**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 30, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP1457-CR** **Cir. Ct. No. 2012CF371**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL DILLON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Chippewa County: THOMAS J. SAZAMA and JAMES M. ISAACSON, Judges. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Michael Dillon appeals a judgment, entered upon a jury's verdict, convicting him of second-degree recklessly endangering safety. Dillon also appeals the order denying his postconviction motion for a new trial.[1] Dillon argues the trial court erred by denying his mistrial motion. Dillon also claims he was denied the effective assistance of trial counsel. We reject these arguments and affirm both the judgment and the order.

## BACKGROUND

¶2 The State charged Dillon with second-degree recklessly endangering safety; substantial battery; and misdemeanor battery. The charges arose from an altercation between Dillon and Joel Wiltrout, who was then engaged to Dillon's daughter, Savanah.

¶3 At trial, Wiltrout testified that Dillon, along with Dillon's son, Michael Jr., and another daughter, Sekaidah, showed up at Wiltrout's home to see Savanah. Wiltrout indicated Savanah did not live there and when Dillon asked where she lived, Wiltrout stated he would not tell Dillon. According to Wiltrout, Dillon looked angry and when Wiltrout took a step back into his home and attempted to close the door, Dillon reached in, grabbed Wiltrout by the front of his shirt, and threw him outside, where he landed on his hip at the bottom of the front steps. Wiltrout further testified that as he attempted to regain his footing, Dillon repeatedly slammed his head into the step. Wiltrout stated that as Dillon beat him, Dillon said that he would "always have access to Savanah" and also said things demeaning to Wiltrout's "position as a man."

[1] The Honorable Thomas J. Sazama presided at trial. The Honorable James M. Isaacson presided at sentencing and entered the order denying the postconviction motion.

¶4 Wiltrout suffered a severely bruised hip, cuts to his hands and elbow, internal damage to his nose, bruising to his face and back, and three loose teeth, two of which were cracked. After Wiltrout described the assault, the following exchange occurred:

> Prosecutor: What did you think was going to happen to you when this was going on?
>
> Wiltrout: I was worried I would be severely injured or killed.
>
> Prosecutor: And why was that?
>
> Wiltrout: Because I heard things about him.

Defense counsel immediately objected and moved for a mistrial. The trial court sustained the objection and indicated "your motion for a mistrial is denied, at least for now."

¶5 One of Wiltrout's neighbors, Aundray Houston, testified that he was awakened by the sound of screaming and yelling. When he went outside, he saw someone on top of Wiltrout, pounding Wiltrout's head into the side of the concrete porch. Houston also noticed a "guy and a girl" standing "on the side." Houston heard the attacker say something to the effect of, "If you want to be with my daughter, you got to act or be something like a man, more like a man." When Houston yelled, "What are you doing," the attacker got up and walked away, along with the two other people who had been standing there.

¶6 Michael Jr. testified that after Wiltrout told Dillon he would not say where Savanah was, Wiltrout grabbed Dillon by the shirt, in an apparent attempt to pull Dillon into the house. Michael Jr. further testified that Dillon then grabbed Wiltrout's wrist and elbow, pulled him out of the house, and pushed him onto the ground. According to Michael Jr., there was "a scuffle on the ground for a while,"

but Dillon did not strike Wiltrout. Rather, Dillon was trying to pacify Wiltrout by keeping him on the ground. Sekaidah similarly testified that after Wiltrout grabbed Dillon by the collar, Dillon grabbed Wiltrout's hand and elbow in a way that should have resulted in Wiltrout landing on the grass but, instead, he "ended up with his face on the cement." Sekaidah indicated she never saw Dillon smash Wiltrout's head against the stoop—Dillon merely put his hand on Wiltrout's back to hold him down.

¶7 Dillon testified that when he asked where Savanah was, Wiltrout "just had kind of a temper tantrum," grabbed Dillon's shirt and hit the corner of his mouth. Dillon stated that Wiltrout was trying to pull him into the house and, to defend himself, he "tried to just get [Wiltrout] pinned down as easy as [he] could and get out of there." Dillon indicated he twisted Wiltrout's wrist and put his hand on Wiltrout's elbow and, although he attempted to lay him on the grass, Wiltrout landed with his face by the edge of the stair. Dillon denied slamming Wiltrout's head into the stairs and stated Wiltrout's injuries were caused by his own movements, as he thrashed around and struggled to get up.

¶8 The jury found Dillon guilty of the reckless endangerment charge and acquitted him of the battery charges. The court withheld sentence and placed Dillon on probation for three years, with sixty days of conditional jail time. Dillon's postconviction motion for a new trial was denied without a hearing, and this appeal follows.

## DISCUSSION

¶9 Dillon's arguments all stem from the exchange between the prosecutor and Wiltrout, in which Wiltrout testified he was worried he would be severely injured or killed because he "heard things about [Dillon]." First, Dillon

argues the circuit court erred by denying his motion for a mistrial. A mistrial is appropriate if the trial court determines, in light of the whole proceeding, that the claimed error was sufficiently prejudicial to warrant a new trial. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. Whether to grant or deny a mistrial is within the trial court's discretion. ***Id.*** Where, as here, the court fails to give a reason for denying a mistrial motion, this court may independently review the record to determine whether there is a basis for the trial court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). The record supports the trial court's ruling.

¶10 Wiltrout testified he was afraid he would be seriously injured or killed because he heard "things" about Dillon; however, he never said what those things where. Given the brevity and vagueness of the comment, especially in the context of the entire trial, the court acted within its discretion to deny the mistrial motion. Moreover, Dillon claims on appeal that the challenged testimony was relevant to the substantial battery charge—a charge for which Dillon was acquitted. Therefore, in light of the entire proceeding, we conclude the claimed error was not sufficiently prejudicial to warrant a new trial. *See* ***Doss***, 312 Wis. 2d 570, ¶69.

¶11 Dillon also argues he was denied the effective assistance of trial counsel. To succeed on his ineffective assistance of counsel claim, Dillon must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such

magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the prongs in the order we choose; therefore, if Dillon fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶12 Dillon contends his trial counsel was ineffective by not moving to strike the challenged testimony and by not requesting that the jury be instructed to disregard it. His assertions of prejudice, however, are merely conclusory. Dillon argues he was prejudiced by counsel's failure to move to strike the testimony because "[t]he jury was allowed to consider highly prejudicial evidence about … Dillon's likelihood for committing violent acts." Dillon adds that "[t]his evidence supported the State's case and the jury's verdict on the charge of substantial battery." As to the jury instruction, the entirety of Dillon's prejudice argument is that "[b]y not requesting a jury instruction that specific evidence should not have been considered by the jury, trial counsel acted deficiently, prejudicing Dillon, and as such, Dillon is entitled to a new trial."

¶13 As the State notes, Dillon's assertions fail to explain how Wiltrout's testimony constituted highly prejudicial evidence about Dillon's likelihood for committing violent acts, especially where Wiltrout never identified what "things" he had heard about Dillon. Dillon also fails to relate the alleged prejudice to the context of the entire trial. Moreover, as noted above, Dillon was acquitted of the offense to which he says Wiltrout's testimony related.[2] Ultimately, there is no

[2] We note that Dillon did not file a reply brief and thus does not offer any arguments in rebuttal to the State's contentions on these issues.

reasonable probability that, absent the claimed errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).