State v. Murphy
Wis.App.,2004.
NOTICE: UNPUBLISHED OPINION. RULE 809.23(3), RULES OF CIVIL PROCEDURE, PROVIDE THAT UNPUBLISHED OPINIONS ARE OF NO PRECEDENTIAL VALUE AND MAY NOT BE CITED EXCEPT IN LIMITED INSTANCES.(The decision of the Court is referenced in the North Western Reporter in a table captioned "Wisconsin Court of Appeals Table of Unpublished Opinions".)

Court of Appeals of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent,
v.
Dennis H. **MURPHY**, Defendant-Appellant.
No. 03-1673-CR.

June 2, 2004.

Appeal from a judgment and an order of the circuit court for Walworth County: James L. Carlson, Judge. Reversed and cause remanded with directions.

Before ANDERSON, P.J., NETTESHEIM and SNYDER, JJ.

¶ 1 PER CURIAM.
***1 Dennis H**. **Murphy** appeals from a judgment of conviction of first-degree reckless homicide, aggravated battery, and obstructing an officer, and from an order denying his motion for postconviction relief. We conclude that trial counsel was ineffective for not impeaching the testimony of the key witness with statements made in trial counsel's office. We address other alleged trial errors that may recur upon a new trial. We reverse the judgment and order and remand for a new trial.

¶ 2 B.J. Downing died of injuries suffered while in the company of Murphy and Kevin Welch at Murphy's apartment. The three had been drinking heavily when fighting or wrestling broke out. Downing sustained injuries and was rendered unconscious. He was left unattended on an outdoor balcony overnight. The rescue squad was not called until more than twelve hours later. Downing died in the hospital a day later.

¶ 3 At trial Welch testified that Murphy beat Downing with his fists because he was angry at Downing's lewd conduct. There was evidence of other physical abuse inflicted on Downing by Murphy. Two of Welch's pastors and his attorney testified about what Welch told them in the weeks following Downing's death, a story consistent with Welch's trial testimony.

¶ 4 The theory of defense was that Welch had caused Downing's injuries while performing a wrestling maneuver known as a “pile driver.” The medical examiner testified that Downing died from a head injury consistent with his head striking a carpeted floor in a particular manner. One witness testified that in a conversation after Downing's death, Welch demonstrated a “pile driver” that Welch said he had performed on Downing.

¶ 5 What the jury did not hear is that the day after Downing's death, Welch repeatedly said that Murphy “didn't do it.” The statements came during a meeting with Attorney Steven Harvey. Welch, his girlfriend, Amber Noel, and Murphy's mother, Justine Wolff, were meeting with Harvey to see if he would possibly serve as defense counsel for Murphy.[FN1]Four to six times during the meeting, Welch said Murphy “didn't do it,” a statement which contradicted Welch's trial testimony. Harvey also observed that Welch had a cut on one of his fingers. Harvey was Murphy's defense counsel at trial.

FN1. Murphy was arrested for obstructing an officer after emergency personnel responded to his apartment.

¶ 6 Murphy sought a postconviction ruling that his trial counsel was ineffective for not putting into evidence Welch's statements the day after Downing's death and that Welch had a cut on his finger. Murphy argued that Harvey should have withdrawn from representation so that he could testify about the meeting in his office. During his *Machner*[FN2] testimony, Attorney Harvey explained that he did not believe he had a conflict of interest as both counsel and witness because he intended to present evidence of Welch's statements in his office through the testimony of Wolff. However, he incorrectly testified that he had questioned Wolff about Welch's statements. The trial court concluded that Harvey did not have a conflict of interest because he did not have exclusive information about the meeting in his office. It also concluded that Harvey was not constitutionally ineffective for not questioning witnesses about the meeting in his office in light of other contradictions in Welch's testimony and attacks on his credibility.

FN2. A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim. *See State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App.1979).

¶ 7 In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis.2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact.*Id.*, ¶ 21.The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *Id.* However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *Id.*

***2** ¶ 8 There is no dispute here that trial counsel did not ask any witness about Welch's statements in his office the day after Downing died. Evidence of the cut on Welch's finger was also not put into evidence. Thus, even though trial counsel advanced a strategy reason for not

withdrawing so that he could become a witness, he never utilized that strategy. Once counsel failed to put in the evidence by other witnesses, he had an ethical obligation to disqualify himself and give testimony about the meeting in his office. *See*SCR 20:1.16(a)(1), 20:3.7(a) (2001-02).

¶ 9 The State argues that Murphy was not prejudiced by trial counsel's deficient performance. We cannot agree. "The test for the prejudice prong is whether counsel's errors deprived the defendant of a fair trial, a trial whose result is reliable."*State v. Marcum,* 166 Wis.2d 908, 917, 480 N.W.2d 545 (Ct.App.1992). It is not an outcome determinative standard. We are concerned with whether counsel's deficient performance so affected the adversarial process that our confidence in the outcome is undermined. *See id.*

¶ 10 We acknowledge that there were other inconsistencies in Welch's testimony and that other witnesses testified about contrary admissions Welch made in the days following Downing's death.[FN3]However, Welch and Murphy were the only two eyewitnesses to the crime. Welch's repeated statements the very next day that Murphy "didn't do it" was critical impeachment evidence. It was the only direct statement Welch made that Murphy was not responsible; it was a statement that directly conflicted with Welch's trial testimony. Moreover, in light of the testimony from Welch's pastors and attorney, having an attorney testify as to Welch's next-day statement would have been more effective than had Wolff testified about the statements. Attorney Harvey's testimony would have balanced the testimony from Welch's attorney. Evidence of the cut on Welch's finger would have inferentially supported the theory of defense that Welch was responsible for Downing's injuries. Without this available evidence, our confidence in the outcome is undermined. Murphy was denied the effective assistance of counsel and is entitled to a new trial.

> FN3. Welch first told police that he had left the apartment before anything happened. Welch's coworker testified that the next day Welch admitted to her that he had "jacked" and "stomped" Downing. After an interview with police, Welch expressed to that same coworker concern that he could go to jail for life. Wolff indicated that after Downing was taken out of the apartment by emergency personnel, Welch started praying and asking for God's forgiveness for his sin.

¶ 11 Murphy raises additional claims of trial error. Although our holding on the preceding issue does not require that we address other claims, we do so in the interests of completeness and because the issues may recur upon a new trial. *See State v. Neuser,* 191 Wis.2d 131, 141, 528 N.W.2d 49 (Ct.App.1995). We need not, however, decide whether any of the additional errors were harmless.

***3** ¶ 12 Murphy argues that it was improper for Welch's pastors and attorney to testify about prior consistent statements by Welch. The testimony was admitted under a hearsay exception permitting admission of a prior consistent statement when "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."WIS. STAT. § 908.01(4)(a)2 (2001-02).[FN4] Murphy contends that the statements were made to the witnesses after Welch's alleged motive to lie existed. *See State v. Street,* 202 Wis.2d 533, 550-51, 551

N.W.2d 830 (Ct.App.1996) (prior consistent statement must have been made before the alleged fabrication, influence, or motive came into being). He argues that Welch had the motive to lie from the moment Downing was attacked or, at the latest, when Welch learned that Downing had died.

FN4. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶ 13 We review the trial court's ruling on the admission of evidence for a proper exercise of discretion. *State v. Miller,* 231 Wis.2d 447, 467, 605 N.W.2d 567 (Ct.App.1999). We need only find that the trial court examined the relevant facts, applied a proper standard of law and, using a rational process, reached a reasonable conclusion. *Id.* Murphy claims the trial court failed to make the necessary inquiry into whether the statements to the pastors predated Welch's motive to lie or fabricate.

¶ 14 The State responds that the statements to Welch's pastors were admissible under *State v. Lindner,* 142 Wis.2d 783, 796-97, 419 N.W.2d 352 (Ct.App.1987). In *Lindner,* the defendant argued that the recent fabrication exception did not apply because it was his contention that the victim's allegation of sexual assault was fabricated from the beginning. *Id.* at 796, 419 N.W.2d 352. The court concluded that the defendant's cross-examination of the victim only suggested that the victim's testimony had been rehearsed or improperly influenced by the prosecutor. *Id.* at 797, 419 N.W.2d 352. The court affirmed the admission of the prior consistent statements made before the prosecutor had the opportunity to influence the victim. *Id.* The State contends that Murphy's cross-examination of Welch only attempted to demonstrate that Welch pointed the finger at Murphy once he became aware that the police considered Welch a suspect.

¶ 15 We cannot agree that the evidence was that Welch's motive to lie arose only when he believed the police were looking at him as a suspect and after he spoke with his pastors. Welch testified that right after Murphy beat Downing, he left the apartment because he was sure the police would be coming to check out the disturbance and he wanted to avoid trouble. When he returned to Murphy's apartment the next night (after the rescue squad had been called), he saw police cars and yellow tape across the door. He indicated he did not approach the officers and offer information about the incident because he did not want to be involved. The next night he was asked to go to the police station to talk to the investigating detective. Welch was escorted to the police station in a squad car. He lied to police and said he had left Murphy's apartment before anything had happened. When asked why he had lied, he said Murphy was in enough trouble and Welch did not want anything to do with it since he was a new father and would soon be getting married. Although within two days of Downing's death Welch called his pastor and set up a meeting, he had one more police contact before he got to meet with his pastor. Welch acknowledged that he was asked to go to the police station again because the detective knew he was lying. During his second meeting at the police station, two days after Downing died, Welch lied again and told police that although he had not witnessed the fight, Murphy told Welch how he had beaten Downing. Welch then had his first meeting with his pastor. When he got home after the meeting, the police were at his house and had confiscated his shoes and boots. Welch

stated that the first time he knew Murphy was accusing him was when the police took his shoes and boots. About six weeks later Welch gave a written statement to police. On cross-examination, Welch reiterated that he did not approach the police at Murphy's apartment because he was trying to avoid trouble, did not want anything to do with it, and that his concern was keeping himself, his wife, his infant son, and Murphy out of trouble. Although Welch retreated a bit from his direct testimony that he knew Murphy had accused him when his shoes were confiscated, he acknowledged that he began looking for a lawyer for himself a week and a half after the incident. He described the detective as hounding him for information about the incident and being afraid.

***4** ¶ 16 The trial court's ruling that the prior consistent statements to Welch's pastors were admissible was made pretrial and without the benefit of Welch's actual testimony. Thus it is problematic to apply the *Lindner* approach that the scope of cross-examination defines when the motive to fabricate arises. Welch's testimony suggests that he may have had the motive to lie or fabricate immediately after Downing was attacked. He admittedly tried to avoid police contact so that he would not be involved. He admittedly lied to police on two occasions before meeting with his pastor. Although the meeting with one of the pastors occurred before Welch's shoes were confiscated, the other pastor could not fix a time or date when Welch made statements to him. On this state of the record we conclude that admission of the pastors' testimony was an erroneous exercise of discretion because it was made without ascertaining if Welch's statements to his pastors predated his motive to lie. The admissibility of Welch's prior consistent statements to his pastors upon a new trial should be based on the evidence and cross-examination adduced at that trial. *See State v. Hoyt,* 21 Wis.2d 284, 298, 128 N.W.2d 645 (1964) (admissibility question open for determination at new trial depending on evidence offered).

¶ 17 The State concedes that Welch's statement to his own attorney was made after Welch was aware that the police were looking at him as a suspect. The State advances that the statement to Welch's attorney was admissible as relevant evidence on credibility as explained in *State v. Gershon,* 114 Wis.2d 8, 12, 337 N.W.2d 460 (Ct.App.1983).*Gershon* recognizes that a prior consistent statement, without regard to when it was given, is admissible on the issue of credibility, although not admissible for substantive purposes. *Id.* Murphy argues that *Gershon* has been abandoned *sub silentio* through the exclusive use of the hearsay exception in WIS. STAT. § 908.01(4)(a)2, as illustrated in *Ansani v. Cascade Mountain, Inc.*, 223 Wis.2d 39, 53, 588 N.W.2d 321 (Ct.App.1998); *Street,* 202 Wis.2d at 550-51, 551 N.W.2d 830;*State v. Mainiero,* 189 Wis.2d 80, 102-03, 525 N.W.2d 304 (Ct.App.1994); and *State v. Peters,* 166 Wis.2d 168, 177, 479 N.W.2d 198 (Ct.App.1991). Despite the perceived conflict, we observe that we are obligated to follow *Gershon.See Cook v. Cook,* 208 Wis.2d 166, 190, 560 N.W.2d 246 (1997).

***5** ¶ 18 However, this is not a *Gershon* case. In *Gershon,* the trial court gave a cautionary instruction about the purpose of the statements and advised the jury that the statements were offered to support the victim's credibility, not as substantive evidence of the facts of the alleged criminal conduct. *Gershon,* 114 Wis.2d at 13, 337 N.W.2d 460. This instruction cured any prejudice from the prosecution's introduction of five versions of the event. *Id.* Here, no limiting instruction was requested by the prosecution or defense. The attorney's testimony cannot be

admitted under the reasoning of *Gershon* without the limiting instruction. The error is not likely to recur at the second trial.

¶ 19 In order to determine whether there was a discovery violation by the defense, the trial court allowed the defense investigator, Robert Pierson, to testify about his witness interviews.[FN5] A voir dire examination took place outside the presence of the jury. Pierson explained that it was his practice to destroy any handwritten notes he makes of witness interviews so that nothing has to be turned over to the prosecution and that he had followed that practice in this case. The trial court found that there was no discovery violation. The prosecutor sought to call the investigator to impeach the testimony of two of Murphy's witnesses but the investigator was by then unavailable. Redacted portions of the voir dire examination were read to the jury on the last day of the trial. Murphy claims that his defense was unfairly prejudiced by the publication of Pierson's testimony to the jury.

FN5. A defense witness mentioned that the investigator made notes during their interview, thus prompting the prosecutor to question whether there had been a discovery violation.

¶ 20 We reject Murphy's initial argument that any voir dire of the investigator was improper. Although handwritten notes taken by the investigator were not subject to discovery requirements under WIS. STAT. § 971.23(1)(e), *see Pohl v. State*, 96 Wis.2d 290, 310, 291 N.W.2d 554 (1980), the voir dire examination was an appropriate vehicle for confirming the method of note taking by the investigator, that no statements were taken, and that no discovery violation occurred. We do not decide Murphy's claim that the investigator's testimony was improperly used as impeachment evidence because no objection was made on that ground. Regardless of whether the testimony was proper impeachment, there was no reason to publish to the jury that part of the examination related to the investigator's note taking and destruction of the notes. We agree with Murphy that the admission that the defense would employ a tactic which would not require disclosure to the prosecution was prejudicial.[FN6] The examination implied that the investigator's destruction of the notes was illegal. It impugned the integrity of the defense and should not have been admitted.

FN6. The following testimony was read to the jury:
EXAMINATION BY THE COURT: And did you interview people who might be potential witnesses?

PIERSON: Yes, sir.

COURT: Did you take any notes or record any statements in any fashion?

PIERSON: I took-recorded no statement or anything like that. I took a few brief notes, yes.

COURT: Did you do those by phone or in person?

PIERSON: In person.

COURT: And did you have, did you have a file regarding this case?

PIERSON: I just had some discovery that was given to me, yes, sir.

COURT: So in other words they provided information about what some witness might have said, or something like that?

PIERSON: Yes, sir.

COURT: I want to ask you what you did in this case?

PIERSON: I destroy them. I rip them up and throw them away.

COURT: And you did that in this case?

PIERSON: Yes, sir.

COURT: When did you take these statements?

PIERSON: Two, three, four weeks ago, that I recall.

COURT: All of them were in that time period?

PIERSON: Yes, sir.

COURT: And were they destroyed then or when?

PIERSON: Then.

....

EXAMINATION BY MR. KOSS [D.A.]: Mr. Pierson, you said that you took notes when you talked to these people.

PIERSON: Some I did, yes. Other times I did not.

D.A.: How do you decide when to take notes and when not to?

PIERSON: If I feel there's something that was said that I may not recall, I might take a note on it. Like I say, they were usually very brief.

D.A.: When you were a police officer, I assume when you talk to people, when you took

notes, you made a report?

PIERSON: Yes, sir.

D.A.: Why don't you do it now?

PIERSON: Because it's a different position I'm in now. Most of the defense attorneys I work for, if not all, do not want a report. So everything I do with them, I verbalize.

D.A.: And how did you know whether or not in this case you should make a report or do it verbally?

PIERSON: Because I have worked for Mr. Harvey before, and he's never requested me to produce any reports or anything. So I felt it was the same this time or he would have said so.

D.A.: Has he told you in the past: I don't want you to make a report on these?

PIERSON: Yes, sir.

D.A.: And that's so there's apparently there's no statement that can be given to the prosecution, right?

PIERSON: Yes, sir.

***6** ¶ 21 Several witnesses testified about prior incidents of fighting between Murphy and Downing and that they had observed Downing with bruises, contusions and a black eye. This other acts evidence was admitted to establish motive, identity and intent. *See*WIS. STAT. § 904.04(2). Murphy argues that the admission of the evidence was an erroneous exercise of discretion. He contends that prior assaults do not provide a motive for the assault that ended in Downing's death, that there was nothing about the prior assaults that constituted Murphy's "imprint" so as to bear on identity, and that intent was not an issue.

¶ 22 Our review of this issue is governed by the erroneous exercise of discretion standard, and the trial court's decision to admit the other acts evidence will be upheld if it is in accordance with legal standards and facts of record, if the court undertook a reasonable inquiry and examination of the underlying facts, and if there exists a reasonable basis for the determination. *See State v. Sullivan,* 216 Wis.2d 768, 780, 576 N.W.2d 30 (1998). The three-step analysis to be applied is laid out in *State v. Gray,* 225 Wis.2d 39, 49-50, 590 N.W.2d 918 (1999).

¶ 23 We conclude that the other acts evidence was offered for an acceptable purpose of motive and identity and relevant to those issues. The testimony indicated that Murphy would use physical abuse against Downing. Residents of the apartment building heard the two men fighting during times when Downing would stay with Murphy. One witness indicated that Murphy said he had to slap Downing around to straighten him up. While the prior assaults may not mimic the intensity of the fatal assault, they are probative of motive and identity. The trial court correctly

concluded that the other acts evidence was not unfairly prejudicial. A cautionary instruction was given which reduced the prejudicial effect. *Id.* at 65, 590 N.W.2d 918. Admission of the other acts evidence was a proper exercise of discretion.

¶ 24 During his direct examination, Welch testified that he had offered to take a polygraph test and was still willing to do so. Murphy argues that this testimony was erroneously admitted because there was no foundation establishing that Welch believed the test to be accurate and admissible in court. *See State v. Santana-Lopez,* 2000 WI App 122, ¶ ¶ 4-5, 237 Wis.2d 332, 613 N.W.2d 918 (offer to take a polygraph test is admissible if the person believes the test is accurate and admissible). Although Murphy objected to admission of such testimony, he did not object on foundation grounds. The appellate claim is waived. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis.2d 486, 611 N.W.2d 727. We hold Murphy to his waiver because if his objection had been more specific, the prosecution may have been able to satisfy the foundational requirement. *See State v. Whitrock*, 161 Wis.2d 960, 969, 468 N.W.2d 696 (1991). However, if this testimony is offered upon a new trial, an adequate foundation should be established.

***7 ¶** 25 We need not address Murphy's argument that a new trial be granted under WIS. STAT. § 752.35, in the interests of justice. We reverse the judgment of conviction and the order denying postconviction relief, and remand with directions for a new trial.

Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See*WIS. STAT. RULE 809.23(1)(b)5.

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