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

**January 26, 2016**

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



**Appeal No. 2015AP138-CR** **Cir. Ct. No. 2012CF775**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEVONTE M. WILLIAMS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Devonte Williams appeals a judgment of conviction for armed robbery and armed burglary, as party to a crime with repeater enhancements, and the denial of a postconviction motion for a new trial. Williams argues his trial counsel was ineffective for failing to object to the identification

testimony of two probation agents. Williams also argues he is entitled to sentence credit. We affirm.

## BACKGROUND

¶2 On April 9, 2012, two males entered an apartment in Green Bay and demanded money at gunpoint from two individuals. At trial, one of the victims identified Williams as an armed perpetrator. The other victim who lived at the apartment testified he was certain that Williams entered his residence "armed with a gun."

¶3 Police recovered surveillance video equipment that was installed in the victim's residence and obtained still photographs from the video. The jury viewed both the surveillance photographs and video during the trial.

¶4 During their investigation, police showed the surveillance video and photographs to several Wisconsin Department of Corrections probation agents. During the trial, the agents identified Williams as an offender who they personally knew due to his probation status. Agent Amy Anderson testified:

> Q: Was Mr. Williams a client of yours at some time?
>
> A: Yes, he was.
>
> Q: Do you know approximately what period of time, how long?
>
> A: I had him on – I would say back in 2011, he was placed on probation with me for a second time.
>
> Q: Okay. Second time with you or second time on probation?
>
> A: Second time on probation and I had him a second time. I had him the first time he was on probation as well.

> Q: So, you supervised him for a fairly considerable period of time?
>
> A: Yes.

¶5 The State also called agent Sara Marineau as a witness. Marineau identified Williams as a "client" of agent Anderson, with whom Marineau shared a two-person office. Marineau testified that she was asked to go to the police department to view photographs of one of Anderson's "offenders" in an attempt to identify a suspect in the home invasion. Marineau identified Williams from the photos, and "[e]ven more so after seeing the [surveillance] video." Marineau explained, "When [Williams] came to our office, he never sat still. He was constantly moving. He was in our office multiple times. So, by viewing him in our office and then viewing the individual in that video, the mannerisms, the movement, they were all the same. I knew even more so after seeing the video that it was [Williams]."

¶6 The jury convicted Williams, and the circuit court imposed a sentence of fifteen years' initial confinement and seven years' extended supervision on the armed robbery charge; and ten years' initial confinement and five years' extended supervision on the armed burglary charge. The sentences were to be served concurrently to each other but consecutively to any other sentence.

¶7 Williams filed a postconviction motion seeking a new trial and sentence credit. Williams argued his trial counsel was ineffective for failing to object to the testimony of agents Anderson and Marineau. Williams insisted his counsel abandoned at trial a pretrial motion in limine that prohibited the State from introducing prior acts evidence. Williams argued the testimony of the probation agents "implicated Williams as having committed prior acts, unrelated

to this matter, that were specifically barred when [the circuit court] granted Williams' Motion in Limine."

¶8 At the ***Machner***[1] hearing on Williams' motion, his trial counsel testified that prior to trial he filed a "very standard motion in limine[,]" which included a "motion … for exclusion of prior acts." Counsel testified that when he filed the motion in limine, "I was aware that the probation agents were the prime identifying witness[es] in this case and that their nature as probation agents would infer some prior criminal conviction that would have landed Mr. Williams on probation." Counsel testified he understood the probation agents would refer to Williams as "probationer" or "client," but his main concern about their testimony was not how they would refer to Williams, but whether they would "talk[] about convictions" and "the nature of those convictions."

¶9 Williams' trial counsel also testified that although he did not specifically recall Anderson testifying that Williams had been on probation, he knew "that she was testifying about how long she had known Mr. Williams." He did not object to the statement that Williams had been on probation when she supervised him because she "was going to be identifying Mr. Williams, so the basis for her being able to recognize him is relevant evidence. So, I didn't object because I did not think prejudice was outweighed by the probative value." The attorney further testified that he did not ask for a cautionary instruction because Williams did not testify at trial.

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

¶10 The circuit court denied the motion for a new trial, but granted Williams' request for 69 days of sentence credit. The DOC subsequently requested the court review the sentence credit, stating that "a portion of the 69 days on the JOC appears to be duplicate credit …." The court subsequently amended the judgment to provide seven days credit, finding that "[t]he 60 days credit initially granted is duplicative and contrary to ***State v. Boettcher***, 144 Wis. 2d 86 (1988)." Williams now appeals.

## DISCUSSION

¶11 Williams argues his trial counsel was ineffective for failing to take steps to exclude or mitigate the identification testimony of agents Anderson and Marineau, which he insists was "inherently prejudicial." According to Williams, "[w]ithout the agents' testimony, when the other evidence is considered, there was reasonable doubt about Williams' identity." Specifically, Williams argues "there was extensive testimony about Williams' lengthy probationer status and other references about 'offenders'" that detrimentally exposed Williams' prior criminal history …."

¶12 A defendant claiming ineffective assistance of counsel must prove both deficient representation and that he suffered prejudice as a result of that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If this court determines the defendant has not proven one prong of this test, it need not address the other. ***Id.*** at 697. Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. ***State v. Manuel***, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811. Findings of fact will be upheld unless clearly erroneous. ***Id.*** Whether the defendant's proof satisfies either the deficient performance or prejudice prong is a question of law we decide independently. ***Id.***

¶13 We conclude the testimony of the probation agents was properly admitted as identification testimony, and Williams' trial counsel was not deficient for failing to object to the testimony or request a limiting instruction. Evidence of a defendant's probation status may be admissible in the proper exercise of judicial discretion "if such evidence demonstrates the motive for, or otherwise explains, the defendant's alleged criminal conduct." ***State v. Kourtidias***, 206 Wis. 2d 574, 585, 557 N.W.2d 858 (Ct. App. 1996).

¶14 Here, the agents' testimony had a strong and direct nexus to Williams' criminal conduct, as the testimony relating to Williams' probation was relevant to show the agents were very familiar with Williams and thus able to identify him as the suspect in the photographs and videotape. *See* ***id.*** Similarly, Marineau used the term "offender" to essentially say, "I can positively identify Williams because we know him."

¶15 Contrary to Williams' perception, the identification testimony was not admitted for the purpose of showing Williams had engaged in prior similar criminal conduct. There was no testimony as to why Williams was on probation, and no reference was made to any specifics about his prior misconduct that would have been prohibited by the pretrial motion in limine.

¶16 Because the testimony was used to identify Williams, the circuit court properly exercised its discretion by concluding the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice. The jury in this case knew Williams was charged in the criminal complaint as a repeat offender. Therefore, the fact that he was a "client" of the probation agents who identified him on the surveillance video was not prejudicial to his defense. That

he was on probation would similarly be neither surprising to the jury nor unduly prejudicial.

¶17 Consistent with this analysis, Williams' trial counsel testified at the ***Machner*** hearing that he did not object to this testimony because he knew "the probation agents were the prime identifying witness[es] in the case." As such, "their nature as probation agents would infer some prior criminal conviction that would have landed Mr. Williams on probation." Trial counsel's main concern was not how the agents referred to Williams, but about them "talking about convictions" and "the nature of those convictions." Trial counsel knew that Anderson's testimony that she supervised Williams on probation was for the purpose of establishing how long she had known him.

¶18 As the circuit court observed:

> [C]learly [trial counsel] was not ineffective. He knew what he was doing. Not only that, he analyzed the situation and he knew what the Court was likely to rule if he were to make the objection in the first place. So, not only was his assistance not ineffective, it wasn't prejudicial. Because … [objecting to the agent's testimony] wouldn't have changed the outcome of the trial …

¶19 We agree with the circuit court's analysis. The State needed to establish a foundation for how these witnesses could identify Williams. Even if we could somehow conclude counsel's failure to object to the agents' identification testimony was "error," it would not be so fundamental as to undermine our confidence in the outcome of the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Other evidence, including the victims' trial testimony identifying Williams as an armed perpetrator of the home invasion, and the jury's viewing of the photographs and surveillance video, supported the

jury verdict. The court properly denied Williams' motion for a new trial based on ineffective assistance of counsel.

¶20 Williams also argues he is entitled to a new trial in the interest of justice. We disagree. We conclude the real controversy here has been fully tried, and we do not see a miscarriage of justice. *See* WIS. STAT. § 805.15(1) (2013-14).

¶21 Finally, the circuit court properly amended the judgment of conviction to avoid granting duplicative sentence credit on consecutive sentences. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 95-96, 423 N.W.2d 533 (1988). Williams was not entitled to sentence credit that he already received in two other Brown County cases, Nos. 2011CM142 and 2011CM638. As explained by the DOC's correspondence to the circuit court:

> Mr. Williams received credit on the Revocation Order and Warrant (ROW) dated October 18, 2012 from April 16, 2012, which is only 7 days after the date of the offense for [this] case, 12CF775, until the present for cases 11CM142 and 11CM638. The Court ordered the sentence in case 12CF775 to be served consecutive to any sentence now serving, thus it would appear that granting the entire 69 days credit on case 12CF775 would duplicate credit previously granted to cases 11CM142 and 11CM638.

¶22 The DOC attached a copy of the revocation order and warrant showing that Williams began receiving sentence credit in the other Brown County cases on April 16, 2012; therefore, he is entitled to credit in the present case for the seven days prior to that date. Williams is not entitled to credit in the present case after that date because Williams has already received sentence credit for that time in his sentence after revocation in the other Brown County cases, to which the sentence imposed in this case was ordered to run consecutively. *See* ***Boettcher***, 144 Wis. 2d at 90, 100. The circuit court correctly amended the judgment of conviction in the present case, reducing the 69 days of sentence credit

to seven, to avoid giving Williams duplicative sentence credit on his consecutive sentences. *See* ***State v. Aytch***, 154 Wis. 2d 508, 514, 453 N.W.2d 906 (Ct. App. 1990). Accordingly, the court's order amending the judgment of conviction is affirmed.

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

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