COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP563-CR **Cir. Ct. No. 2013CF2699**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENYATTA A. CLINCY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO and WILLIAM S. POCAN, Judges. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Kenyatta Clincy appeals from a judgment of conviction for armed robbery and from an order denying, without a hearing, his postconviction motion seeking a ***Machner*** hearing[1] and a new trial based on ineffective assistance of counsel.[2] Clincy argues that he is entitled to a hearing. We affirm the judgment and order.

BACKGROUND

¶2 Clincy and Montreal Freeman were charged in connection with robbery after evidence tied each one to the undisputed getaway car. The two men gave differing accounts about what happened that day. At Clincy's trial, Clincy denied any involvement in the robbery and testified that he had loaned the car, which was his girlfriend's, to Freeman on the day of the robbery. Freeman, whose fingerprints were found on an item from the robbery and on the getaway car, pleaded guilty to a reduced charge and testified at Clincy's trial pursuant to the plea agreement. Freeman's testimony was that Clincy, who wanted money for drugs, committed the robbery while Freeman was getting a ride from him, and that Freeman had gotten behind the wheel as the robbery took place, waited for Clincy, and then drove away from the scene.

¶3 At Clincy's trial, N.S. testified that at approximately 7:30 p.m., she had just parked near her home and was walking toward her front door, carrying a purse on one shoulder. She was approached by a black male wearing a dark

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] The Honorable Glenn H. Yamahiro presided over the trial. The Honorable William S. Pocan denied the postconviction motion.

hooded sweatshirt, jeans, and glasses with black-framed glasses. She saw a shiny object in his hand that she thought was a gun. N.S. testified that the man said, "ma'am, just drop the bag," which she did, and that the man crouched down and grabbed her bag as she screamed for help. N.S.'s husband came from inside the house and chased the man as he ran toward a car that had pulled up. When N.S.'s husband got close enough to grab the man's jacket, N.S. screamed that the man had a gun, so her husband backed away. The man opened a door on the passenger side and got in, and the car drove off. N.S.'s husband noted the license plate and reported it to police. On a nearby street, police recovered a small sandwich bag with aspirin in it that N.S. identified as having been in her purse. Freeman's fingerprints were found on the recovered plastic bag.

¶4 Police learned that the getaway vehicle was registered to a woman who was later identified as Clincy's girlfriend, and officers were dispatched to her address. An officer testified that about three hours after the robbery, he was in a squad car parked at the curb in front of the address and saw a vehicle approaching at a high rate of speed. He turned on his siren and lights as it passed and initiated a traffic stop. An officer on the scene recognized the vehicle as fitting the description given by the victim's husband. The only person in the car, later identified as Clincy, was wearing jeans and a black hooded sweatshirt. On the driver's side floorboard was a dark 18-inch lug nut wrench. Clincy was not wearing glasses, but his cell phone contained pictures of him wearing black-framed glasses. A phone belonging to Freeman's cousin showed texts and calls between Freeman and Clincy before the crime. Freeman's cousin testified that Freeman had used her phone during that time period.

¶5 Clincy denied any involvement in the robbery. He testified that Freeman had given him cash and drugs in exchange for the use of the car, and later

returned the car while in the company of two people Clincy did not know. Clincy testified that he was told he would be killed if he told police who had used the car. Clincy testified that he was never in the area of the robbery on that day.

DISCUSSION

¶6 Clincy argues that there were four instances of deficient performance by his trial counsel and that each one prejudiced him. He also argues that the deficiencies had a cumulative prejudicial effect, even if each individually fails to satisfy the prejudice prong.

¶7 Clincy's trial counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). A defendant claiming ineffective assistance of counsel must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the deficient performance prejudiced the defense. ***Id.*** at 687; ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305 (stating that where counsel has multiple deficiencies, prejudice should be assessed based on the cumulative effect of counsel's deficiencies). An evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A motion for such a hearing may, at the discretion of the circuit court, be denied when: (1) the defendant has failed to allege sufficient facts in the motion to raise a question of fact; (2) the defendant has presented only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Roberson,*** 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111.

¶8 For the reasons stated below, we conclude that Clincy's motion was correctly denied because the record conclusively demonstrates that the defendant is not entitled to relief. Thus, an evidentiary hearing was not required and the circuit court did not erroneously exercise its discretion in denying his motion for one.

¶9 We first discuss two of Clincy's ineffective assistance of counsel claims and explain why he is not entitled to relief based on his failure to allege facts that could support a claim of deficient performance. We then discuss his two other claims, and as to those we will assume deficient performance and conduct only the prejudice prong analysis. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (noting that under ***Strickland***, because defendant must show both deficient performance and prejudice, a failure to satisfy one obviates the need for the court to address the other).

¶10 The first ineffective assistance claim we address is that trial counsel misstated the burden of proof during opening argument. Counsel described for the jury how the presentation of testimony would proceed and stated, "[The State] has the burden of bringing it to you. I have the burden of showing you how wrong it all is, and it's a heavy burden. But I'm pretty sure we can do it." Clincy argues that this misstatement—putting a burden on the defendant's counsel—constituted deficient performance even though counsel stated the burden correctly several other times during the trial. Clincy argues that the single statement did "too much damage" because it was the last statement of the burden of proof that the jury heard before the presentation of the evidence.

¶11 "We presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). The

record is clear that the burden was correctly stated by defense counsel three times in closing and by the circuit court at least eight times prior to opening and closing arguments, including in the jury instructions. When the jury has been repeatedly informed by the court of the proper standard of proof, there is no grounds for finding deficient performance for a misstatement as insignificant as this. Because there is no deficient performance, we do not reach the prejudice prong.

¶12 The next ineffective assistance claim is that trial counsel "had to have [been] distracted [] from his trial counsel duties" by the fact that counsel had been arrested for operating while intoxicated (OWI) about a week before Clincy's trial and had a previous OWI incident that was also likely to be charged. Before and during Clincy's trial, counsel was facing the possibility of a felony charge of his own. There is no indication that charges were filed in either case before or during Clincy's trial, and Clincy does not specify what improper thing trial counsel did or what he failed to do due to this alleged distraction. Further, with Clincy present in the courtroom, the circuit court confirmed that trial counsel had discussed with Clincy the fact that counsel was "potentially facing criminal charges." The circuit court asked, "And he wishes to have you continue your representation at this time?" and counsel answered, "Yes." The circuit court then asked, "Do you have any questions about what we're talking about, Mr. Clincy?" and Clincy said, "No, sir."

¶13 Clincy now asserts that had he known the severity of the charges against his attorney, he would have sought new counsel. However, in an omission that is fatal to his argument on this point, Clincy points to no deficient performance caused by this alleged distraction. Further, Clincy was given the opportunity to ask about the severity of the charges prior to his trial. This undermines his position. *See* ***State v. Lipke***, 186 Wis. 2d 358, 363, 521 N.W.2d

444 (Ct. App. 1994) (concluding that defendant sandbagged the court when specifically asked a question about a sentence and holding that defendant "cannot be allowed to take advantage of a situation which he caused…").

¶14 We analyze Clincy's additional two ineffective assistance claims under the prejudice prong. For this analysis, we consider whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** Both claims relate to the identification evidence: counsel's failure to question N.S. about the photo array in which she had been unable to identify Clincy, and counsel's failure to stress to the jury the varied estimates that the victim and witness gave of the assailant's height, which ranged from 5'4" to 5'10.

¶15 A police report states that N.S. viewed photos of potential suspects, including a photo of Clincy, at the police station on the night of the robbery. At trial, the State asked whether she was able to identify the robber at the police station, and she answered "No." Her testimony did not elaborate on the method of attempted identification. The jury heard other identifying details of the robber and of Clincy from N.S., her husband, Freeman, and the police. N.S. testified that the robber was wearing a dark hoodie, jeans, and glasses with black frames. N.S.'s husband described the jacket and jeans in the same way, and testified that he had been close enough to grab the robber. A police officer testified that when Clincy was stopped, he was wearing clothing that matched the description given by the victim and her husband. An investigator testified that files recovered from Clincy's cell phone included pictures of him wearing black-framed glasses. Freeman testified, identifying Clincy as the robber and as someone he had known since childhood, and there was testimony and telephone records showing that the

two men had been in contact prior to the crime. Freeman also testified that Clincy was wearing a dark hoodie on the night of the robbery.

¶16 Clincy argues that counsel should have questioned N.S. about the photo array so that the jury could hear that she had looked at a photo of Clincy the night of the crime and had been unable to identify him as the robber. He argues that the failure to do so prejudiced him because it is reasonably probable that the jury would then have been able to exclude him definitively from involvement in the crime. However, Clincy minimizes the testimony that the jury heard that N.S. was unable to make an identification and ignores the weight of the other corroborating evidence regarding the clothing and glasses. The jury heard that N.S. could not identify the robber, and in light of that and other evidence, our confidence in the outcome is not undermined by trial counsel's failure to question N.S. about the photo array.

¶17 The other identification-related issue is counsel's alleged failure to "hammer home" the discrepancies in the way N.S. and her husband described Clincy's height on the night of the robbery and at trial, specifically that their estimates are closer to Freeman's height (5'4") than to Clincy's (6'2"). At trial the State asked N.S. what height estimate she gave police on the night of the robbery; she testified that she told police she was unsure and first estimated "like five-six, five-seven," but that she agreed with a police officer to a "range" of "like five-four to five-seven, or five-four to five-eight." N.S. also testified that when she saw the robber coming toward her, he "ducked down." N.S.'s husband testified that the robber was "around like five foot ten."

¶18 Clincy's counsel alluded to the discrepancies in the witnesses' height estimates eight times in closing argument. The jury saw both Clincy and Freeman

and heard their actual heights; it was obvious from testimony that neither N.S. nor her husband ever estimated the robber's height as 6'2". The jury also heard that the robber was ducking down, that N.S. was uncertain about her ability to estimate his height from the beginning, and that N.S. had identified specific clothing that matched what Clincy was wearing when he was stopped a few hours later. To prevail on prejudice, Clincy must show that but for the failure of counsel to put greater emphasis on the original height estimates, there is a reasonable likelihood of a different outcome. On these facts, he has not done so because there is no reason to think, in light of the emphasis that counsel in fact gave this issue and in light of the other evidence, that more emphasis on a fact in evidence would be reasonably likely to change the outcome.

¶19 Finally, Clincy asserts that if the effects of the multiple incidents of deficient performance are aggregated, the sum is prejudicial. In cases where there are multiple instances of deficient performance, a court is not required to rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. *See* ***Thiel***, 264 Wis. 2d 571, ¶59. Here, the deficiencies taken together do not establish cumulative prejudice when considered together because in both instances the alleged prejudice is based not on omissions of evidence but merely on the premise that Clincy's counsel could have emphasized the evidence—that N.S. could not identify the robber and that she initially gave a height estimate that matched Freeman's height and not Clincy's height—in a more favorable manner to the jury. *See* ***State v. Maloney***, 2006 WI 15, ¶37, 288 Wis. 2d 551, 709 N.W.2d 436 (declining to use the supreme court's discretionary power of reversal to order a new trial to allow a defendant to present a different defense theory when the theory the defense presented was competent).

¶20 Because we conclude that the first two claims of ineffective assistance of counsel were not deficient performance and the other two claims did not prejudice Clincy either individually or in the aggregate, Clincy has not overcome the strong presumption that counsel acted reasonably within professional norms. The record conclusively demonstrates that Clincy is not entitled to relief. We conclude that the circuit court properly denied his motion without a hearing.

By the Court.—Judgment and order affirmed.

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