

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 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.

**Nos. 98-1746-CR &
98-2100**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**98-1746-CR
STATE OF WISCONSIN,**

PLAINTIFF-RESPONDENT,

V.

LARRY HOWARD,

DEFENDANT-APPELLANT,

ANTONIA MARIE LEWIS AND CHRIS A. HOLCOMBE,

DEFENDANTS.

**98-2100
STATE OF WISCONSIN,**

PLAINTIFF-RESPONDENT,

V.

LARRY HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed and cause remanded.*

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

¶1 PER CURIAM. Larry Howard appeals from a judgment entered after a jury found him guilty of one count of false imprisonment as a party to a crime, and one count of false imprisonment while armed, as a party to a crime.¹ See §§ 940.30, 939.63, 939.05, STATS. Howard also appeals from an order denying his motion for postconviction relief.² Howard argues that he is entitled to a new trial because he received ineffective assistance of counsel, and that the trial court, therefore, erred in denying his motion for postconviction relief. We affirm and remand for correction of the judgment of conviction as indicated in footnote one.

BACKGROUND

¶2 In July of 1996, Renee Haskins, Antonia Lewis and Sandy Paikowski went with Howard and a man known as “Blue” into a vacant house near

¹ The judgment of conviction erroneously reflects that Howard was convicted of two counts of false imprisonment while armed. The jury found that Howard was not armed during the second act of false imprisonment. We direct the trial court to enter a corrected judgment of conviction upon remand.

² In addition to the postconviction motion that counsel filed on Howard’s behalf, the merits of which are addressed in this appeal, Howard also filed a *pro se* postconviction motion. The trial court denied the motion filed by counsel on the merits, but refused to consider the merits of the claims in Howard’s *pro se* motion because Howard was represented by counsel. Counsel filed a notice of appeal from the trial court’s denial of the postconviction motion he had filed, and Howard filed a *pro se* notice of appeal from the trial court’s denial of his *pro se* motion. We consolidated the appeals and instructed Howard that he could proceed either by counsel or *pro se*. Howard chose to proceed by counsel, and counsel does not challenge the propriety of the trial court’s denial of Howard’s *pro se* postconviction motion. The issues raised in Howard’s *pro se* motion are not before us.

Howard's apartment to engage in sexual acts and smoke crack cocaine. Howard fell asleep at the house. When he awoke, he found that some of his cocaine was missing. Haskins and Paikowski were no longer at the house when Howard awoke. Lewis, however, was there, and Howard demanded that Lewis and the other two women pay him for the missing cocaine.

¶3 On Wednesday, July 24, 1996, Lewis saw Haskins on the street and told her that Howard was mad because he believed that they had taken his cocaine, and that he wanted them to pay him for it. Haskins, therefore, went with Lewis to see Howard and resolve the problem. While Haskins was at Howard's apartment, Howard accused her of stealing his cocaine, and he struck her on the side of her head. Haskins then began mumbling that she wanted to go home, but Howard told her to sit on the couch. Howard got some food for Haskins, and began to talk about the missing cocaine with Lewis and Paikowski, who had also come to the apartment. Howard said that the three women each owed him about \$100 for the missing cocaine. Howard told Haskins that, if necessary, she would have to prostitute herself to earn the money.

¶4 At some point while Howard was telling Haskins that she would have to pay him, Haskins was handcuffed to Lewis's belt and Howard threatened to burn Haskins. Howard asked his girlfriend to bring him a can of kerosene that had a wick hanging out of it, and he lit a lighter next to the wick. Haskins remained either at Howard's apartment or at the vacant house until Friday morning, and she was constantly monitored during that time. On Friday morning, a girl, whose name Haskins could not recall at trial, was assigned to take Haskins for some food; the girl let Haskins go instead of forcing her to return to Howard.

¶5 On Friday morning, after getting something to eat, Haskins tried to call her mother. Her mother was not home, so Haskins went to the nearby apartment of an acquaintance, Mark Ceplina. There, Haskins slept for several hours. On Friday night, Haskins and Ceplina went across the street to the home of Julie Skenandore and Kenneth Demmuth and smoked crack. Haskins remained with Ceplina until Saturday morning; Haskins, Ceplina, and Ceplina's friend, Michael Witkowski, smoked crack together throughout that time.

¶6 After Haskins had left their home, Skenandore and Demmuth learned that Lewis was looking for Haskins and that they could get some cocaine if they helped Lewis find Haskins. On Saturday morning, at about 7:30 a.m., Lewis, Skenandore and Demmuth found Haskins near a pay phone outside Ceplina's apartment. Chris Holcombe, whom Haskins had met through Howard, had just dropped Haskins off after the two had gone somewhere to smoke crack together. Skenandore held a knife to Haskins, while she and Lewis forced Haskins, kicking and screaming, into Holcombe's truck, which was still parked in the street. Demmuth also got into the truck. Haskins begged Holcombe to help her, but he drove the group to Howard's apartment.

¶7 Lewis put something over Haskins's head, and Skenandore held the knife against Haskins and told her to be quiet as they took her into Howard's apartment. The whole group went into the apartment, and Haskins was ordered to sit on the couch. Lewis then yelled at Haskins and slapped her for having left on Friday morning. Shortly thereafter, Howard entered the living room and commented on Haskins's presence. He then left the room, and Howard's girlfriend and Lewis ordered Haskins to clean the kitchen.

¶8 When Haskins next saw Howard, she asked him if she could call her father to get the money for Howard. Haskins called her father and asked him to bring her some money and to meet her at the spot where she had been abducted. Howard told his friend “Blue” to accompany Haskins to get the money from her father. Blue asked Howard if he was to bring Haskins back after he got the money, and Howard told Blue that Haskins could do whatever she wanted after she gave Blue the money.

¶9 Haskins’s father went to the meeting spot, and found that the police were also there because Witkowski, who had seen the abduction from Ceplina’s apartment, had called 911. The police asked Haskins’s father to give them a signal when he saw Haskins approaching. They then hid and waited for Haskins to arrive. When Haskins and Blue approached, Haskins’s father gave the signal, and the police intervened.

¶10 Haskins initially told the police that nothing had happened to her, but after speaking to her father and a female detective, she explained what had occurred over the past several days. The police thereafter arrested those who took part in the abduction and confinement of Haskins. Lewis, Skenandore, and Demmith all pled guilty to charges resulting from their actions, and each testified at Howard’s trial.

¶11 Howard was charged with two counts of false imprisonment for the events of Wednesday, July 24, 1996, and the events of Saturday, July 27, 1996. Howard was tried jointly with Holcombe, who was charged with one count of false imprisonment for his actions on Saturday, July 27, 1996. Holcombe did not testify at the trial, but his statement to the police upon his arrest was admitted into

evidence. The jury convicted Howard of both counts, as noted, and the trial court entered the judgment of conviction.

¶12 Thereafter, Howard filed a postconviction motion requesting a new trial. In the motion, Howard asserted that he had received ineffective assistance of counsel. The trial court denied the motion without a hearing.

DISCUSSION

¶13 If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *See id.*

“[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.”

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (quoted source omitted). We will reverse the trial court’s discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See id.*, 201 Wis.2d at 311, 548 N.W.2d at 53.

¶14 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel’s performance was deficient and that the deficient performance produced prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To prove deficient performance, a defendant

must identify specific acts or omissions of counsel that were “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. A defendant has not been denied effective assistance of counsel merely because he or she did not receive “the best counsel that might have tried the case, nor the best defense that might have been presented. ‘Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.’” *State v. Williquette*, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993) (quoted source omitted), *aff’d*, 190 Wis.2d 677, 526 N.W.2d 144 (1995). Counsel’s performance is to be evaluated from counsel’s perspective at the time of the challenged conduct. *See Strickland*, 466 U.S. at 690. Counsel is strongly presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See id.*

¶15 To show prejudice, the defendant must demonstrate “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.*, 466 U.S. at 694.

¶16 Ineffective assistance of counsel claims present mixed questions of law and fact. *See State v. Pitsch*, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court’s factual findings must be upheld unless they are clearly erroneous. *See State v. Harvey*, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel’s performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See Pitsch*, 124 Wis.2d at 634, 369 N.W.2d at 715.

¶17 Howard asserts that his trial counsel was ineffective because the State introduced a statement made by Howard's codefendant, Holcombe, and counsel failed to file a motion to either sever Howard's trial from Holcombe's trial or to have the statement redacted, as required by *Bruton v. United States*, 391 U.S. 123 (1968). We conclude that there is no reasonable probability that Howard would have been acquitted if Holcombe's statement had not been admitted. Counsel was thus not ineffective in failing to seek either a severance or redaction of the statement. *See Strickland*, 466 U.S. at 694.

¶18 In his statement, which he gave on Saturday, July 27, 1996, Holcombe said that Howard was missing some cocaine, and that Howard believed that Lewis and Haskins had taken it. He said that he knew Howard wanted to talk to Haskins, but that he believed things had already been resolved. Holcombe said that he was at Howard's home earlier that day, and that while he was there, Lewis asked him to help her find Haskins. Lewis would not tell him why she wanted to find Haskins. Holcombe left Howard's apartment because Lewis was getting on his nerves.

¶19 Holcombe further told the police that he saw Haskins on the street at around 7:00 a.m. and he informed Haskins that Lewis was looking for her. Holcombe and Haskins then went somewhere to smoke crack, after which Holcombe dropped Haskins off at the corner where Lewis and Skenandore abducted her. Holcombe told the police that Lewis and Skenandore hit and kicked Haskins, and then pushed her into his truck. He said that Skenandore had a knife. Holcombe said that Demmith also got into the truck and helped pull Haskins in. Holcombe said that Haskins was kicking at the windows of the truck, so he drove her to Howard's home to get her "out of the car before she could damage the car." He said that Lewis and Demmith had told him to drive to Howard's.

¶20 Holcombe said that when they arrived at Howard's, Lewis put something over Haskins's head, told her not to make a scene, and took her inside. He said that once they were inside, Lewis yelled at Haskins because "she skipped out on them and didn't pay her bill." Haskins then apologized and said she would get the money. According to Holcombe's statement, Lewis kept screaming at Haskins. Haskins then called her father, and Howard later told Blue to go with Haskins to get some money.

¶21 Howard's theory of defense was that he "just wanted his money," but that he did not ask Lewis to "go out and collect his debt." He asserted that Haskins came to his residence voluntarily on July 24, 1996, and that Lewis acted of her own accord when she abducted Haskins and held her at his home. Holcombe's statement to the police was consistent with this theory of defense. Holcombe identified Lewis as the person who sought Haskins out and controlled Haskins's actions. Moreover, the portions of the statement related to Howard merely indicated that Howard wanted Haskins to pay him for his missing cocaine, and that he sent Blue with Haskins to get the money. These factors were well established by several witnesses, and they do not necessarily implicate Howard for false imprisonment. We therefore conclude that the result of the proceedings would not have been different if Holcombe's statement had not been admitted. Holcombe's counsel was not deficient in failing to request either a severance or redaction of the statement. *See Strickland*, 466 U.S. at 694.

¶22 Howard next asserts that his trial counsel was ineffective because he failed to offer evidence of "a prior incident of violent behavior by Lewis against Haskins," which would have established that "Lewis had been violent and controlling towards Haskins in the past." He asserts that such evidence would have supported the defense theory that Lewis had acted alone in abducting and

confining Haskins. Again, we conclude that there is no reasonable probability that the outcome of the trial would have been different absent the alleged deficiency. *See id.*

¶23 It was undisputed that Lewis actively looked for Haskins, abducted her and abused her. Evidence that Lewis was violent towards Haskins in the past was not necessary to establish Lewis's role in the crimes, and such evidence would not have refuted the evidence that Howard confined Haskins at his home because he wanted money from her for the missing cocaine. Moreover, Howard's argument on this issue is inadequately developed; we therefore do not address it further. *See Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments).

¶24 Howard's final claim is that his trial counsel was ineffective because he offered defense witnesses, thereby opening the door for the State to present rebuttal witnesses. He asserts that the defense witnesses were not helpful, and the rebuttal witnesses strengthened the State's case against him. Again, Howard's argument is undeveloped. He offers no authority for the proposition that his counsel was deficient in calling witnesses for the defense. *See State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Indeed, as the State explains in its response brief, to which Howard did not file a reply, counsel was not deficient because without the defense witnesses, Haskins's testimony that Howard had held her against her will would have been completely unrefuted. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted).

By the Court.—Judgment and orders affirmed and cause remanded.

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

