COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2000

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

No. 99-1909-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD HEMM, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Donald Hemm, Jr., is prosecuting this appeal pro se in hope of reversing his conviction on two counts of exposing his genitals

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

or pubic area to a child in violation of WIS. STAT. § 948.10 (1997-98).[2] Hemm has waived any argument on his contentions that he received ineffective assistance of trial counsel and that the trial judge should have recused himself after presiding over a codefendant's trial by failing to properly preserve both issues in the trial court. Because the evidence overwhelmingly supports the trial court's guilty verdict on both counts, we rebuff Hemm's challenge to the sufficiency of the evidence and affirm.

¶2 Hemm complains that trial counsel failed to provide effective assistance on four specific issues. First, that trial counsel failed to challenge the police's failure to give Hemm the warnings mandated by ***Miranda v. Arizona***, 384 U.S. 436 (1966).[3] Second, counsel failed to file a timely motion for substitution of the assigned judge. Third, counsel failed to exhibit diligence during cross-examination of witnesses. Finally, counsel failed to seek discovery of evidence under the control of the prosecution.

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

[3] Hemm complains that the police failed to advise him of his constitutional rights when they were investigating the complaint against him. ***Miranda*** is not applicable. Hemm was never interrogated in custody. The first two police contacts occurred when an officer questioned Hemm after he voluntarily appeared at the police department for his first interview and a second interview in a local restaurant. Because Hemm was not in custody, it was not necessary for the police to read him his ***Miranda*** rights before questioning him. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 344-45, 588 N.W.2d 606, *modified*, ***State v. Armstrong***, 225 Wis. 2d 121, 591 N.W.2d 604 (1999). The third time Hemm had contact with the police was when he appeared for booking after the criminal complaint had been issued. During this contact, Hemm advised the investigating officer he was sticking to his previous story. Hemm was released after processing. Because there was no custodial interrogation, ***Miranda*** warnings were not required. *See* ***State v. Ross***, 203 Wis. 2d 66, 73, 552 N.W.2d 428 (Ct. App. 1996).

¶3 Hemm raises an ineffective trial counsel claim for the first time on appeal.[4] He never sought a trial court hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), at which trial counsel could explain his strategy during the trial. Such testimony is a prerequisite to the proof of the deficient performance prong. *See* ***id***. Without the hearing, we have no way of knowing whether trial counsel had legitimate strategic reasons for the manner in which he conducted Hemm's defense. If trial counsel had legitimate strategic reasons, Hemm has no claim of ineffective trial counsel. We will not presume that trial counsel's chosen course of action was the result of deficient performance. Hemm had the burden to make the case on that issue at a ***Machner*** hearing. In short, Hemm's failure to have a ***Machner*** hearing bars him from challenging his trial counsel's effectiveness.

¶4 Also, for the first time Hemm alleges that the trial judge was biased because he had presided over the trial of Hemm's codefendant and should have recused himself from Hemm's trial.[5] Because there is no evidence in the record that Hemm requested the trial judge to recuse himself before the conviction, he has waived the appeal of this issue. "[A] party seeking reversal may not advance arguments on appeal which were not presented to the trial court." ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995). The waiver rule was designed for cases such as this to prevent a party from deliberately supplementing

[4] Hemm's motion for postconviction relief was limited to a challenge to the sufficiency of the evidence. During the postconviction hearing. Hemm restricted his criticism to the sufficiency of the evidence. In response to the trial court's uncertainty over the relief Hemm was seeking, Hemm replied, "I'm asking this Court to change its mind."

[5] Hemm also contends that his counsel's failure to timely file a motion for the substitution of the trial judge was one element of his ineffective assistance of counsel claim. Previously, we held that Hemm's failure to seek a ***Machner*** hearing adds up to a waiver of this claim.

the record for appeal by filing ersatz arguments, never made to the trial court, after conviction and with the intent to argue a trial court error that never transpired. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). We will not knowingly be a part of Hemm's attempt to obfuscate the issue on appeal and conclude that he has not preserved the issue of the self-disqualification of the trial judge.

¶5 We now turn our attention to Hemm's challenge to the sufficiency of the evidence. In reviewing the sufficiency of the evidence, we may not reverse the trier of fact unless the evidence, viewed in the light most favorable to the outcome of the proceeding, is so deficient that, as a matter of law, no reasonable fact finder could have reached the same result. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The test is whether this court can conclude that the trier of fact could, acting reasonably, be convinced of the defendant's guilt by evidence it had a right to believe and accept as true. *See* ***id***. It is the function of the trier of fact—not the appellate court—to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from it. *See* ***id***. at 506.

¶6 The evidence in support of the trier of fact's conclusion that Hemm exposed his genitals to two minors was largely presented by the two minor victims. Christen L. D. and Lisa O. were delivering newspapers on the afternoon of February 10, 1998, and were walking past an apartment building when they heard banging on a window in the building. Lisa looked toward the source of the sound and saw two men without any clothing; the first man, the taller of the two, was rubbing his erection, and the second, shorter individual was not touching his privates when Lisa looked. During the trial, Lisa positively identified Hemm as the second, shorter individual. Christen's testimony of what she saw was

consistent with Lisa's. Christen testified that she had previously seen the same two men, fully clothed, in the driveway of the apartment building. And, like Lisa, Christen was able to positively identify Hemm as the second, shorter individual.

¶7 In corroboration of this testimony, the State presented Lisa's stepfather. The stepfather testified that Lisa and Christen came into the house very upset and after they calmed down he was able to understand that two men had exposed themselves to the girls. Lisa told her stepfather that the apartment was visible from their backdoor and the stepfather stepped out onto the rear stoop and saw two shadows in the window for fifteen to thirty seconds. The stepfather was unable to identify the two shadows.

¶8 The principal defense witnesses were Thomas J. Inzeo, Hemm's roommate who had been previously convicted for the same incident, and Hemm. Inzeo testified that he may have been naked in front of the apartment's window and probably made a banging noise when he struck the window with his elbow. Inzeo denied that he touched his privates; denied that Hemm was unclothed; and testified that during the time in question, Hemm was in the garage cleaning his car.

¶9 In his testimony, Hemm claimed that he was in the basement of the apartment during the time Christen and Lisa testified they saw him and Inzeo naked in the window. According to Hemm, the first he knew of the incident was when he found the business card of a police officer stuck in the front door later that day.

¶10 Hemm makes two broad attacks on the evidence. First, he asserts that the trial court misused its discretion in admitting the testimony of three police officers. He contends that their failure to advise him of his constitutional rights was a bar to that testimony. However, warnings were not required to be given to

Hemm because he was not in custody and under interrogation when he provided statements to the officers. *See* ***Miranda***, 384 U.S. at 444. Even if the warnings were required and not given, Hemm would only be entitled to the suppression of statements he gave and not statements of the victims or other witnesses.

¶11 Hemm's other general attack on the evidence is that the inconsistencies in the testimony of Lisa and Christen make the evidence insufficient as a matter of law. Hemm fails to cite to any of the alleged inconsistencies.[6] Even if there were inconsistencies between witnesses' testimony, it is the task of the trier of fact to determine both the credibility of each witness and the weight to be given to the testimony. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). We shall not assess the credibility or the weight of the evidence. Nor shall we substitute our judgment for that of the trier of fact, unless "the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). We conclude that based on the evidence, the trial court reasonably could have found Hemm guilty of two counts of exposing his genitals or pubic area to a child.

[6] Hemm fails to provide any record cites to establish the inconsistencies in the evidence. We therefore reject any assertion of insufficiency of the evidence predicated on inconsistencies. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments).

By the Court.—Judgment and order affirmed.

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