COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-1563-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EUGENE NICHOLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Eugene Nichols appeals pro se from a judgment convicting him as a habitual offender of battery by a prisoner while using a dangerous weapon and from an order denying his postconviction motion for a new trial. We affirm.

¶2 Nichols was charged after an altercation with his cellmate, Ronald Rode. Nichols claimed he acted in self-defense and testified to that effect; Rode testified that Nichols attacked him with three writing instruments which had been rubber-banded together.[1] Prior to the altercation, Nichols and Rode had been having a disagreement about whether the cell window should be open. The jury convicted Nichols.

¶3 On appeal, Nichols argues that his trial counsel was ineffective because she did not call a witness, Scott Baldwin, who was in the cell next door and whom Nichols believed would support his self-defense theory. At the postconviction motion hearing, trial counsel testified that Nichols disagreed with her decision to exclude Baldwin's testimony. Counsel believed that Baldwin's testimony would have been more detrimental than helpful to Nichols. Based on trial counsel's testimony, the circuit court found that counsel made a strategic decision to exclude Baldwin's testimony.

¶4 "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 (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 (1996). The circuit

[1] We reject Nichols's suggestion that the evidence against him was circumstantial. Rode, the victim, testified that Nichols attacked him. Such testimony is not circumstantial evidence. *See* WIS JI—CRIMINAL 170 ("[c]ircumstantial evidence is the proof of certain facts from which a jury may logically infer the existence of other facts according to the knowledge or common experience of mankind"). The jury was not required to infer anything from Rode's testimony.

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.*** We will not overturn a circuit court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). Whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***Sanchez***, 201 Wis. 2d at 236-37. To preserve an ineffective assistance of counsel claim, the defendant must produce trial counsel at a postconviction ***Machner***[2] hearing and question counsel regarding the areas of alleged ineffectiveness. *See* ***State v. Mosley***, 201 Wis. 2d 36, 50, 547 N.W.2d 806 (Ct. App. 1996).

¶5 While Nichols argues that Baldwin would have testified that he heard the altercation and that Rode was the aggressor, this evidence was not presented at the postconviction motion hearing. There, Nichols had the burden to show that counsel's performance was deficient and that he was prejudiced thereby. *See* ***Smith***, 207 Wis. 2d at 273. Nichols did not question trial counsel about the specifics of Baldwin's testimony or have Baldwin testify as to what his trial testimony would have been. In the absence of this evidence, the court's finding that trial counsel made a strategic decision to exclude Baldwin's testimony is not clearly erroneous.

¶6 Nichols's next appellate issue relates to the admission of evidence that he is a Muslim.[3] The evidence came in during Nichols's cross-examination

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[3] Because Nichols's trial counsel objected in these instances, we do not address this as an ineffective assistance of trial counsel issue. Rather, we treat it as a challenge to the circuit court's discretionary evidentiary rulings.

and during the testimony of a rebuttal witness for the State that Nichols's correctional institution has a sizable and influential Muslim population. The court found that the rebuttal testimony was relevant to an inference that Rode would have to fear retaliation from other Muslims if he had a conflict with Nichols, thereby undermining Nichols's contention that Rode was the aggressor. The court also found that the evidence was not unduly prejudicial.[4]

¶7 Nichols claims that evidence that he is a Muslim was inadmissible under WIS. STAT. § 906.10 (1997-98). Section 906.10 bars evidence of beliefs or opinions of a witness on matters of religion if the purpose of the evidence is to show that by reason of the beliefs or opinions, the witness's credibility is impaired or enhanced.

¶8 The admission of evidence is within the circuit court's discretion and its rulings will not be overturned on appeal absent a misuse of discretion. *See* ***State v. Givens***, 217 Wis. 2d 180, 194, 580 N.W.2d 340 (Ct. App. 1998). We conclude that the circuit court properly exercised its discretion in admitting evidence that Nichols is a Muslim.

¶9 We reject Nichols's contention that WIS. STAT. § 906.10 barred evidence that he is a Muslim. It is clear from the record that the evidence was admitted because it was relevant to Nichols's claim that Rode was a loner and the aggressor. The evidence did not relate to Nichols's beliefs or opinions on matters of religion. In closing argument, the prosecutor observed that it was curious that a

[4] The court decided the objection during cross-examination at a sidebar conference. Although the court's reasons are not set forth in the trial transcript, we may independently review the record to determine whether it provides a basis for the court's discretionary decision. *See* ***Town of Seymour v. City of Eau Claire***, 112 Wis. 2d 313, 322, 332 N.W.2d 821 (Ct. App. 1983).

loner would attack Nichols because other Muslims would support Nichols in any confrontation with Rode. As the prosecutor aptly noted, if Rode had been the aggressor, he would have to "watch his back" for the rest of his prison term. The prosecutor argued that it did not make sense for Rode to attack someone who was well connected to the prison's sizable Muslim population.

¶10 Finally, Nichols argues that he is entitled to a new trial in the interest of justice. We have rejected Nichols's claims of ineffective assistance of trial counsel and misuse of discretion in admitting evidence that he is a Muslim. A final catch-all plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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