COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2015AP171-CR

Cir. Ct. No. 2011CF222

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. INKMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. A jury found David A. Inkmann guilty of theft in a business setting (> $5,000-$10,000). He appeals from the judgment of conviction and from the order denying his postconviction motion alleging ineffective assistance of trial counsel. We affirm.

¶2 Inkmann was a manager at a Super Lube auto maintenance store. His duties included readying the cash and checks for deposit and securing the cash and checks overnight in the store's safe until being deposited the next day. One of the owners reported to police and testified at trial that shortly after Inkmann was hired, bank deposits began to come up short or were not made at all, that shortfalls occurred only on the days Inkmann was responsible for making the deposits, and that the discrepancies ceased after Inkmann was terminated. In a five-month period, deposits were short $10,982.94.

¶3 An officer testified that Inkmann stated, "To save face, I guess yeah, I took it." One of the Super Lube owners testified that Inkmann called him while in police custody and said, "I am sorry that I did this. I will pay you back. Just please get me out of here. I can't go to jail." The defense theory, however, was that someone else took the money from a desk drawer where Inkmann claimed he sometimes put the prepared deposits instead of putting them in the safe. His "admissions," the defense argued, were not an acknowledgement of guilt but of responsibility for the theft because of his "sloppiness" in his managerial duties.

¶4 At closing argument, defense counsel asserted that the fact that the money was taken was not in controversy; rather, "[w]hat is in controversy is Mr. Inkmann has denied taking [it]." The State objected that the argument was improper. When the court told counsel to rephrase, he went on: "Okay. And the burden of proof is with the State to prove beyond a reasonable doubt not only that money is missing but that Mr. Inkmann is the guy who took it."

¶5 On rebuttal, the prosecutor reiterated the State's burden and emphasized that a defendant has a constitutional right not to testify. This exchange ensued:

> [PROSECUTOR]: *But at the same time, there's something that goes hand in hand with that*, which is you have never heard to the extent that – you don't have to, there's no obligation for you to hear this, but the reality of this case is that *you have never heard the defendant's account of what happened*. So to the –
>
> [DEFENSE COUNSEL]: Well –
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> [PROSECUTOR]: – extent that Mr. Laatsch stands in front of you during closing argument and tells you the defendant denies taking it, I ask you to reflect on all of the testimony you heard today and tell me, *was there ever a point in the proof of this case where the defendant denied taking it*?
>
> [DEFENSE COUNSEL]: Your Honor, now I think –
>
> THE COURT: Gentlemen, let's move beyond this point. I think there was some fair response, but I don't want to get into major issues on that. I think you sort of opened the door to it, Mr. Laatsch; and Mr. Gerol, you're going to close it, and we're going to move on. Okay?
>
> [PROSECUTOR]: That's fine. In a simple way no defendant has an obligation to present any evidence to you. But to the extent the defendant in closing argument suggests to you that other people might be responsible for this, ask yourself is that argument supported by anything in the record. Anything? And the answer is it's not. (Emphasis added.)

¶6 Postconviction, Inkmann alleged that defense counsel ineffectively either opened the door to the State's comments on his choice not to testify, or failed to fully object or ask for an immediate curative instruction and/or a mistrial.

¶7 At the ***Machner***[1] hearing, defense counsel testified that he argued that Inkmann "denied taking the money" in reliance on Inkmann's not-guilty plea and the court's preliminary instruction to the jury that a not-guilty plea "means a

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

denial of every material allegation in the information." He also testified that he "[m]ost definitely [did] not" consider his closing argument as opening the door to the State's comments on Inkmann's silence and it "certainly was not [his] intention" to do so.

¶8 On the alternative ground, defense counsel testified that he considered objecting when the State argued that the jury had "never heard the defendant's account of what happened," and believed he had objected when the State asked if there ever was a point in the case where Inkmann denied taking the money, but the court directed them to "move on." He did not recall having a reason for not requesting a curative instruction or a mistrial, other than he did not believe the court would grant a motion for a mistrial, as the court already indicated it believed he opened the door to the comment.

¶9 The court concluded the State's remark was a fair response to counsel's statements and was not prejudicial. It also concluded it "probably" would have given a curative instruction if requested, but "didn't think it was that big of a deal" or it would have given one sua sponte and overall "thought drawing less attention to it was the better way to go." The court denied the motion.

¶10 Here on appeal, Inkmann renews his claims that defense counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Assessing the deficiency prong requires a court "to determine whether counsel's performance was objectively reasonable." ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 8380, *modified on other grounds by* ***State v. Schaefer***, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760.

"Prejudice" means that counsel's alleged errors actually had an adverse effect on the defense. ***Id.***, ¶9. The trial court's findings of fact will not be disturbed unless they are clearly erroneous but we review independently whether counsel's performance was deficient and prejudicial, both questions of law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

Opening the Door

¶11 It is improper for a prosecutor to suggest to the jury that a defendant's choice not to testify indicates guilt unless the defense has "opened the door"—i.e., the prosecutor's statement must be "a fair response" to a defense argument. *See* ***State v. Jaimes***, 2006 WI App 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669. Inkmann argues that by remarking on Inkmann's denial of guilt, defense counsel invited the State's comment on his silence. The State counters that counsel did not open the door to comments on Inkmann's choice not to testify but, rather, was arguing consistent with its theory that the alleged confessions were an acceptance of responsibility, but a denial of actually taking the money.

¶12 The trial court found that defense counsel opened the door and that the State's remark was a fair response to the assertion that Inkmann denied taking the money, but observed that both lawyers' remarks "were kind of vague statements" that did not "take place in a vacuum." It concluded that opening the door was not prejudicial to Inkmann when balanced against the substantial evidence—"boxes of material"—implicating him.

¶13 We agree with the trial court that counsel's argument could be viewed as a door-opening that resulted in no prejudice. We also agree that, as the State argues, it could be viewed as a reasonable trial strategy that did not open the door. An objectively reasonable strategy, although unsuccessful, does not

establish deficient performance. *See* ***State v. Maloney***, 2005 WI 74, ¶44, 281 Wis. 2d 595, 698 N.W.2d 583. Either way, counsel was not ineffective.

Failing to Object or Move for Curative Instruction/Mistrial

¶14 Inkmann contends that even if counsel did not open the door to the State's rebuttal comments, he still was ineffective, first, for not objecting more forcefully when the State remarked on Inkmann's silence.

¶15 Counsel did object. The court responded, "Gentlemen, let's move beyond this point." It is conjecture that not following up with a more strenuous objection caused the jury to conclude Inkmann was guilty because he did not testify, when it was instructed that closing argument conclusions and opinions are not evidence, WIS JI—CRIMINAL 160, and that the exercise of the "absolute constitutional right not to testify … must not be considered by you in any way and must not influence your verdict in any manner." WIS JI—CRIMINAL 315. The jury is presumed to have followed the instructions it is given. *See* ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994). A defendant does not establish prejudice simply by "showing that an error had some conceivable effect on the outcome." *See* ***Koller***, 248 Wis. 2d 259, ¶9. It requires affirmative proof. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶16 Inkmann also contends that counsel was ineffective for failing to request an immediate curative instruction or move for a mistrial at that point. It was deficient performance, Inkmann argues, because counsel testified at the ***Machner*** hearing that he did not recall why he did not request either, but added he did not think a mistrial would be granted, as the court had just told the attorneys to "move on." It was prejudicial, he asserts, because, although the State told the jury

that it could draw no negative inferences from Inkmann's silence, it "then invited the jury to do just that."

¶17 Defense counsel's subjective testimony is not dispositive. It simply is evidence to be considered along with other evidence of record a court examines in assessing counsel's overall performance. ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752. Our function on appeal is to determine whether defense counsel's performance was objectively reasonable under prevailing professional norms. ***Id.***, ¶31. A curative instruction would have advised jurors they could not consider Inkmann's silence in any way. Reiterating an instruction that already was going to be given would have been redundant and simply underscored his silence. The trial court did not think a curative instruction was necessary. Not requesting the instruction was objectively reasonable.

¶18 As to not moving for a mistrial, counsel stated that he did not believe the motion would have been granted. He likely is correct. A trial court may declare a mistrial when, considering all the circumstances, there is a "manifest necessity" for it so that the ends of justice are not defeated. ***State v. Mattox***, 2006 WI App 110, ¶13, 293 Wis. 2d 840, 718 N.W.2d 281 (citations omitted). It should be used only "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." ***Id.*** (citation omitted). In the circumstances here, the State's remarks in rebuttal did not rise to the level that a mistrial was a manifest necessity. Counsel cannot be faulted for not taking a course of action that would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶19 We reject Inkmann's overarching suggestion that the jury found him guilty simply because it never heard him deny the allegations. The strength of the

evidence supported the verdict. The testimony and considerable documentary evidence conclusively, if circumstantially, established that money began going missing shortly after Inkmann was hired, coinciding with the dates he worked and was in charge of making a deposit. The testimony also established that Inkmann told a police officer that he "took it" and told an owner he was "sorry that I did this. I will pay you back." Inkmann has not shown "a reasonable probability that, but for counsel's unprofessional 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.