COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

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

No. 98-3604-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMITRIUS GOODLOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Demitrius Goodlow appeals from a judgment of conviction for attempted armed robbery, party to a crime, contrary to WIS. STAT.

§§ 943.32(1), (2) and 939.32(3) (1997-98),[1] and from an order denying motions for postconviction relief.

¶2 Goodlow seeks reversal based on four claims of error. He asserts that: (1) he was denied his Sixth Amendment right to effective assistance of trial counsel; (2) the evidence was insufficient to support his conviction for attempted armed robbery, party to a crime; (3) the trial court erred in refusing to submit to the jury lesser-included jury instructions for attempted robbery and attempted theft; and (4) the interests of justice require he receive a new trial.

¶3 Because Goodlow failed to sufficiently allege that he received ineffective assistance of trial counsel; because there was sufficient credible evidence to allow a jury to find beyond a reasonable doubt that he committed attempted armed robbery, party to a crime; because the evidence in the record did not support the submission of lesser-included offenses to the jury; and because the real controversy was tried, we affirm.

BACKGROUND

¶4 The undisputed facts reveal that on January 5, 1998, Goodlow, along with a companion, Silas Mason, were observed in a well-lit parking lot located at 1220 West Lincoln Avenue, attempting to rob a sixty-one-year-old man, David Koss, by physically accosting him. Goodlow and Mason's attempt failed however, because two City of Milwaukee police officers observed the attack and intervened. The only facts in dispute were whether there was a threat or actual use of a dangerous weapon during the incident. Mason pled guilty to attempted armed

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

robbery, party to a crime. The jury found Goodlow guilty of armed robbery, party to a crime. Goodlow filed postconviction motions seeking a new trial or, in the alternative, a new sentencing hearing. The trial court denied the motion for a new trial, ruling that the ineffective assistance of counsel claims were conclusory and speculative. It also denied the alternative motion for resentencing. Goodlow now appeals.

ANALYSIS

A. Ineffective Assistance of Counsel Claims.

¶5 Goodlow first contends he was denied his Sixth Amendment right to effective assistance of trial counsel. He cites four reasons for this claim: (1) counsel's failure to obtain discovery regarding fingerprint testing or adequately cross-examine the State's witness regarding the fingerprints; (2) counsel's failure to cross-examine his accomplice, Mason, as to whether Goodlow was carrying a dangerous weapon; (3) counsel's failure to seek a competency examination of him; and (4) counsel's failure to seek dismissal of the "while armed" penalty enhancer.

¶6 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697.

¶7 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *See* ***id.***, 124 Wis. 2d at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶8 With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *See* ***Strickland***, 466 U.S. at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. Rather, he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See* ***id.*** at 694. Even strategically indefensible errors cannot justify reversal if they had no effect on the conviction. *See* ***id.*** at 691.

¶9 The right to effective assistance of counsel does not guarantee a criminal defendant either the best defense or the best defense attorney possible. *See* ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 677, 526 N.W.2d 144 (1995). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***Id.*** Rather, defendants who claim their conviction should be reversed because they received ineffective assistance must prove "that they have been denied a fair trial by the

gross incompetence of their attorneys." ***Kimmelman v. Morrison***, 477 U.S. 365, 382 (1986).

¶10 If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows that the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 313-18, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. *See* ***id.***, 201 Wis. 2d at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. *See* ***id.***, 201 Wis. 2d at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. *See* ***id.***, 201 Wis. 2d at 318. With these criteria in mind, we shall now examine each basis for Goodlow's ineffective assistance of trial counsel claim.

¶11 Goodlow's first claim of ineffective assistance of trial counsel is two-pronged. He asserts that he requested his trial counsel to have a fingerprint test conducted on a knife found at the scene of the robbery. He argues that if the knife had been tested, his prints would not have been found. Alternatively, he asserts that if his trial counsel had cross-examined the testifying officers about any fingerprint tests, they would have had to concede that no testing had been done and that the testing could not have been done because of the manner with which

the officers handled the knife when found.[2] Goodlow then argues that under either scenario, the information developed would have improved his chances for acquittal. This argument is unavailing for two reasons.

¶12 The State charged Goodlow with attempted-armed robbery, party to a crime. The jury convicted him of the same. Mason was Goodlow's accomplice. There was direct testimony from the officers that Mason, who initially assaulted Koss, possessed a knife which was found at the scene of the crime and introduced into evidence. Whether Goodlow used a knife in this incident is irrelevant because of his party to a crime status. His guilt is not necessarily connected to the presence or absence of fingerprints.

¶13 Goodlow speculates that if his trial counsel had questioned the arresting officers about fingerprint tests, they would have had to admit that no testing had been conducted and was, in fact, impossible because of the manner with which the officers at the scene handled the knife he was alleged to have used. There is no basis in the record for this assertion. Goodlow was wearing gloves and there is not a smidgen of evidence that the police incorrectly collected the knife in question. Allegations that are "opinion-subjective" as opposed to "factual-objective" are not sufficient to warrant an evidentiary hearing. *See* ***State v. Sanders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995).

¶14 Goodlow's second basis for claiming ineffective trial counsel is the failure to cross-examine his accomplice, Mason, as to whether Goodlow was carrying a dangerous weapon. A review of the evidence reveals the following.

[2] During closing argument, Goodlow's trial counsel attempted to argue, "Where are the fingerprints?" but the trial court sustained an objection to the remark because of the absence of any evidence about fingerprints.

Before Mason and Goodlow arrived at the parking lot on West Lincoln Avenue, they had been riding around looking for someone to rob. Mason stated that he gave the knife to Goodlow sometime before stopping at the parking lot. Goodlow's trial counsel was able to elicit from Mason his lack of knowledge as to whether Goodlow actually carried the knife with him when they left the car. Subsequent to the trial, Mason wrote a letter to Goodlow recanting how the incident took place and absolved Goodlow of any blame for the incident. Goodlow now claims that if his counsel had pressed harder during Mason's cross-examination, Mason "would have conceded and told the truth." We reject this line of reasoning as hypothetically absurd because trial counsel had absolutely no knowledge of the later composed letter and had performed well in eliciting Mason's lack of knowledge. Rank speculation cannot be a basis for an ineffective assistance of trial counsel claim.

¶15 Next, Goodlow claims ineffectiveness for his attorney's failure to seek a competency evaluation for him or to file a motion to withdraw as counsel. His basis for this assertion is as follows. In his postconviction affidavit he stated that he did not tell his trial counsel "my story" of what really happened because he did not trust his counsel in that he was a former district attorney. He argues lack of communication with his trial counsel and his decision not to testify at trial should have prompted his counsel to petition for a competency evaluation or, in the alternative, he ought to have moved to withdraw because of his client's lack of cooperation.

¶16 In respect to these allegations, the trial court ruled that "[d]efendant has presented nothing to this court that even minimally suggests he was incompetent to understand the proceedings at the time and his affidavit shows only that he distrusted his lawyer because he was a former prosecutor." Nowhere in the

record is there the slightest indication that Goodlow was incompetent or that his failure to provide helpful information to his trial counsel was the result of any mental health problems. The trial court was correct in its analysis. This portion of Goodlow's claim fails.

¶17 Fourth and last, Goodlow claims ineffective assistance of trial counsel for his failure to move for dismissal of the dangerous weapon enhancer at the close of the State's case. Goodlow proffers two bases for this claim: (1) Koss, the victim, testified that he did not actually see a weapon in the possession of either assailant until after the police intervened; and (2) the enhancer feature could have been dismissed because the victim was elderly with physical disabilities, and thus, the two robbers did not need a weapon. These proposed bases are absurd. Regardless of the victim's observations, the eyewitness testimony of the two police officers was not contradicted. For this reason, the trial court decided that "[a]ny motion to dismiss the enhancer would have been denied on the eyewitness testimony of both police officers." The trial court did not err. From our review of the entire record, there is conclusive demonstration that Goodlow is not entitled to relief. Accordingly, the trial court did not erroneously exercise its discretion by denying Goodlow's motion for a new trial without a hearing.

B. Insufficiency of the Evidence Claim.

¶18 Goodlow's second claim of error is the insufficiency of credible evidence to allow the jury to find beyond a reasonable doubt that he was guilty of attempted armed robbery, party to a crime.

¶19 In reviewing a challenge to the sufficiency of the evidence, we

> may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state

> and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). Under this standard of review, we conclude that the record is sufficient to uphold the conviction.

¶20 This was a party to a crime, armed robbery prosecution. To succeed, the State had to prove that Goodlow, or his accomplice Mason, with intent to steal, took property from the person or presence of the owner by use or threat of use of a dangerous weapon. *See* WIS. STAT. § 943.32(1) and (2). For a conviction of the inchoate attempted version of the same crime, the State had to meet the requirements of WIS. STAT. § 939.32(3).[3]

¶21 Goodlow admits there is sufficient evidence to establish beyond a reasonable doubt that a robbery was intended and thus, as party to a crime, he would be convicted. His challenge is to the "armed" part of the charge because he claims "there was no threat or actual use of a dangerous weapon per Koss." The sole basis for this argument is Koss's testimony that he did not observe either man with a weapon during the struggle. He first saw weapons on the ground after the

[3] WISCONSIN STAT. § 939.32(3) provides:

> **(3)** An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

police intervened. Mason testified he kept his weapon in his pocket during the scuffle.

¶22 In contrast, the two police officers testified that they saw dangerous weapons in the possession of both men and soon thereafter recovered knives from the ground of the crime scene. Both knives were introduced into evidence. Thus, the difference in testimony created a conflict in interpreting the same basic facts. It was the task then of the jury to assess credibility and weigh the evidence. The question then is, was the conclusion drawn by the jury a reasonable inference under ***Poellinger***? We conclude that any contradiction between Koss's failure to observe any weapons while the initial struggle was taking place, and the officers' observation that weapons were utilized reasonably could be attributed to Koss's fear and panic of being attacked. Thus, a reasonable jury could have accepted the version of what transpired as presented by the two police officers, and determined that Koss's failure to initially observe the weapons did not mean that weapons were not used. We conclude that there is sufficient evidence to sustain the verdict.

C. Lesser-Included Offenses Claim.

¶23 Goodlow's third claim of error is that the trial court refused to submit the lesser-included charges of attempted robbery and attempted theft with appropriate instructions. The trial court denied the request and instructed the jury only on the charge of attempted-armed robbery.

¶24 A criminal defendant is entitled to a lesser-included offense instruction only when there exists reasonable grounds in the evidence both for acquittal on the greater offense and conviction on the lesser offense. *See* ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995). A challenge to the

trial court's refusal to submit a lesser-included offense instruction presents a question of law that we review *de novo*. *See* ***id.***, 191 Wis. 2d at 23.

¶25 When a trial court considers a defense request for a lesser-included offense instruction, the evidence must be viewed in the light most favorable to the defendant and to the requested instruction. *See* ***id.***, 191 Wis. 2d at 23. There must be credible evidence in the record to support the defendant's theory of the case. The jury cannot accept the defense theory of the case based upon speculation. *See* ***id.***, 191 Wis. 2d at 25-26.

¶26 A lesser-included offense instruction should be submitted only if there is a reasonable doubt as to some particular element included in the greater offense. *See* ***id.*** at 23. A lesser-included offense instruction is not warranted when it is supported by a "mere scintilla" of evidence. It must be supported by a reasonable view of the evidence; there must be some appreciable evidence supporting the lesser-included offense instruction. *See* ***Ross v. State***, 61 Wis. 2d 160, 171-72, 211 N.W.2d 827 (1973). A lesser-included offense instruction is not warranted when it is supported by mere conjecture. *See* ***Johnson v. State***, 85 Wis. 2d 22, 34-35, 270 N.W.2d 153 (1978). Attempted robbery and attempted theft from a person are lesser-included crimes of attempted-armed robbery. In light of the record evidence, however, the trial court did not err as a matter of law.

¶27 The record demonstrates that two police officers, while on squad patrol, observed Goodlow and Mason grab Koss in a parking lot, struggle with him, and attempt to search him. Goodlow was observed bearing a knife. Police were able to stop the assault by drawing their service revolvers. The knife that Goodlow possessed was recovered from where he had dropped it when confronted by the police. Koss did not see any weapons during his effort to resist the robbery,

but observed knives on the ground after Goodlow and Mason were arrested. On the basis of this record, we deem it unreasonable for a jury to conclude that Goodlow and Mason attempted to steal property from Koss, but not by the attempted use or threatened use of a dangerous weapon. No reasonable view of the evidence would allow a jury to acquit on the greater offense and convict on one of the proposed lesser offenses. *See* ***State v. Muentner***, 138 Wis. 2d 374, 387, 406 N.W.2d 415 (1987).

D. Interest of Justice Claim.

¶28 Lastly, Goodlow argues that he is entitled to a new trial in the interest of justice because of the errors of his trial counsel, the recantation of Mason, and the failure of the trial court to instruct the jury on the requested lesser-included offenses.

¶29 A court may grant a new trial in the interest of justice under WIS. STAT. § 752.35 in two circumstances: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has, for any reason, miscarried. *See* ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Thomas***, 161 Wis. 2d 616, 468 N.W.2d 729 (Ct. App. 1991). The court may exercise its discretionary power without finding the probability of a different result on retrial when it concludes that the real controversy has not been fully tried. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶30 The real controversy in a case may not be fully tried in two different situations: first, when the jury is erroneously denied the opportunity to hear important testimony which bears directly on an important issue in the case; and second, when the jury hears improperly admitted evidence which so clouds a

critical issue in the case that a fair and just result cannot be reached. *See* ***Wyss***, 124 Wis. 2d at 735. Goodlow has failed to satisfy either prong of the statutory requirement.

¶31 The only disputed issue of fact of any consequence was whether Goodlow was armed with a dangerous weapon while participating in the attempted robbery and whether he attempted to use it. From our review of the testimony, no evidence was improperly admitted or excluded that would have affected the verdict. Goodlow, through cross-examination of the police officers, more than aptly challenged the police officers' version of events and clearly was able to present, for the jurors' benefit, his theory of defense. Goodlow has presented no cognizable basis for granting a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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