COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0330-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. HARMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. David L. Harmon appeals, *pro se*, from a judgment entered after a jury convicted him of second-degree sexual assault by use of force. *See* WIS. STAT. § 940.225(2)(a) (1997-98).[1] He also appeals from an order

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

denying his motion for postconviction relief. Harmon argues: (1) that he is entitled to a new trial because he was not present for two pretrial scheduling conferences; (2) that the trial court lacked subject matter jurisdiction over his trial because the trial court did not make a finding of probable cause; (3) that he received ineffective assistance of trial counsel; (4) that the trial court erroneously exercised its discretion in precluding the defense from arguing that phone records that had been admitted into evidence showed calls made from the victim's home; (5) that the trial judge was biased against him; (6) that the State engaged in prosecutorial misconduct by knowingly presenting false testimony; and (7) that he is entitled to a new trial in the interests of justice.[2] We affirm.

BACKGROUND

¶2 On August 30, 1996, a complaint was filed charging Harmon with second-degree sexual assault. The complaint was based upon allegations by Harmon's former girlfriend, Patricia O., that Harmon had entered her home, without her permission, and forced her to have sex with him. Harmon waived his right to a preliminary hearing on the complaint, and an information was filed charging him with the sexual assault. Thereafter, an amended information was filed adding an additional charge of burglary.

¶3 According to Patricia O., on August 29, 1996, at about 1:30 p.m., Harmon entered her home while she was upstairs preparing to take a shower. She

[2] Within these main arguments, Harmon touches upon various other issues that are without merit. We do not separately address those issues. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424, 430 (1996) (appellate court need not address issues that "lack sufficient merit to warrant individual attention"); ***State v. Waste Management, Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

went to the stairway, saw Harmon downstairs and asked him why he was there. Harmon then went up the stairs, grabbed Patricia O.'s arm and twisted it behind her back, and forced her into her bedroom. Although Patricia O. struggled to get away from Harmon, he eventually threw her onto the bed and had sexual intercourse with her.

¶4 Patricia O. testified that Harmon placed his forearm to her neck to hold her down while he had sex with her. She further testified that he sucked and bit her neck during the sexual assault. Patricia O. said that after the sexual assault, Harmon went downstairs and yelled up to her to make him something to eat. She said she then went downstairs and told him to leave. Patricia O. testified that Harmon asked her about some things that he had left at her house and when she went to get those things, she saw Harmon run out the front door.

¶5 Patricia O. then ran to the telephone and dialed 911, but Harmon came back into the house and pulled the cord out of the telephone receiver. Patricia O. said that Harmon put his arm around her neck and pulled her into the kitchen and towards the basement door. Patricia O. struggled and asked Harmon what he was doing, and he told her that he was going to lock her in the basement. She then grabbed a knife from a kitchen drawer and tried to stab Harmon, but he pulled the knife away from her and tossed it to the floor. Patricia O. begged Harmon not to lock her in the basement because she didn't want her children to find her there.

¶6 Patricia O. testified that she and Harmon then began arguing, and Harmon struck her on the left side of her face, knocking her to the floor. Harmon then left, and Patricia O. fixed the telephone and again called 911. She told the operator that Harmon had beaten her up.

¶7 The police were sent to Patricia O.'s home, where they interviewed her and took photographs. Thereafter, they took Patricia O. to the hospital, where a nurse examined her. The nurse testified that the left side of Patricia O.'s face was swollen and sore to the touch, and that there was bruising on the right side of her neck. She testified that Patricia O. also felt pain in her shoulder and in her vaginal area. The nurse observed multiple tears to Patricia O.'s vaginal tissue.

¶8 Harmon testified on his own behalf and admitted that he had had sex with Patricia O., but he asserted that it was consensual. He testified that he went to Patricia O.'s home to get some things he had left there, and that she voluntarily let him into the home, after making several phone calls for him. He further testified that Patricia O. told him she knew he was in a new relationship and asked him to have sex with her one last time. The jury convicted Harmon of the sexual assault charge, but acquitted him of the burglary charge.

DISCUSSION

¶9 Harmon argues that he is entitled to a new trial because he was not present for two pretrial conferences. At the first conference, the dates for the final pretrial conference and the trial were set. At the second conference, the State moved to file the amended information adding the burglary charge, and the motion was set for a hearing.[3]

¶10 Harmon argues that his presence was required at the two pretrial conferences, and he cites WIS. STAT. § 971.04(1)(h), in support of his argument. Section 971.04(1) provides, in relevant part:

[3] Harmon was present for the hearing on the motion.

> [T]he defendant shall be present:
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> (a) At the arraignment;
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> (b) At trial;
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> (c) During voir dire of the trial jury;
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> (d) At any evidentiary hearing;
>
> (e) At any view by the jury;
>
> (f) When the jury returns its verdict;
>
> (g) At the pronouncement of judgment and the imposition of sentence;
>
> (h) At any other proceeding when ordered by the court.

Harmon asserts that because the two pretrial conferences were ordered by the court, his presence at those conferences was required by § 971.04(1)(h). Harmon misreads the statute. Section 971.04(1)(h) does not require a defendant to be present at all proceedings that are ordered by the court; rather, it requires the defendant to be present for a proceeding when the trial court specifically orders the defendant to be present. We therefore reject Harmon's argument that his presence at the pretrial scheduling conferences was statutorily required.

¶11 Harmon also argues that his absence from the pretrial conferences violated his constitutional right to be present at every stage of his trial. We disagree.

> An accused has the right under art. I, sec. 7 of the Wisconsin Constitution and the sixth and fourteenth amendments of the United States Constitution to be present during his trial, and his right to be present at the trial includes the right to be present at proceedings before trial at which important steps in a criminal prosecution are often taken…. However, the presence of defendant is constitutionally required only to the extent a fair and just hearing would be thwarted by his absence….
>
> "The presence of a defendant must bear a reasonably substantial relationship to the opportunity to defend. The Constitution does not assure 'the privilege of presence when presence would be useless, or the benefit but a shadow.'"

Leroux v. State, 58 Wis. 2d 671, 689–690, 207 N.W.2d 589, 599–600 (1973) (citations omitted).

¶12 As noted, nothing of substance occurred at the two pretrial conferences that were held in Harmon's absence; they were merely scheduling conferences. Harmon's opportunity to defend himself was not in any way impaired by his absence from the conferences, and his presence at the conferences would have been useless. Harmon's absence from the conferences did not violate his constitutional right to be present at every stage of his trial.

¶13 Harmon next argues that the trial court lacked subject matter jurisdiction over his trial because the trial court did not make a finding of probable cause. *See* WIS. STAT. § 970.03(9) ("If the court does not find probable cause to believe that a felony had been committed by the defendant, it shall order the defendant discharged forthwith."). The record reveals, however, that Harmon waived his right to a preliminary hearing, and stipulated that the State could establish probable cause for the sexual assault charge. Indeed, the preliminary hearing questionnaire and waiver form that Harmon signed and filed with the trial court specifically provides: "I understand that by waiving the preliminary hearing, I am conceding that the State can establish probable cause, and that I will be ordered to stand trial." We therefore reject Harmon's argument the trial court lacked subject matter jurisdiction.

¶14 Harmon also argues that he received ineffective assistance of counsel. He asserts that trial counsel was deficient because she allegedly failed to properly explain to him the consequences of a stipulation she made with the State and, when he testified contrary to the stipulation and the State objected, she advised him to contradict his own testimony. Harmon asserts that the error

regarding the stipulation destroyed his credibility because he ultimately gave two different answers to the same question.[4]

¶15 As noted, Harmon decided to testify at trial. The State then sought a ruling on the admissibility of a custodial statement that Harmon had given to the police. Rather than have a hearing, Harmon's counsel conferred with Harmon and then stipulated that the statement was given voluntarily, after Harmon had been fully advised of his constitutional rights and had waived those rights.

¶16 During cross-examination, the State asked Harmon whether the detective who interviewed him advised him of his constitutional rights before questioning him. Harmon testified, "No, he didn't." The State then requested to be heard outside the presence of the jury and objected to Harmon's response because it did not conform to the stipulation. Harmon's attorney replied that she may not have adequately explained the stipulation to Harmon, and that Harmon had always maintained that he had not been advised of his constitutional rights before he was questioned. She then asked to confer with Harmon regarding the stipulation. After speaking to Harmon, counsel advised the State, "We still have a stipulation. He is prepared to answer in the affirmative to your question."

¶17 The State then continued its cross-examination of Harmon:

> Q Mr. Harmon, I have previously asked you if the detective who conducted that interview of you on September 17, 1997 had advised you of your constitutional rights and you say no. Is that not correct, he had advised you?

[4] Harmon also asserts other claims of ineffective assistance. Those additional claims are not before us, however, because Harmon did not assert them in a postconviction motion before the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979) (a challenge to the effectiveness of trial counsel must first be raised in the trial court).

A Yes.

Q Okay. So you were advised of your constitutional rights?

A Yes.

Q On that day by the detective?

A Yes.

Q Okay. And you agreed to waive them, is that right?

A Yes.

Q And you further agreed to answer as honestly as you could, is that right?

A Yes.

Q Okay. And you agreed to do this voluntarily?

A Yes.

As noted, Harmon asserts that his credibility was ruined when he gave the two conflicting responses about whether he was informed of his constitutional rights before speaking to the police. We conclude, however, that there is no reasonable probability that the jury would have acquitted Harmon of the sexual assault charge absent the conflicting responses. We therefore reject Harmon's claim that he received ineffective assistance of counsel.

¶18 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 prejudiced the defense. *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), *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.***

¶19 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." *See* ***id.***, 466 U.S. at 694.

¶20 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.

¶21 In light of the compelling physical evidence corroborating Patricia O.'s account of the sexual assault, there is no reasonable probability that the result of the trial would have been different absent Harmon's conflicting responses. As noted, Patricia O. testified that Harmon twisted her arm around her back and forced her into her bedroom, where he sexually assaulted her. She further testified that he sucked and bit her neck during the sexual assault, and, after

the assault, he struck her across the left side of her face, knocking her to the floor. Consistent with this testimony, the nurse who examined Patricia O. after the assault said that the left side of Patricia's face was swollen and sore, that she had bruising on her neck, that her shoulder and vaginal area were sore, and that she had multiple tears to her vaginal tissue. Harmon admitted that he had sex with Patricia O., but he offered no explanation for Patricia O.'s physical injuries. Thus, the physical evidence strongly supported Patricia O.'s version of the sexual encounter, rather than Harmon's version. Moreover, the conflict in Harmon's testimony did not relate to a central issue at trial and it was not highlighted by the prosecutor in closing argument as a reason to doubt Harmon's credibility. We therefore reject Harmon's claim that he received ineffective assistance of counsel.

¶22 Harmon further argues that the trial court erroneously exercised its discretion in precluding the defense from arguing that phone records that were admitted into evidence related to phone lines in Patricia O.'s home. Harmon asserts that the phone records established that Patricia O. had lied when she testified that she did not have a phone on the upper level of her residence.[5] He further asserts that the phone records support his testimony that Patricia O. made phone calls for him when he first arrived at her home.

¶23 "The trial court has discretion to determine whether counsel's remarks during closing argument are appropriate." ***State v. Seeley***, 212 Wis. 2d 75, 81, 567 N.W.2d 897, 900 (Ct. App. 1997). We will uphold the trial court's

[5] Harmon's trial counsel argued that the phone records also impeached Patricia O.'s testimony that she only had one phone. The record reveals, however, that Patricia O. was never asked how many phones she had; nor was she asked how many phone lines were in her home. She testified only that she did not have a phone upstairs.

discretionary determination unless there was no reasonable basis for it. *See* ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903, 907 (1983).

¶24 After the close of the State's case, the defense called two witnesses. The first witness, Regina Sloan, testified that Harmon had called her at 1:30 p.m. on the day of the sexual assault. The next witness was a representative from the phone company, who testified regarding phone calls made to Sloan and to Harmon's relatives, near the time of the sexual assault, from two phone lines. The witness initially testified that both lines were assigned to the residence of Mary Harmon, Harmon's mother. Upon cross-examination, however, the witness testified that he was not sure if both lines originated from the same residence.

¶25 After presenting the foregoing witnesses, the defense rested.[6] Thereafter, upon the State's request, the trial court precluded Harmon's counsel from arguing that the phone records related to phones in Patricia O.'s home. The trial court concluded that the number of phone lines in Patricia O.'s home was not relevant to any disputed issue, and therefore, rejected counsel's argument that Patricia O.'s medical records contained her phone number and showed that one of the phone lines to which the phone records referred was assigned to her home.

¶26 Harmon does not explain how the phone records establish that Patricia O. had a phone upstairs. At best, the jury could have inferred from the records that Patricia O. had two phone lines. The records, however, shed no light upon the location of the phones in Patricia O.'s home. Consequently, we reject Harmon's argument that the records were useful in impeaching Patricia O.'s

[6] The defense was later permitted to reopen its case to allow Harmon to testify on his own behalf.

testimony. Moreover, at the time the trial court made its ruling, the defense had rested and Harmon had not yet testified. Harmon's counsel did not ask the trial court to revisit its ruling after Harmon testified. We therefore reject Harmon's challenge to the trial court's ruling insofar as it is based upon the argument that the phone records support his testimony that Patricia O. made phone calls for him when he arrived at her home. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 212, 474 N.W.2d 753, 755 (Ct. App. 1991) (arguments not made before the trial court are waived).

¶27 Additionally, as noted, Harmon admitted that he had sex with Patricia O., but he asserted that it was consensual. Phone records showing that Patricia O. made phone calls to Harmon's relatives prior to the sexual encounter do not shed light on whether the sex was forced or consensual. We therefore conclude that Harmon's claim of error is without merit.

¶28 Harmon next argues that he is entitled to a new trial because the trial judge was allegedly biased against him. *See* ***State v. Rochelt***, 165 Wis. 2d 373, 378, 477 N.W.2d 659, 661 (Ct. App. 1991) (due process dictates that a judge presiding over criminal proceedings must be unbiased). He claims that the trial court's finding of probable cause to support the burglary charge and its various rulings against the defense demonstrate that the trial judge was biased against him. We disagree.

¶29 The trial court found probable cause for the burglary charge based upon Patricia O.'s allegation that Harmon entered her home without her permission and proceeded to sexually assault her. The record does not indicate that the trial court's finding was in any way motivated by bias. Similarly, the trial court's various rulings were made after thoughtful consideration of the arguments

from the State and the defense, and do not evidence bias. Harmon's claim that the trial court was biased against him is without merit. Moreover, Harmon did not question the trial judge's impartiality in the course of the trial court proceedings. Therefore, the claim is not properly before us. *See* ***State v. Marhal***, 172 Wis. 2d 491, 505, 493 N.W.2d 758, 765 (Ct. App. 1992) ("A challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known ….").

¶30 Harmon next argues that the State engaged in prosecutorial misconduct by knowingly presenting false testimony, and that his conviction is thus constitutionally defective. *See* ***Naupe v. Illinois***, 360 U.S. 264, 269 (1959) ("[I]t is established that a conviction obtained through false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."). He asserts that Patricia O. lied when she testified that she did not have a phone upstairs and that the State knew that she was lying. Harmon also complains that Patricia O. allegedly lied about various other subjects.

¶31 The record provides no support for Harmon's claim that the State knowingly presented false testimony. Indeed, the only evidence indicating that Patricia O. had a phone upstairs is Harmon's own testimony.[7] Harmon's argument that Patricia O. lied about the phone and various other subjects, in essence, asks us to reweigh the evidence and judge the credibility of the witnesses. Those tasks are reserved solely for the trier of fact. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752, 756 (1990). We therefore reject Harmon's argument.

[7] Contrary to Harmon's assertion, the State did not admit that Patricia O. was lying when she testified that she did not have a phone upstairs. Rather, in the portion of the record to which Harmon refers in support of his argument, the State agreed that the witness from the phone company was mistaken when he testified that the phone records disclosed calls made from the residence of Mary Harmon.

¶32 Finally, Harmon argues that he is entitled to a new trial in the interests of justice. WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

If we conclude that the real controversy has not been fully tried, we may grant a request for a new trial based upon that conclusion alone, *see* ***State v. Betterley***, 191 Wis. 2d 407, 424–425, 529 N.W.2d 216, 223 (1995); if we conclude that it is probable that justice has miscarried, however, we must also determine that there is a substantial probability that a new trial would produce a different result, *see* ***State v. Martinez***, 210 Wis. 2d 397, 403, 563 N.W.2d 922, 925 (Ct. App. 1997).

¶33 Harmon's request for discretionary reversal is grounded primarily upon his claim that he received ineffective assistance of trial counsel. As noted, there is no reasonable probability that the outcome of Harmon's trial would have been different absent his conflicting testimony about whether he was advised of his constitutional rights, and Harmon's other claims of ineffective assistance are not properly before us. We therefore decline Harmon's request for discretionary reversal.

By the Court.—Judgment and order affirmed.

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