [t]he court must find something either in the appearance, demeanor, or manner of a witness while testifying, or such a conflict or contradiction between him and the other witnesses in the case, or such an inherent incredibility in the facts testified to by him, as would reasonably tend to show that the witness swore falsely.

Id.

¶19 In this case, the State argued a *falsus in uno* instruction was appropriate because the defense witnesses "all told different stories" and "directly contradicted each other." The circuit court agreed, reasoning:

> Falsus In Uno says if they find anyone willfully testified falsely. Doesn't mean that they have testified by mistake or they didn't have the ability to see. Sometimes people can see things that might be the same thing, but see them differently. I don't think it says that. I think it's a sword that cuts both ways and it [a]ffects prosecution witnesses as much as defense witnesses if the Jury believes that somebody testified falsely, willfully testified falsely. I think it's a case of issues that obviously there [are] different stories and I think it's very relevant in this matter. I don't think it's unfair. I think it is a Jury instruction that would apply to the testimony of both defense witnesses and prosecution witnesses.

¶20 The circuit court's explanation is not a textbook example of a proper exercise of discretion. The court did not make an express finding that there was a sufficient basis in the evidence for the jury to conclude any witness or witnesses had willfully testified falsely. Rather, the court stated a *falsus in uno* instruction was "relevant" because witnesses for the State and the defense had told "different stories." The court did not address whether discrepancies in the various witnesses' accounts could have been the result of "manifestly honest mistakes, due to faulty observation, imperfect recollection, or mistaken impressions of facts." *See* ***id.*** at

111. Nevertheless, "[a]lthough the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Here, our independent review of the record confirms that, although the instruction is disfavored and we believe the better course would have been to refrain from giving it, there was a sufficient evidentiary basis for the circuit court's decision to give a *falsus in uno* instruction.

¶21 ***Pumorlo*** provides that a circuit court may give a *falsus in uno* instruction if the court finds "such a conflict or contradiction between [a witness] and the other witnesses in the case … as would reasonably tend to show that the witness swore falsely." ***Pumorlo***, 125 Wis. at 111. In this case, there were many contradictions between the State's witnesses' and the defense witnesses' testimony regarding the fight and the events leading up to it. Some of these contradictions can be explained away as having likely been the result of mistakes or misperceptions. In the chaos of the fight, for instance, it is understandable that various witnesses could have misperceived whether it was Gibson, or someone else, who used a paddle to strike J.R.V. Because a *falsus in uno* instruction requires evidence that a witness or witnesses *willfully* provided false testimony, without additional evidence of false swearing, these conflicts in and of themselves did not provide a basis for the circuit court to give the instruction.

¶22 Conversely, however, conflicts in the witnesses' testimony regarding the events leading up to the fight cannot reasonably be characterized as "manifestly honest mistakes, due to faulty observation, imperfect recollection, or mistaken impressions of facts." ***Id.*** As noted above, all five of the victims—including J.R.V. and J.G.—testified their group had no contact with Gibson's

group prior to the fight. In contrast, Olson and Farley testified J.R.V. and J.G. verbally harassed them earlier that day by "shouting vulgar words" at them. In addition, Gibson, Waychoff, and Stoll testified J.G. poured a beer over Gibson's head in a separate incident before the fight occurred. These discrepancies cannot reasonably be attributed to honest mistakes—either the incidents described by the defense witnesses occurred, or they did not. They represent what ***Pumorlo*** described as "such a conflict or contradiction between [a witness] and the other witnesses in the case … as would reasonably tend to show that the witness swore falsely." ***Id.*** The only reasonable conclusion is that either the defense witnesses or the State's witnesses willfully lied about whether these incidents occurred.

¶23 Whether there were conflicts between the two rafting groups prior to the fight could reasonably be considered a material fact. It is not the dispositive fact—i.e., whether Gibson or someone else struck the victims with the paddle. Nevertheless, it can be viewed as material to that dispositive issue because it provides a motive, or lack thereof, for the altercation, as well as providing context for it. Because the existence and nature of prior conflicts between the groups could be construed as material facts, the witnesses' contradictory testimony about whether those conflicts occurred and how they occurred provided an evidentiary basis for the circuit court to give a *falsus in uno* instruction under ***Pumorlo***. Consequently, although instructing the jury on *falsus in uno* is not favored, the court's decision to do so here was not an erroneous exercise of discretion.

II. Ineffective assistance

¶24 Gibson also argues his trial attorney was ineffective by: (1) asking Gibson whether he had been involved in "a fight like this" before; (2) failing to object when the State subsequently questioned Gibson about a prior battery charge

and conviction for disorderly conduct; and (3) failing to request a limiting instruction regarding that evidence. Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

¶25 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶26 In this case, we need not address deficient performance because, regardless of whether Gibson's trial attorney performed deficiently, Gibson has failed to demonstrate prejudice. The circuit court concluded it was not reasonably probable the result of Gibson's trial would have been different absent counsel's alleged errors because the State presented strong evidence of Gibson's guilt—specifically, the testimony of multiple eyewitnesses who identified Gibson as the person who hit the victims. In particular, the circuit court noted the State's

witnesses were confident in their identification of Gibson as the assailant because Gibson looked like their friend, J.G. The court further explained:

> [T]his Court sat through the trial as well, and when I look at the totality of the circumstances—and totality means everything, just not what we sometimes see in the transcript, because what we don't see in the transcript is the demeanor of all of the witnesses of how they—their body motions, their facial expressions. The evidence was strong that there was guilt.

In addition, the court noted the fact that Gibson ran from police following the fight provided further evidence of his guilt.

¶27 We agree with the circuit court that, given the strong evidence the State presented, it is not reasonably probable the jury would have acquitted Gibson absent counsel's alleged errors. Gibson challenges the strength of the State's evidence on the grounds that the State's witnesses "identified Gibson amidst the chaotic fight, admitted they had been drinking alcohol throughout the day, and testified that they had never seen Gibson before." We reject this argument for several reasons.

¶28 First, there were significant credibility issues regarding the defense witnesses who identified "Kurt," rather than Gibson, as the person who hit the victims. The defense witnesses were Gibson's friends and therefore had reason to lie about whether Gibson was the assailant. In contrast, the State's witnesses did not know Gibson and had no reason to purposefully falsely accuse him. In addition, multiple defense witnesses described Kurt as having light brown or strawberry blonde hair and testified he does not resemble Gibson, who is bald. This evidence indicates it is unlikely the State's witnesses merely mistakenly identified Gibson, rather than Kurt, as the assailant. Furthermore, although Stoll and Farley testified at trial that it was Kurt, not Gibson, who hit the victims with a

paddle, they conceded they did not identify Kurt as the assailant on the day of the fight.

¶29 Second, as the circuit court noted, the jury could have reasonably relied on the fact that Gibson ran from police as evidence of his guilt. *See **State v. Winston***, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984). Third, witnesses at the scene provided a description of the assailant shortly after the fight that was consistent with Gibson's appearance, including the swimming trunks he was wearing that day. Finally, the State's witnesses' admission to consuming alcohol on the day of the fight did not render their testimony less credible as there was also evidence that members of Gibson's group were consuming alcohol that day. For all of these reasons, we reject Gibson's argument that, because of the chaos of the fight, the fact that the State's witnesses had been drinking, and the fact that they did not know Gibson, the jury likely would have discounted their testimony that Gibson hit the victims absent the admission of evidence regarding Gibson's prior battery charge and disorderly conduct conviction and counsel's failure to request a limiting instruction regarding that evidence. Moreover, the battery charge and disorderly conduct conviction occurred over ten years before Gibson's trial, and no further details regarding those incidents were divulged to the jury. This further suggests the jury likely did not give the evidence regarding the prior charge and conviction much weight when assessing Gibson's guilt or innocence in the instant case.

¶30 Gibson also asserts the State's evidence was not particularly strong because it was based on eyewitness identifications. He raises a number of arguments in support of the proposition that eyewitness identifications, as a general matter, are inherently unreliable. However, Gibson fails to account for the fact that both the State and the defense relied solely on eyewitness identifications

at trial—the State's witnesses identified Gibson as the assailant, whereas the defense witnesses identified Kurt. The jury was thus forced to choose between differing eyewitness accounts. For the reasons explained above, we conclude the jury did not convict Gibson because he was a bad person, but because, as the circuit court found, the state's evidence was significantly stronger than the defense's. As a result, it is not reasonably probable the result of Gibson's trial would have been different absent his attorney's alleged errors.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under RULE 809.23(3)(b) (2015-16).