COURT OF APPEALS
DECISION
DATED AND FILED

January 6, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP76-CR **Cir. Ct. No. 2010CF746**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY T. GRANDISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: JILL N. FLASTAD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timothy Grandison appeals a judgment convicting him of kidnapping with the use of a dangerous weapon, two counts of second-degree sexual assault, resisting or obstructing an officer, possession of cocaine with use of a dangerous weapon, and two counts of criminal damage to property, all as a repeat offender. He also appeals an order denying his postconviction

motion, in which he alleged ineffective assistance of trial counsel and juror misconduct. The circuit court rejected the ineffective assistance claim after considering the testimony of Grandison's trial counsel, and it rejected the juror misconduct claim without taking testimony from the juror, finding Grandison's motion and supporting affidavit failed to identify any potentially prejudicial extraneous information discovered by the juror. Grandison contends his trial counsel was ineffective in his closing argument by conceding Grandison obstructed an officer, and he asserts he is entitled to a hearing on his claim of juror misconduct.[1] We reject these arguments and affirm the judgment and order.

¶2 All of the charges arise out of an incident in which Grandison was alleged to have restrained, repeatedly sexually assaulted and robbed a bookkeeper at the hotel where they both worked. He allegedly smoked crack cocaine during the assaults, damaged hotel property. When police responded to the call at the hotel, he attempted to hide by lying on the ground and, after being ordered to remain on the ground by a uniformed officer in marked squad cars, ran from officers ignoring their repeated orders to stop.[2]

Ineffective assistance of counsel

¶3 During his closing argument, Grandison's counsel conceded the obstruction charge. Citing ***State v. Gordon***, 2003 WI 69, ¶¶24-28, 262 Wis. 2d

[1] Grandison's trial counsel filed a postverdict motion alleging juror misconduct. Counsel withdrew the motion. Grandison contends his trial counsel was ineffective for withdrawing the motion. That issue arises only if we conclude withdrawing the motion constituted a waiver of Grandison's juror misconduct issue. Because we do not apply a waiver theory, we need not address that issue.

[2] The jury acquitted Grandison of the counts alleging armed robbery, felony theft and intimidating a victim.

380, 663 N.W.2d 765, Grandison argues counsel's concession was in direct conflict with Grandison's testimony and was the functional equivalent of entering a guilty plea, in excess of counsel's authority. Grandison cites a portion of his own testimony in which he admitted he ran, but claimed he stopped when he heard the officer say "Stop." Grandison's testimony as a whole, however, included sufficient admissions to establish that he obstructed the officer.[3] He conceded he was on probation, knew he had drugs in his system, and ran from police to avoid apprehension.

¶4 To establish ineffective assistance of counsel the defendant must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable ***Id.*** at 690. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Id.*** at 691. To establish prejudice, Grandison must show 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.

¶5 Grandison established neither deficient performance nor prejudice from his counsel's concession on the obstruction charge. At the postconviction hearing, counsel explained his strategy of conceding Grandison's guilt on the

[3] The elements of obstructing an officer are: (1) The defendant obstructed an officer, meaning that the defendant prevents or makes more difficult the performance of the officer's duties; (2) The officer was doing an act in an official capacity; (3) The officer was acting with lawful authority; and (4) The defendant knew that the officer was acting in an official capacity and with lawful authority and that the defendant knew his conduct would obstruct the officer. *See* WIS JI—CRIMINAL 1766 (2010).

relatively minor charge, hoping the jury would not view Grandison's flight as evidence of his guilt on the more serious charges. As in ***Gordon***, Grandison's own testimony left his counsel with little choice but to concede the obstruction charge. Grandison also failed to establish prejudice because his own testimony that he fled because he knew he had a controlled substance in his system and was on probation effectively admitted his guilt on that offense.

Juror misconduct

¶6 A defense investigator who interviewed the jurors after the trial submitted a report that juror Jon Greenwood stated, "[h]e knew the defendant had 11 prior convictions and indicated he did not want to be asked how he knew this, but Jon said the jurors were not to know this information." Greenwood refused to sign an affidavit to that effect, claiming he was misquoted by the investigator. Greenwood denied doing any outside investigation of Grandison's record or doing any research in the case. However, based on the investigator's report, Grandison filed a postconviction motion requesting a hearing to determine whether grounds existed for a new trial based on outside influence or extraneous prejudicial information influencing the jury. The court denied the motion without taking testimony from Greenwood.

¶7 A party seeking to impeach a verdict must demonstrate (1) the juror's testimony pertains to extraneous information, not the jurors' deliberative process, (2) extraneous information was improperly brought to the jury's attention, and (3) the extraneous information was potentially prejudicial. ***State v. Eison***, 194 Wis. 2d 160, 172, 533 N.W.2d 738 (1995). To be entitled to a hearing, the moving party must present detailed, nonconclusory facts establishing who, what, when, where, why and how an error justifies a new trial. ***State v. Allen***, 2004 WI

106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Grandison's motion and affidavit were not sufficient to justify a hearing because they identified no prejudicial extraneous information. The only specific information Greenwood allegedly acquired was that Grandison had eleven prior convictions. That fact was disclosed to the jury as a whole by Grandison himself. Regardless of when and how Greenwood acquired that information, Grandison was not prejudiced because Greenwood learned of the eleven convictions through direct testimony at the trial.

¶8 Grandison speculates that Greenwood could have learned of other information based on his alleged statement "don't ask me how I know this, but we weren't supposed to know this information." Grandison's motion did not identify what information Greenwood might have uncovered, why it was significant or how it would prejudice his defense. The postconviction hearing is for presenting evidence, not discovery. Mere speculation that Greenwood might have uncovered some other prejudicial information is not sufficient to merit an evidentiary hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).