COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1706-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN WARREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. John Warren appeals his judgment of conviction and an order denying postconviction relief. Warren was convicted of one count of fleeing from an officer – habitual criminality, contrary to §§ 346.04(3), 346.17(3)(a), and 939.62, STATS., and one count of retail theft, party to a crime – habitual criminality, contrary to §§ 943.50(1m) & (4)(a), 939.05, and 939.62,

STATS. Warren appeals the trial court's denial of his postconviction motion claiming ineffective assistance of trial counsel. He also claims that the trial court erred in failing to inquire why Warren requested a new attorney on the day of the trial before denying his request. We affirm.

I. BACKGROUND.

On February 21, 1997, Warren was arrested after driving a man known to Warren only as "E" to a local Sentry store. According to Warren, "E" told Warren to wait in the car and then "E" entered the store and stole several T-shirts, returned to Warren's car and forced Warren, at gun-point, to flee from police. Further, Warren claims that "E" threatened to "blow Warren's brains out" if he stopped the car; however, when Warren turned down a dead end street, "E" ordered him to pull over, and "E" jumped out of the car and escaped. Warren was arrested and charged with retail theft, party to a crime, and fleeing an officer. Warren claimed that he had not planned the theft with "E" and that he had offered "E" a ride to Sentry to pick up "E's" fiancée in exchange for gas money and "a couple of bags of crack." In charging Warren as a party to the crime to both the crime of retail theft and the crime of fleeing from an officer, the State contended that Warren was aware of "E's" intention to steal and that Warren was not coerced into fleeing from the police.

On the trial date, immediately after his case was called, Warren's attorney informed the trial court that Warren was requesting a new attorney. The trial court responded, "I don't grant that on the trial date. Would have to be something really ridiculous to warrant me to grant a request to have a new lawyer on the day of the trial." Beyond this statement, the trial court inquired no further into Warren's reasons for requesting a new attorney. Warren's attorney then

informed the court that he was prepared for trial, but the trial court, presumably due to court's calendar, then "spun off" the case for trial to a different court.

After the case was "spun" to the second court, a question arose in chambers regarding a statement Warren had provided to a detective with the Wauwatosa Police Department. The statement was never reduced to a written report and the detective retired in the interim. The prosecutor, concerned that the discovered statement might be exculpatory, as the statement may have been consistent with Warren's defense, was willing to join in a request for an adjournment to permit Warren's attorney to obtain the statement. Warren's attorney informed Warren that it was likely that a request for an adjournment would be granted so the attorney could pursue this evidence. However, Warren's attorney warned Warren that in light of a report reflecting numerous bail violations by Warren, the court would almost certainly review bail if the trial was adjourned, and it was likely that Warren would be remanded into custody until the next trial date. Rather than risk the possibility that his bail would be revoked and he would be returned to jail, Warren elected to continue to go to trial without the additional evidence. Despite being presented with additional grounds for the granting of a continuance, Warren did not renew his request for a new attorney and the trial commenced.

At trial, Warren testified in his own defense. During direct examination, Warren's attorney elicited testimony from Warren that he had previously owned a .25-caliber handgun in an effort to explain how it was that Warren could identify "E's" weapon. Warren's attorney also explored Warren's criminal record with him. Warren had fourteen criminal convictions. During cross-examination, in reference to Warren's fourteen convictions, the prosecutor asked two follow-up questions regarding Warren's criminal record: "You know as

a person with 14 prior convictions if you are convicted you're not going to get a lot of breaks, are you?" Warren answered, "[n]o sir," and the prosecutor followed with, "[y]ou're a career criminal, aren't you?" At this point Warren's attorney objected and the objection was sustained by the court. Later, during closing argument, the prosecutor referred to Warren several times as a "liar." However, Warren's attorney did not object to the prosecutor's remarks nor move for a mistrial.

After the jury convicted Warren on both counts, Warren was assigned new counsel who filed a postconviction motion alleging ineffective assistance of trial counsel. The trial court denied Warren's postconviction motion without a hearing, finding, in part, that Warren had not been prejudiced by the actions of his trial counsel. Warren appeals the trial court's order denying his postconviction motion, as well as his judgment of conviction.

II. ANALYSIS.

Warren requests that this court either grant him a new trial or remand this matter to the trial court for a ***Machner***[1] hearing on his ineffective assistance of counsel claim. Alternatively, Warren asks this court to remand his case for a hearing regarding his reasons for requesting new counsel and presumably, if appropriate reasons are found for Warren's request for a new attorney, his conviction must be overturned and a new attorney appointed. Because we conclude that Warren's attorney was not ineffective, he is not entitled to either a new trial or a ***Machner*** hearing. We affirm the trial court's denial of

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

Warren's postconviction motion. We also conclude that Warren abandoned his request for a new attorney.

A. Ineffective assistance of trial counsel.

Warren posits his ineffective assistance of counsel claim on three acts or omissions by his attorney during trial: (1) counsel failed to renew Warren's request for a new attorney after the case was moved to a second court; (2) counsel failed to make a timely objection or move for a mistrial when the prosecutor made allegedly improper remarks during cross-examination and closing arguments regarding Warren's character and criminal record; and (3) counsel elicited testimony on direct examination that Warren previously owned a .25-caliber handgun, which prejudiced the jury against him. After an independent review of the record, we are satisfied that these acts or omissions did not deprive Warren of the effective assistance of counsel.

To determine whether Warren was deprived of the effective assistance of counsel, we must apply a two-pronged test. The familiar two-pronged test requires defendants to demonstrate that: (1) counsel's performance was deficient; and (2) counsel's deficient performance was prejudicial to the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding that the ***Strickland*** analysis applies equally to ineffectiveness claims under the state constitution). First, to demonstrate deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant's

claim will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***id.***

Second, to demonstrate prejudice, "[t]he defendant must show that there is 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. In other words, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687. We will "strongly presume" counsel to have rendered adequate assistance. *See* ***id.*** at 690. If we conclude that Warren has not proven one prong, we need not address the other prong. *See* ***id.*** at 697. Proof of either prong is a question of law which we review *de novo*. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985). Because we conclude that Warren cannot establish prejudice, we need not address the deficient performance prong.

Warren alleges that counsel's failure to renew Warren's request for a new attorney, his failure to make a motion for mistrial or object in response to the prosecutor's comments, and the testimony he elicited from Warren regarding the .25-caliber handgun, were all "clearly prejudicial" errors. First, Warren asserts that counsel's failure to renew his request for a new attorney was prejudicial because: (a) he was entitled to a new attorney because there were multiple reasons for the court to grant an adjournment, and Warren had only made one request for a new attorney; and (b) counsel's failure to renew the request forced Warren to go through the trial with an attorney he allegedly did not want. Warren, however, makes no showing as to how or why a new attorney would have changed the outcome of this case. The fact that Warren allegedly did not like his attorney, without more, does not merit a finding of prejudice.

Second, Warren concludes that counsel's failure to object to the prosecutor's remarks during direct examination and closing arguments was clearly prejudicial because the remarks were heard by the jury. Counsel's failure to object to the prosecutor's remarks was not prejudicial because an objection to the remarks would not have been sustained. "Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury." ***State v. Neuser***, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995) (citing ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992)). Furthermore, the supreme court has approved a prosecutor's reference to a defendant as a "'liar,' a 'rapist,' and 'guilty,'" as long as the remarks were made in analyzing the evidence. ***State v. Johnson***, 153 Wis.2d 121, 132 & nn.9-10, 449 N.W.2d 845, 850 & nn.9-10 (1990) (citing ***United States v. Scott***, 660 F.2d 1145, 1177 (7th Cir. 1981) ("Unflattering characterizations of a defendant will not provide a reversal when such descriptions are supported by the evidence.")). Here, the prosecutor's remarks were made in analyzing the evidence presented at trial; under ***Johnson***, as such, the prosecutor's remarks were not objectionable. Therefore, counsel's failure to object to the prosecutor's remarks did not result in prejudice to Warren.

Third, Warren argues that combining the knowledge of his criminal record with the statements elicited by counsel regarding his knowledge of .25-caliber handguns resulted in an "overwhelming" prejudicial effect. Warren posits that the jury may have been under the impression that he owned the gun illegally, or used it for illegal purposes. We determine that Warren's attorney's inquiries into Warren's knowledge of guns was not prejudicial. Gun ownership is generally legal, and Warren's assertions that the jury must have believed that

Warren owned the gun illegally or used it for illegal purposes is pure speculation, not affirmative proof of prejudice.

In sum, we conclude that Warren cannot establish a claim for ineffective assistance of counsel, specifically because he cannot demonstrate that counsel's performance was prejudicial. Demonstrating prejudice, under ***Strickland***, requires more than speculation, and Warren bears the burden of affirmatively proving prejudice. *See* ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848 (construing ***Strickland***, 466 U.S. at 693); ***State v. Wirts***, 176 Wis.2d 174, 187, 500 N.W.2d 317, 321 (Ct. App. 1993). We are satisfied that Warren cannot meet this burden because he cannot affirmatively prove that counsel's errors were so egregious that Warren was deprived of a fair trial and a reliable outcome. Since Warren cannot demonstrate that counsel's acts or omissions prejudiced the defense, he cannot establish a claim for ineffective assistance of counsel.

Finally, Warren requests that if this court will not grant a new trial based on Warren's ineffective assistance claim, he asks, in the alternative, that we remand the case for a ***Machner*** hearing on the ineffective assistance issue. Warren's request is denied for two reasons: (1) Under ***Machner***, we are unable to grant a new trial due to the ineffective assistance of counsel absent an evidentiary hearing, *see* ***Machner***, 92 Wis.2d at 804, 285 N.W.2d at 908-09; and (2) we are satisfied that the trial court properly exercised its discretion in denying his postconviction motion without a hearing because his motion failed to allege sufficient facts to raise a question of fact, relied on conclusory allegations, and the record clearly indicates that the movant is not entitled to relief, *see* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). Therefore, we see no need to remand this case to the trial court for what would amount to a fishing expedition.

B. Warren's request for new counsel.

It is undisputed that Warren requested a new attorney and that the trial judge did not inquire into the reasons behind Warren's request. "Once such a request is made, it is within the trial court's discretion to determine whether a proper factual basis exists for appointing new counsel." ***State v. Kazee***, 146 Wis.2d 366, 371, 432 N.W.2d 93, 96 (1988) (citation omitted). However, the trial court must exercise its discretion on an informed basis. *See* ***id.*** at 372, 432 N.W.2d at 96. A trial court erroneously exercises its discretion if it does not show consideration of the facts germane to its decision. *See* ***id.*** Warren argues that the trial court's failure to inquire about his reasons for requesting a new attorney constitutes error entitling him to a hearing on the matter.

The State counters by asserting that Warren effectively abandoned his request for a new attorney by informing the trial court after the trial was spun to a second court that he wished to proceed to trial immediately. We agree. A defendant who chooses a particular course of action may not later claim error or defect brought on by such action. *See* ***State v. Robles***, 157 Wis.2d 55, 60, 458 N.W.2d 818, 820 (Ct. App. 1990) (citing ***Farrar v. State***, 52 Wis.2d 651, 660, 191 N.W.2d 214, 219 (1971)). Such a choice amounts to an abandonment of the right to complain. *See* ***id.***

After the case was spun to the second judge, Warren was confronted with a choice—he could ask for a continuance so that his attorney could pursue possibly exculpatory evidence with the knowledge that his bail may be revoked, or he could proceed to trial. Had Warren still desired a new attorney, a continuance due to the newly-discovered statement would have provided him with an excellent opportunity to renew his request for a new attorney, as the trial court would have

been more likely to grant his request if the trial was not imminent. However, Warren knew that, due to his bail infractions, he would almost certainly have been returned to jail until the next trial date. Warren opted for the second choice and elected to press on without the additional evidence and with the same attorney. By choosing to proceed to trial immediately, Warren chose a particular course of action thereby abandoning his right to claim trial court error by failing to explore his reasons for wanting a new attorney.

"[T]his [abandonment] rule is all the more applicable in a case where the defendant's action not only impacts upon his own fate, *but also induces the court to take certain action in reliance thereon*." ***Robles***, 157 Wis.2d at 60, 458 N.W.2d at 820-21. Warren's choice affected the trial court and the State as well as himself. Additionally, we note that the defendant's actions do not have to have a negative impact, they simply must impact upon his own fate and induce reliance by the court. *See* ***id.*** Here, the trial court, satisfied that Warren was making a conscious decision to forego the continuance and proceed to trial, relied on Warren's choice and impaneled a jury and tried the case. Because Warren's choice had an impact upon his own fate and induced action by the trial court in reliance on that choice, under ***Robles***, the abandonment rule is all the more applicable. Therefore, we conclude that by choosing to proceed to trial, Warren abandoned his request for a new attorney and he cannot now be heard to protest that choice.

For all of the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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