COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1912-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WESLEY VANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Wesley Vann appeals from a judgment of conviction for armed robbery, contrary to § 943.32(1)(b) & (2), STATS., entered after a jury trial, and from an order denying his motion for postconviction relief. Vann raises two issues on appeal: (1) whether the trial court erred by denying Vann's request

for a ***Machner***[1] hearing based on the alleged ineffectiveness of his trial counsel; and (2) whether the trial court erred in finding no prosecutorial misconduct. We conclude that the trial court was not required to hold an evidentiary hearing because Vann's motion failed to allege sufficient facts that, if true, would constitute ineffective assistance of counsel, and we conclude that the prosecutor did not engage in misconduct. Thus, the trial court properly denied Vann's postconviction motion and we affirm.

I. BACKGROUND.

Vann was charged with one count of armed robbery, and one count of endangering safety by use of a dangerous weapon. In opening statements, Vann's attorney suggested to the jury that they would hear from witnesses who would corroborate Vann's contention that he was elsewhere at the time of the crimes. During the four-day jury trial, Vann's counsel cross-examined the State's witnesses, but he called no witnesses for the defense. Vann claims that he protested this decision, and that he told his attorney to call four of his relatives who were prepared to testify as alibi witnesses. Vann alleges that, in response, his attorney told him that calling alibi witnesses was not necessary because the State had failed to prove its case.

The jury acquitted Vann of endangering safety by use of a dangerous weapon, but convicted him of the armed robbery charge. Vann, proceeding *pro se*, filed a postconviction motion arguing that he was entitled to a new trial because he was denied the effective assistance of counsel, and that the prosecutor engaged in misconduct. In the supporting materials attached to his motion, Vann

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

asserted, *inter alia*, that: his attorney erred by never asking him if he was willing to waive his right to present witnesses, when, in fact, Vann informed counsel that he wished to present the witnesses; he was prejudiced because had the alibi witnesses been presented, he would not have been found guilty; and finally, the prosecutor engaged in misconduct because, during closing arguments, she not only called Vann a "punk," but she also allegedly referred to his failure to testify, as well as commenting on counsel's failure to call witnesses or present a defense. Finding Vann's allegations concerning his trial attorney conclusory, and thus, finding Vann's claim of ineffective assistance of counsel "wholly unsupported," the trial court denied the motion without holding a ***Machner*** hearing. The trial court also found that Vann's claim of prosecutorial misconduct was without merit and did not support a claim for a new trial. Vann appeals.

II. ANALYSIS.

A. Ineffective assistance of counsel.

Vann argues that the trial court erred by denying, without a hearing, his postconviction motion for new trial based on ineffective assistance of counsel. Vann contends that he was entitled to a ***Machner*** hearing on the issue of his trial attorney's alleged deficient performance. Vann correctly argues that he would be entitled to a hearing on his claim of ineffective assistance if the motion alleged sufficient facts that, if true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion containing the allegation of trial counsel's ineffective assistance alleges sufficient facts is a question of law which we review *de novo*. *See* ***id.*** We determine that Vann's motion failed to allege sufficient facts entitling him to relief, and, thus, we affirm

both the trial court's refusal to hold a hearing and the trial court's dismissal of Vann's claim that his attorney was ineffective.

As noted, to merit a ***Machner*** hearing, Vann's motion must allege sufficient facts to establish that his trial counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***State v. Sanchez***, 201 Wis.2d 219, 232-36, 548 N.W.2d 69, 74-76 (1996). In order to establish both that his counsel performed deficiently, and as a result Vann was prejudiced, Vann's motion must allege sufficient facts to demonstrate two things: (1) that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); and (2) "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 [of the proceeding]." ***Id.*** at 694. In addition, the Supreme Court has asserted that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." ***Strickland***, 466 U.S. at 697. Vann's motion fails to satisfy either prong.

Neither Vann's motion nor the supporting materials provide sufficient facts to establish either deficient performance or prejudice. Vann's claim of ineffective assistance by trial counsel is predicated solely on the fact that at trial, Vann's counsel did not call any witnesses on Vann's behalf, despite the availability of four "alibi witnesses." Vann asserts that these alibi witnesses would have placed him "at a different locale during the commission of the offenses charged." However, Vann's conclusory allegations do not provide facts

through which we may meaningfully assess his claim. *See* ***Bentley***, 201 Wis.2d at 314, 548 N.W.2d at 55.

Vann's factual allegations are vague and unsupported and are not sufficient to earn a hearing on his ineffective assistance claim. We note, as did the trial court, that Vann "failed to provide any specifics with regard to his alibi defense or any support for his motion." Vann, quoting his trial counsel's opening statement, merely asserts that the alibi witnesses would provide "testimony that while Mr. Vann was not viewed at all times and all places by everyone, if he had left between the hours of 2:30 and 3:30 they would have known about it." Thus, Vann has offered only a vague indication of what his alibi witnesses allegedly would have testified to. In addition, Vann provided no proof for these assertions—no affidavits of the four potential witnesses were filed supporting Vann's contentions. Based on such a vague and unsupported assertion of an alibi defense, we cannot conclude that Vann is entitled to a hearing on his ineffective assistance claim. Without more, this claim regarding alibi witnesses is not sufficient to establish that counsel's failure to call them constitutes a deficient performance or that it prejudiced Vann.

While it is true that Vann's trial counsel in opening argument told the jury that they would hear testimony that Vann was not in the area of the crime scene at the time of the offense, and that had he left his grandmother's house his relatives would have seen him, it is not deficient performance for an attorney to fail to present witnesses suggested during opening statements. *See* ***Turner v. Williams***, 35 F.3d 872, 903-04 (4th Cir. 1994) ("In our view, assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is 'virtually unchallengeable.'") (quoting ***Strickland***, 466 U.S. at 690), *overruled in*

part on other grounds by ***O'Dell v. Netherland***, 95 F.3d 1214 (4th Cir. 1996). Vann asserts that at trial his attorney decided not to call any witnesses because he determined that the State had failed to prove all the elements of the charged crimes. Indeed, the record reveals substantial grounds upon which to challenge the credibility of Vann's alibi witnesses, and this fact may have distracted the jury from determining whether the State had met its burden of proof. Assuming Vann's recollection is accurate, we conclude his attorney's strategy was reasonable and certainly not evidence of deficient performance, as Vann was, in fact, acquitted of one charge. Trial strategy, such as the decision made by Vann's attorney not to call any alibi witnesses, is an area left to the professional judgment of the attorney. *See* ***State v. Hereford***, 224 Wis.2d 605, 614-15, 592 N.W.2d 247, 251 (Ct. App. 1999); *see also* SCR 20:1.2(a) (1998); ***State v. Albright***, 96 Wis.2d 122, 133 n.8, 291 N.W.2d 487, 492 n.8 (1980). Moreover, contrary to Vann's contention, his attorney was not required to obtain Vann's waiver of the decision to call no defense witnesses because this decision was a strategic decision left to the trial attorney.

Thus, our review of Vann's motion failed to uncover any factual assertions or special circumstances that would allow us to meaningfully assess Vann's claim of ineffective assistance and a hearing was properly denied. Therefore, we conclude that Vann's motion, on its face, fails to allege sufficient facts to entitle him to relief, and we are satisfied that the trial court properly denied Vann's motion for new trial based on ineffective assistance of counsel without a hearing.

B. Prosecutorial misconduct.

Vann next argues that the prosecutor engaged in misconduct during closing arguments by referring to the fact that Vann did not take the stand or present witnesses, as well as by calling him a "punk." "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). We will only overturn the trial court's determination if it has erroneously exercised its discretion in a way that is likely to have affected the jury's verdict. *See* ***id.*** (citing ***State v. Bjerkaas***, 163 Wis.2d 949, 963, 472 N.W.2d 615, 620 (Ct. App. 1991)). We conclude that the trial court properly exercised its discretion in finding that Vann's prosecutorial misconduct claim was without merit.

Although Vann characterizes the prosecutor's actions as misconduct, he concedes that, standing alone, his allegations with regard to the prosecutor's conduct would not entitle him to relief. Instead, Vann asserts that the combination of the prosecutor's actions with the ineffective assistance of his trial counsel entitles him to a new trial. As noted, we have already determined that Vann failed to allege sufficient facts for an ineffective assistance claim. We also conclude that the prosecutor's conduct was not improper. From the record, it is clear that, while the prosecutor in closing arguments did comment on counsel's failure to offer support for the defense's theory of the case, the prosecutor never referred to Vann's failure to testify. Thus, the prosecutor's comments "were not manifestly intended or of such a character that the jury would naturally and necessarily take them to be a comment on the failure of the accused to testify." ***State v. Johnson***, 121 Wis.2d 237, 248, 358 N.W.2d 824, 829 (Ct. App. 1984). Rather, the prosecutor's remarks "were directed at the manner in which the jury should

consider the opening statement [revealing the defense's theory of the case] and did not address [the defendant's] failure to take the stand." ***Id.*** In addition, Vann failed to object to the prosecutor's allegedly improper remarks or move for a mistrial and, therefore, he has waived any challenge to these remarks on appeal. *See* ***State v. Hoffman***, 106 Wis.2d 185, 218-19, 316 N.W.2d 143, 161 (Ct. App. 1982).

Nor do we agree with Vann's argument that the prosecutor's actions constituted misconduct when she called him a "punk." 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. *See* ***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, in analyzing the evidence, used the word "punk" in describing the fact that Vann, "a sixteen-year[-]old kid," was allegedly carrying a gun because he intended to rob someone. We conclude that this comment falls well within the ambit of permissible statements by the prosecutor and was supported by the record. Therefore, we are satisfied that the trial court did not erroneously exercise its discretion in dismissing Vann's claim of prosecutorial misconduct.

For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 98-1912-CR(D)

SCHUDSON, J. *(dissenting)*. When arguments rest on false factual premises, they are suspect. And when appellate counsel apparently feels compelled to "spin" the factual record in order to substantiate legal arguments, an appellate court not only should admonish counsel, but also should ponder whether an accurate reading of the record would refute counsel's spinning assertions. *See* ***Wisconsin Natural Gas v. Gabe's Constr. Co.***, 220 Wis.2d 14, 18 n.3, 23 n.5, 582 N.W.2d 118, 119 n.3, 21 n.5 (Ct. App. 1998) (admonishing counsels "that false and misleading statements in briefs filed in court contravene not only RULE 802.05(1)(a), STATS., but also SCR 20:3.3, which requires candor toward tribunals."). In this case, the State's arguments to this court are suspect, and the record is revealing.

At page two of its brief, the State writes that Vann's "[t]rial counsel contemplated calling these [four alibi] witnesses, as he included them on his pretrial witness list, and even *mentioned the possibility of calling them in his opening statement* to the jury at trial." (Emphasis added; citation omitted.) At page thirteen of its brief, the State writes that Vann "claims that counsel's performance was deficient and prejudicial because counsel *referred to the possibility of presenting an alibi in opening statements* to the jury, but failed to deliver on that 'promise' at trial." (Emphasis added; citation omitted.) The record, however, establishes that defense counsel's opening statement advised the jury of much more than a "possibility." Counsel declared:

> *You will also hear testimony that Wesley Vann was not in the area at the time.* You will hear testimony that this took place on 39th and Cherry Street.

> However, Mr. Vann was at home recovering from an illness. It was Father's Day. People remember Father's Day because of the holiday. The Vann family was having a family gathering. As such, many family members were coming over.
>
> *And you will hear testimony that while Mr. Vann was not viewed at all times and all places by everyone if he had left between the hours of 2:30 and 3:30 they would have known about it.*

(Emphasis added.)

Now, with both the record and the State's misrepresentations in focus, I consider the primary issue on appeal: whether the trial court erred in denying Vann's *pro se* motion for a new trial in which he explicitly "request[ed] that an evidentiary hearing and/or a ***Machner*** hearing be held[]" for the purpose presenting evidence to substantiate his assertion that trial counsel was ineffective for failing to call alibi witnesses who, counsel had advised the jury, *would testify*.[2]

The majority, citing ***Turner v. Williams***, 35 F.3d 872 (4th Cir. 1994), *overruled on other grounds by* ***O'Dell v. Netherland***, 95 F.3d 1214 (4th Cir. 1996), asserts that "it is not deficient performance for an attorney to fail to present witnesses suggested during opening statements." Majority slip op. at 5. That *may* be so, but the majority misses the mark. In the first place, as the majority acknowledges earlier in the same sentence, defense counsel's opening statement did much more than "suggest." In the second place, and far more importantly, ***Turner*** clarifies that "'a failure to produce a promised witness *may under some circumstances* be deemed ineffective assistance," and "'the

[2] In this regard, the majority has mischaracterized Vann's argument. The majority writes, "Vann's claim of ineffective assistance by trial counsel is predicated *solely* on the fact that at trial, Vann's counsel did not call any witnesses on Vann's behalf, despite the availability of four 'alibi witnesses.'" Majority slip op. at 4 (emphasis added). Clearly and repeatedly, Vann's claim connects that failure to counsel's assurance to the jury that he *would* call alibi witnesses.

determination of inefficacy is *necessarily fact based.*'" ***Turner***, 35 F.3d at 904 (emphasis added in ***Turner***; quoted sources omitted).

Needless to say, alibi witnesses may be crucial. But was counsel ineffective for failing to call alibi witnesses to testify at Vann's trial, after assuring the jury that he would call them? I do not know. Without an evidentiary hearing, the majority does not know.[3] Without an evidentiary hearing, the trial court could not know. The answer depends on the "*circumstances*." *See* ***id.*** The answer "is *necessarily fact based.*" *See* ***id.***

The majority, however, concludes that "Vann's factual allegations are vague and unsupported" and specifically notes that he failed to submit affidavits of the alibi witnesses. Majority slip op. at 5. Granted, Vann, *pro se*, from his prison cell, might have mustered the affidavits the majority would seem to require. Generally, however, we have an obligation to liberally construe a pro se litigant's pleadings. *See* ***State v. Smith***, 220 Wis.2d 158, 164, 582 N.W.2d 131, 133 (Ct. App. 1998). Moreover, affidavits were *not* required. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996) ("If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing.")

[3] The majority asserts that "the record reveals that Vann was better off not calling alibi witnesses because their credibility would have been subject to attack and this fact may have distracted the jury from determining whether the State had met its burden of proof." Majority slip op. at 6. This assertion, sounding like fact finding far beyond our scope of review, is wholly speculative. How do we know Vann was better off not calling alibi witnesses? Of course their credibility would have been subject to attack, but that does not necessarily mean that they would not have been believed or would not have provided the basis for reasonable doubt. In short, while I certainly cannot assert that the majority's speculation is wrong, the majority has no basis for asserting that its speculation is right. We simply do not know. Without the requested evidentiary hearing, we will not know.

Here, where the record provides defense counsel's opening statement providing the alibi defense theory, generally identifying the alibi witnesses and, to some extent, describing the thrust of their testimony, and where Vann's affidavit accompanying his postconviction motion specifies that he "requested that [counsel] present witnesses on my behalf," and that he understood that counsel "subpoenaed, and was planning on presenting 4 witnesses," I conclude that Vann, *pro se*, has provided enough to gain the hearing he seeks. Accordingly, I respectfully dissent.