COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-0960-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. BLACKMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Michael A. Blackmon appeals pro se from a judgment of conviction of two counts of threat to injure while armed, two counts of false imprisonment while armed, second-degree recklessly endangering safety while armed, injury by negligent handling of a dangerous weapon, possession of

cocaine and disorderly conduct, and from an order denying his motion for postconviction relief. He argues that he was denied the effective assistance of trial counsel and that the trial court erroneously exercised its discretion in refusing the give the self-defense instruction. We affirm the judgment and the order.

Blackmon was convicted for acts committed on February 14, 1995. On that day, Blackmon had smoked crack cocaine at the apartment of Rebecca Pursell. He later returned to the apartment and, after smoking more crack cocaine, threatened to kill Pursell and Frances Hastings while the three were in a locked bedroom of the apartment. He also threatened to burn down the house and kill the children who were asleep in the apartment. He physically threatened Pursell by holding a large glass jar over her head and poking a knife in her neck. Pursell received cuts to her hands. The two women were not allowed to leave the bedroom for about two hours. Eventually Hastings escaped from the bedroom and summoned help from a neighbor's apartment.

"There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* **State v. Sanchez**, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). 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. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.*** In examining prejudice, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and

a reliable trial outcome. *See* ***State v. Pitsch***, 124 Wis.2d 628, 640-41, 369 N.W.2d 711, 718 (1985). An error is prejudicial if it undermines confidence in the outcome. *See* ***id.*** at 642, 369 N.W.2d at 719. When a defendant fails to prove either prong of the test, the reviewing court need not consider the remaining prong. *See* ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104 (Ct. App. 1992).

Blackmon's first claim is that trial counsel was deficient for failing to file a motion in limine or make an objection that would have prevented Hastings from testifying that Blackmon had been in prison before. Trial counsel did not fail to act with respect to Hastings' testimony that Blackmon hated white people because of what they did to him in prison. Although not immediately following Hastings' mention of Blackmon's prior imprisonment, counsel did argue to the trial court that the revelation was impermissible commentary on Blackmon's criminal record. Counsel eventually moved to strike the testimony and for a mistrial. Counsel indicated that he was trying to avoid a contemporaneous objection. That suggests that counsel was trying to avoid calling attention to Blackmon's prior imprisonment. The desire not to call the jury's attention to a potentially prejudicial circumstance is reasonable. *Cf.* ***Watson v. State***, 64 Wis.2d 264, 279, 219 N.W.2d 398, 406 (1974) (recognizing that defense counsel faces a difficult choice when considering a corrective instruction which again calls to the jury's attention a potentially prejudicial circumstance).

Trial counsel's failure to make a motion in limine to prevent the mention of Blackmon's prior imprisonment did not prejudice Blackmon. As the trial court explained in denying the motion to strike the testimony and the motion for a mistrial, the evidence was admissible as part of the context of the crime. *See* ***State v. C.V.C.***, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989)

("[a]n accepted basis for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary for a full presentation of the case." (quoted source omitted)); ***State v. Seibert***, 141 Wis.2d 753, 761, 416 N.W.2d 900, 904 (Ct. App. 1987) (reference to defendant's pending sexual assault charge and violation of a no-contact order was essential to furnish part of the context of the alleged crime and a full presentation of the case). The reason for Blackmon's hatred of white people provided a motive for his criminal acts against Pursell, a white person. It also explained the context of his threats to do to Pursell what other white people had done to him. The motion in limine would have been rejected. Counsel was not deficient for not seeking to exclude the evidence. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

During opening argument, the prosecutor indicated to the jury that a chemist had tested the contents of a baggie found at the crime scene and that the chemist would testify that the substance tested was positive for cocaine. This was a misstatement because the chemist did not test the material in the baggie for the presence of cocaine. Blackmon argues that trial counsel was deficient for not objecting to the prosecutor's misstatement during opening argument.

Blackmon does not suggest how he was prejudiced by the misstatement and we conclude there was no prejudice. The chemist was called as a defense witness and his testimony established that the contents of the baggie had not been tested for cocaine. Blackmon's closing argument utilized this evidence to argue to the jury that the State had not presented any scientific evidence that the substance was cocaine. Additionally, the jury was instructed that the arguments of counsel were not evidence and that it was to disregard any implication of the existence of certain facts not in evidence. We presume that the jury followed the

instruction given by the trial court. *See* ***State v. Smith***, 170 Wis.2d 701, 719, 490 N.W.2d 40, 48 (Ct. App. 1992).

Blackmon claims that trial counsel "failed to put on the right defense." Blackmon's argument is nothing more than the type of "Monday-morning quarterbacking" which the law frowns upon. *See* ***Lee v. State***, 65 Wis.2d 648, 657-58, 223 N.W.2d 455, 459-60 (1974). Counsel presented a blended defense attacking the credibility of the victims and suggesting that a drug-induced paranoia caused Blackmon's violent reaction to the circumstances. It was an adequate, if not the only, defense plausible. Adequate counsel need not be the best counsel available nor present the best defense possible. *See* ***State v. Williquette***, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993), *aff'd*, 190 Wis.2d 677, 526 N.W.2d 144 (1995).

Blackmon seems to suggest that counsel could have more vigorously presented a self-defense theory if counsel had called the State's witnesses as part of the defense case. Trial counsel elicited the pertinent testimony during his cross-examination of the State's witnesses. As a result, throughout the presentation of the State's case-in-chief the jury heard countervailing evidence of Blackmon's claim of self-defense. Counsel was not required to wait to elicit such testimony until the time for presenting the defense case or to recall the witnesses as defense witnesses. To do so would have risked having testimony excluded as cumulative. There is no basis for the claim that trial counsel was ineffective.

Blackmon inexplicably links his decision not to testify with the trial court's refusal to give the self-defense instruction. He claims that his decision not to testify was not knowingly made because he was never informed that "one has to take [the] witness stand to obtain self-defense instructions." Blackmon waived his

right to testify before the trial court made any rulings on his request for a self-defense instruction. With his waiver came the acknowledgment that his testimony could affect the self-defense position and that he believed he had already presented sufficient evidence to raise self-defense before the jury. The trial court correctly noted that it was not required to rule on whether the self-defense instruction would be given until the completion of all the evidence. The deferment of the decision on instructions did not have the effect of switching the burden of production or proof on self-defense. It was Blackmon's choice to not testify based on the assessment that sufficient evidence existed to support the self-defense instruction. That the trial court subsequently found otherwise does not link up with Blackmon's waiver of the right to testify.

It is well established that a trial judge may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case. *See* ***State v. Vick***, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981). A defendant has presented sufficient evidence to justify a self-defense instruction if "a reasonable construction of the evidence will support the defendant's theory 'viewed in the most favorable light it will reasonably admit from the standpoint of the accused.'" ***State v. Coleman***, 206 Wis.2d 199, 213, 556 N.W.2d 701, 707 (1996) (quoted sources omitted).

Here, no reasonable construction of the evidence would support a self-defense instruction. Blackmon was the aggressor. The victims were not armed with any weapons and did not make threats against Blackmon. There was no basis for concluding that Blackmon had a reasonable belief that the victims could harm him or that he was preventing an unlawful interference with his person. *See* ***State v. Camacho***, 176 Wis.2d 860, 879-80, 501 N.W.2d 380, 387 (1993). The trial court properly denied the self-defense instruction.

By the Court.—Judgment and order affirmed.

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