COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 Nos. 2014AP313-W
2014AP344

Cir. Ct. No. 2010CF30

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2014AP313-W

STATE OF WISCONSIN EX REL. RANDY LEE ROSS,

PETITIONER,

V.

JEFFREY PUGH, WARDEN,

RESPONDENT.

NO. 2014AP344

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY LEE ROSS,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Writ denied; order affirmed*.

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

¶1 PER CURIAM. Randy Ross appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. He also petitions this court for a writ of habeas corpus. Ross claims the attorney who represented him in conjunction with his first postconviction motion and direct appeal was ineffective by failing to raise or adequately develop several arguments regarding ineffective assistance of trial counsel. Ross also argues his sentence on count one—theft of movable property whose value exceeds $5,000 but does not exceed $10,000—was unlawful because the evidence presented at trial was insufficient to establish the value of the stolen property. We reject Ross's arguments and affirm.

BACKGROUND

¶2 Ross was charged with five counts in connection with a November 2009 break-in at a pole shed in Pershing, Wisconsin: count one, theft of movable property whose value exceeds $5,000 but does not exceed $10,000; count two, theft of movable property (special facts); count three, burglary of a building or dwelling; count four, criminal damage to property; and count five, theft of movable property (special facts). Ross entered not guilty pleas, and the case proceeded to trial in September 2010. Ross was represented at trial by attorney Carol Hagstrom.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 During Ross's trial, brothers James and John Gassenhuber testified they own a cabin in the Town of Pershing. They left the cabin on November 8, 2009, and when they returned on November 15, they discovered a pole shed on the property had been burglarized. James testified one of the pole shed's windows was broken and multiple items were missing from the building, including: a pistol; a muzzleloader; a Husqvarna chain saw; a Husqvarna weed whacker; fishing rods, reels, and tackle boxes, some of which were used for fishing on Lake Michigan; camouflage hunting chairs; and an Ameristep hunting blind. James testified the approximate value of the stolen items was $7,500.

¶4 Aemus Balsis, a detective with the Taylor County Sheriff's Department, testified he responded to a report of a break-in at the Gassenhubers' pole shed on November 15, 2009. He inspected the broken window, which was about fifteen inches wide and five feet off the ground. He noticed that large shards of glass remained attached to the window frame, and he also noticed there were no impressions on the ground outside the shed to suggest that someone had set something below the window in order to climb inside. He also observed the dust on the inside of the window frame was undisturbed. Based on these observations, and his experience investigating break-ins, Balsis concluded the perpetrator did not enter the pole shed through the window, but instead broke the window to mask the fact that he or she had entered through the door.

¶5 Balsis's investigation therefore focused on people who had access to keys to the pole shed. He learned from the Gassenhubers that a key to the shed was hidden on a propane tank on the property. He also learned the Gassenhubers had recently hired contractor Timothy Bendixen to remodel the cabin. Bendixen had hired two workers to help with the project—Spencer Parrott and Ross. James Gassenhuber confirmed that Bendixen, Ross, and Parrott knew about the key

hidden on the propane tank and used it to access the shed during the course of the remodeling work.

¶6 Parrott testified he and Ross were sometimes left alone on the Gassenhubers' property while working. During those times, they both "looked around" the pole shed and made comments about "the value of the items" in the shed and the fact that the Gassenhubers "didn't have them protected like you would think they would." Parrott also testified Ross made comments about wanting to take the four-wheelers stored in the shed for a ride. In addition, Parrott confirmed that, in a previous statement to investigators, he said Ross "made comments that there were really valuable items" in the shed and that it would be easy to break in and steal them. In the same statement, Parrott told investigators Ross "was inside the [shed] for a long time snooping around." Parrott also told investigators that, after Ross learned he was being investigated in connection with the burglary, he was "very upset and nervous" and stated he "did not want cops snooping around his house."

¶7 Another witness, Mason DeRidder, testified he attended an alcohol and other drug abuse (AODA) meeting with Ross sometime around November 19, 2009. During the meeting, Ross mentioned he was concerned that police were investigating him in connection with a burglary at a cabin in Taylor County. However, Ross did not admit being involved in the burglary.

¶8 The next witness to testify at trial was probation agent Michael Schuetz. Schuetz testified Ross was on probation in November 2009 and was being supervised by Schuetz's colleague, Susan Wagner. On November 25, 2009, Schuetz conducted a probation search of the home where Ross lived with his girlfriend, Jessica Sutten, in the Village of Glen Flora in Rusk County. Schuetz

testified he was looking for illegal drugs, based on: an informant's report that Ross had attempted to sell him liquid morphine; Ross's November 25 admission to Wagner that his urinalysis check would be positive for THC; and another informant's report that Ross sold him THC. During the search, liquid morphine was discovered in Ross's refrigerator. Sutten later told investigators the morphine was hers, although Ross admitted he knew it was in the house.

¶9 Schuetz further testified he noticed a hunting blind in a camouflage bag, "Great Lakes fishing poles that had very large reels," and two camouflage folding chairs during the search of Ross's residence. Schuetz explained he did not seize or photograph these items because he was unaware of the burglary and was only looking for drugs.

¶10 Anthony DeJohn, an acquaintance of Sutten's, testified Sutten came to his home on about November 29, 2009, and attempted to sell him a VCR, hunting chairs, and a hunting blind. DeJohn bought the VCR, but not the other items. On about December 1, DeJohn found the chairs and hunting blind, along with fishing rods and reels, in the yard of a different property he owned. DeJohn testified he contacted police after finding these items.

¶11 Jeffrey Wallace, a Rusk County sheriff's deputy, testified he responded to a different report of items scattered along a river bank four to five miles south of Glen Flora on November 30, 2009. He found hunting and fishing equipment in and around the river, as well as a Husqvarna weed whacker.

¶12 Balsis testified he sent photographs of the items Wallace and DeJohn recovered to John Gassenhuber, who identified them as items stolen from the pole shed. Schuetz also testified some of the items recovered by Wallace and DeJohn were items he had seen in Ross's residence during the probation search. Balsis

testified he interviewed Ross about the burglary on December 9, 2009, after the items were recovered, and Ross appeared nervous and evasive. Balsis executed a search warrant on Ross's home on December 11, but the items Schuetz had described seeing during the probation search were no longer there.

¶13 Sutten also testified at trial. She admitted she sold DeJohn a DVD player on November 29, 2009, but she stated she did not know whether she tried to sell him anything else. She explained she could not remember what happened in November 2009 because she was "doing drugs" at the time. She testified Ross never talked to her about a break-in at a place where he worked, and he never asked her to sell any hunting or fishing equipment.

¶14 The State confronted Sutten with recordings of several phone calls she made to Ross while he was incarcerated pending trial. In one call, Sutten told Ross that she knew he committed the burglary, and that she "took the fall for him" concerning the liquid morphine found in their house. Sutten admitted making similar allegations in a phone call to Ross's mother. In another call, Ross told Sutten not to accept service of the subpoena compelling her to testify at his trial, and Sutten responded she would act drugged and confused when she testified.

¶15 Ross did not testify at trial. However, both of his parents testified in his defense, providing a partial alibi. Specifically, they stated Ross was at their home, which is two and one-half hours away from Taylor County, from November 13 through November 15, 2009. Ross's mother also testified Sutten wrote her a letter indicating Sutten had allowed an individual named Guy Hoyt to store property in the garage at Ross's residence.

¶16 The defense also called MaryAnn DeJohn, a relative of Anthony DeJohn, as a witness at trial. MaryAnn testified Sutten and Hoyt attempted to sell

her some items, including fishing poles, which they told her were stolen. MaryAnn testified Sutten and Hoyt did not mention Ross, except to say that MaryAnn should not tell Ross they had tried to sell her the items. MaryAnn asserted Sutten and Hoyt had "a history of stealing."[2]

¶17 After the defense rested, the State recalled Balsis as a rebuttal witness. Balsis testified he interviewed Sutten, Hoyt, and Ross, each of whom denied any involvement in the break-in. The State then asked, "But through your investigation, you were actually piecing together a fair amount of significant evidence to point that obviously this defendant committed these crimes?" Balsis responded, "Yes." Attorney Hagstrom subsequently asked Balsis whether anyone "actually [said] that they had heard [Ross] say he did it or that they saw him do it?" Balsis responded, "I think Mason DeRidder during one interview[.]"

¶18 The jury convicted Ross of all five counts. Attorney Hagstrom withdrew as Ross's attorney, and attorney Shirlene Perrin was appointed to represent him in postconviction proceedings. On July 18, 2011, attorney Perrin filed a motion for postconviction relief, alleging attorney Hagstrom provided ineffective assistance in sixteen respects. The circuit court denied the motion, following a ***Machner***[3] hearing. Attorney Perrin filed an appeal, and this court affirmed.

¶19 Represented by new counsel, Ross subsequently filed a second postconviction motion, pursuant to WIS. STAT. § 974.06. The motion alleged

[2] Attorney Hagstrom apparently subpoenaed Hoyt to testify at trial, but he failed to appear.

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

attorney Perrin was ineffective by failing to raise or adequately develop in Ross's first postconviction motion four arguments showing ineffective assistance of Ross's trial counsel. The motion also alleged Ross's sentence on count one was unlawful because there was insufficient evidence to prove that the stolen property was worth between $5,000 and $10,000. The circuit court denied Ross's WIS. STAT. § 974.06 motion, following additional ***Machner*** hearings. Ross now appeals from the order denying his § 974.06 motion, and he also petitions this court for a writ of habeas corpus.[4]

DISCUSSION

I. Ineffective assistance of postconviction/appellate counsel

¶20 To prevail on a claim that postconviction or appellate counsel was ineffective by failing to argue ineffective assistance of trial counsel, a defendant must establish that trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. In other words, the defendant must show that trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Id.***, ¶¶14-15. 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." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional

[4] A motion alleging ineffective assistance of postconviction counsel is properly filed in the circuit court under WIS. STAT. § 974.06. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-83, 556 N.W.2d 136 (Ct. App. 1996). In contrast, an ineffective assistance of appellate counsel claim must be raised in a petition for writ of habeas corpus to the appellate court that heard the appeal. ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992).

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.

¶21 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.***

¶22 Ross argues attorney Perrin was ineffective by failing to raise or adequately develop four arguments that attorney Hagstrom was ineffective. We assume, without deciding, that attorney Hagstrom performed deficiently in all four of these respects. Nevertheless, we conclude Ross has not shown attorney Hagstrom was ineffective because he has not established that her performance prejudiced his defense.

¶23 First, Ross claims attorney Hagstrom should have objected to or should not have introduced the following evidence regarding Ross's drug use: testimony that probation agents searched Ross's residence for drugs because Ross admitted his urinalysis check would be positive for THC and because two informants reported Ross sold or attempted to sell them drugs; testimony that liquid morphine was found in Ross's residence, and Ross admitted he knew it was there; and testimony that Ross attended an AODA meeting. Ross argues this testimony was inadmissible other acts evidence. He further asserts he was prejudiced by admission of the evidence because it "made him appear as an

untreatable drug addict[,]" and it "does not require a great leap to surmise that jurors may have inappropriately assumed that a drug addict would commit burglary and theft to feed his addiction."

¶24 We conclude the admission of evidence regarding Ross's drug use did not prejudice his defense.[5] During trial, evidence was introduced that:

- Ross made comments about the value of items in the pole shed and how easy they would be to steal;
- Ross suggested taking the four-wheelers in the shed for a ride;
- Ross was seen snooping around inside the shed for an extended period of time;
- Ross knew where the key to the shed was located;
- Although the burglar broke a window in the shed, Balsis concluded the burglar did not actually enter through the window but instead entered through the door;
- Items matching those taken from the shed were seen in Ross's home during the probation search;
- Following the search, Sutten tried to sell items matching those taken from the shed;
- Items taken from the shed were found on a river bank four to five miles from the village where Ross lived after Ross became aware police were investigating him in connection with the burglary;
- When police subsequently searched Ross's home, the items previously seen by probation agents were no longer present;

[5] Although we do not decide whether attorney Hagstrom performed deficiently by introducing and failing to object to evidence of Ross's drug use, we note it is not clear an objection to the evidence would have succeeded. Evidence about Ross's drug use was necessary to provide context for the probation search—it explained why the agents were in Ross's home and why they did not seize or photograph the stolen property at that time. The testimony regarding Ross's participation in an AODA meeting was similarly contextual.

- Ross appeared nervous and evasive when discussing the burglary; and
- Ross told Sutten not to accept service of the subpoena to testify at his trial, and Sutten responded she would act drugged and confused when she testified.

Given this strong evidence of Ross's guilt, it is not reasonably probable the result of his trial would have been different had evidence about his drug use been excluded. *See* ***Strickland***, 466 U.S. at 694.

¶25 In his reply brief, Ross argues he was prejudiced by the admission of evidence about his drug use because, absent that evidence, the jury "may have concluded" Sutten and Hoyt broke into the pole shed. We are unpersuaded. Ross's theory is that the evidence about his drug use caused the jury to improperly assume he was the kind of person who would commit burglary and theft. However, Sutten's concession at trial that she had a serious drug problem at the time of the break-in made it equally likely the jury improperly assumed Sutten's drug problem made her the type of person who would commit burglary. As a result, it is unlikely the evidence about Ross's drug use was a significant factor in the jury's conclusion that Ross, not Sutten and Hoyt, committed the break-in. In addition, there was no evidence at trial suggesting that Sutten or Hoyt knew about the cabin, knew where the key to the pole shed was located, or had an opportunity to commit the break-in. Ross's theory that the jury would have concluded Sutten and Hoyt committed the break-in absent the drug evidence is therefore entirely speculative.

¶26 Second, Ross claims attorney Hagstrom was ineffective by failing to object to Sutten's out-of-court statements to Ross and his mother that she knew Ross committed the break-in. Ross argues these statements were inadmissible as either hearsay or improper opinion testimony. He further argues admission of the

statements was prejudicial because, given Sutten's relationship with him, the jury "likely inferred she had some inside knowledge" that led her to believe he committed the break-in. He also argues that, absent the statements, the jury may have concluded Sutten and Hoyt committed the break-in.

¶27 Once again, we conclude Ross has failed to establish prejudice. As discussed above, substantial evidence of Ross's guilt was introduced at trial, and there was no evidence that Sutten and Hoyt had the means or opportunity to commit the break-in. As a result, it is not reasonably probable the result of the trial would have been different absent Sutten's out-of-court statements accusing Ross of committing the break-in. *See* ***id.***

¶28 Third, Ross argues attorney Hagstrom was ineffective by failing to object to Balsis's testimony that his investigation "piec[ed] together a fair amount of significant evidence to point that obviously [Ross] committed these crimes[.]" Ross asserts this was improper opinion testimony that invaded the jury's province to determine guilt. Be that as it may, we again conclude Ross has failed to establish prejudice. The jury would not have been surprised to hear that the lead detective in the case believed Ross was responsible for the break-in, and, accordingly, Balsis's testimony to that effect would not have significantly influenced the verdict. It is therefore not reasonably probable the outcome of Ross's trial would have been different had attorney Hagstrom objected to Balsis's testimony. *See* ***id.***

¶29 Fourth, Ross argues attorney Hagstrom was ineffective by failing to impeach Balsis's testimony that DeRidder said he either saw Ross commit the break-in or heard Ross admit to committing the break-in. Specifically, Ross argues attorney Hagstrom should have confronted Balsis with a report he authored

or with DeRidder's written statement, both of which indicated Ross "never said anything [to DeRidder] about actually stealing the items."

¶30 Yet again, we conclude attorney Hagstrom's performance did not prejudice Ross's defense. During DeRidder's testimony, attorney Hagstrom specifically asked whether Ross "ever said anything about actually stealing the items?" DeRidder responded, "No, I wrote that in my statement. You can see that [Ross] never said anything about actually stealing the items." In addition, DeRidder's statement was introduced into evidence at trial. Thus, the jury knew DeRidder did not tell Balsis that Ross admitted committing the break-in. In light of this evidence, it is not reasonably probable the outcome of Ross's trial would have been different had attorney Hagstrom impeached Balsis's testimony with DeRidder's statement or Balsis's own report.

¶31 Finally, Ross argues he has established ineffective assistance based on the cumulative prejudice caused by attorney Hagstrom's errors. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. Again, we are not persuaded. As discussed above, significant evidence of Ross's guilt was introduced at trial. In addition, while Ross asserts the jury may have concluded Sutten and Hoyt committed the crimes absent attorney Hagstrom's errors, that theory is entirely speculative. Consequently, even if attorney Hagstrom performed deficiently, her performance does not undermine our confidence in the outcome of Ross's trial. *See* ***Strickland***, 466 U.S. at 694.

¶32 Because Ross has failed to show that he was prejudiced by attorney Hagstrom's performance, he has failed to establish that he received ineffective assistance of trial counsel. As a result, Ross's claim that he received ineffective

assistance of postconviction/appellate counsel also fails. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

II. Unlawful sentence

¶33 Ross next argues his sentence on count one—theft of movable property whose value exceeds $5,000 but does not exceed $10,000—was unlawful because the evidence presented at trial was insufficient to establish the stolen property's value. We agree with the State that this argument is procedurally barred.

¶34 When a defendant's claim for relief could have been, but was not, raised on direct appeal or in a prior WIS. STAT. § 974.06 motion, the claim may not be presented in a later § 974.06 motion unless the defendant presents a sufficient reason for his or her previous failure to raise the claim. WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ross does not present any reason, let alone a sufficient reason, for failing to raise his claim regarding the stolen property's value in his prior postconviction motion and appeal.[6] Instead, Ross argues the procedural bar does not apply to his claim because "[a] request for commutation of the sentence under [WIS. STAT.] § 973.13 is not forfeited or waived by any prior postconviction motion that failed to challenge the validity of the sentence."

[6] Ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise a claim previously. *See* ***Rothering***, 205 Wis. 2d at 682. However, Ross does not claim attorney Perrin was ineffective by failing to argue in his first postconviction motion that the evidence was insufficient to establish the stolen property's value.

¶35 We reject this argument because Ross's claim regarding the stolen property's value does not fall within WIS. STAT. § 973.13. Section 973.13 provides, "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." Here, the jury found Ross guilty of theft of property whose value exceeds $5,000 but does not exceed $10,000, and the court sentenced him to six years' imprisonment, which is the maximum term of imprisonment authorized by statute. *See* WIS. STAT. §§ 943.20(3)(bm), 939.50(3)(h). Thus, Ross's sentence is not in excess of that authorized by law, and granting relief under § 973.13 would be inappropriate.[7]

¶36 Instead of a claim under WIS. STAT. § 973.13, Ross's argument regarding the stolen property's value is more accurately construed as a claim challenging the sufficiency of the evidence. Because Ross has failed to present a sufficient reason for failing to raise this claim in his prior postconviction motion and appeal, he is procedurally barred from raising it now.

By the Court.—Writ denied; order affirmed.

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

[7] In support of his argument that the procedural bar against successive postconviction motions and appeals does not apply, Ross cites ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998). There, we established a "narrow exception" to the procedural bar that "is only applicable when a defendant alleges that the State has neither proven nor gained the admission of the defendant about a prior felony conviction necessary to sustain [a] repeater allegation." ***Id.*** at 30. That is not the case here, and Ross does not develop any argument that we should extend the ***Flowers*** exception to cover the instant facts.