COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP1651-CR
2015AP1652-CR

Cir. Ct. Nos. 2013CF3941
2013CF4535

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOE BONDS TURNEY,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Brash, JJ.

¶1 BRENNAN, J. Joe Bonds Turney appeals from two judgments of conviction and an order denying his postconviction motion. Turney seeks new trials, claiming that the trial court erred when it permitted joinder of two cases for

trial and when it denied his motion for substitution of judge following his arraignment. In the alternative, he argues that he is entitled to a remand for an evidentiary hearing on his ineffective assistance of counsel claim. He bases that claim on trial counsel's failure to object when a witness for the State testified on direct examination regarding Turney's silence during a custodial investigation after his arrest.

¶2 We affirm because we conclude that neither the joinder nor the substitution denial was error. First, because the crimes share "common … factors of substantial factual importance," and because of the strong policy favoring joinder to further the goals of trial economy and convenience, we conclude that the joinder is proper and not substantially prejudicial. *See* WIS. STAT. § 971.12 (2013-14)[1] and ***Francis v. State***, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979). Second, the statutory right to substitution in WIS. STAT. § 971.20(4) is extinguished after arraignment, and in this case the arraignment occurred before the substitution request during a hearing on December 13, 2015. The timing of the request is dispositive. We require strict adherence to the statute in order to avoid "substantial problems" in administering the right of substitution. *See* ***State v. Austin***, 171 Wis. 2d 251, 257, 490 N.W.2d 780 (Ct. App. 1992). Third, we conclude that Turney's postconviction motion does not allege sufficient material facts that, if proven, would demonstrate that counsel's failure to object to the testimony in question was deficient performance or that it "deprive[d] the defendant of a fair trial, a trial whose result is reliable." *See* ***State v. Balliette***, 2011 WI 79, ¶2, 336 Wis. 2d 358, 805 N.W.2d 334 (stating standard for motion);

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

see also ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (stating test for prejudice). Therefore we conclude that Turney is not entitled to an evidentiary hearing. We discuss each issue in turn below.

BACKGROUND

¶3 On August 22, 2013, Turney argued with T.B. at her duplex, yelling and cursing at her and pushing her in front of their three-year-old child. T.B.'s sister was present. When T.B. threatened to call police, Turney pulled a handgun from his waistband, pointed it at a wall, and fired one shot. T.B. called 911, and Turney ran out the door. From inside, the women saw a person pull up in a gray Honda, pick up Turney, and drive away. Officers came to the scene and located a bullet hole in the wall and a casing from a 9 mm bullet. A warrant was issued for Turney's arrest. A criminal complaint was filed the following day, August 23, 2013, charging one count of being a felon in possession of a firearm, one count of endangering safety by use of a dangerous weapon (discharging into a building), and one count of endangering safety by use of a dangerous weapon (pointing).

¶4 On September 19, 2013, Turney argued with L.W. over a gray 2000 Honda Accord she owned that he was refusing to return to her. L.W. had not seen the car since the person to whom she loaned it was arrested in July 2013. L.W. knew that Turney had the car and the only key to it. She had tried repeatedly without success to contact Turney to retrieve the car: she had tried calling his phone and had left a note at the house where he was living. Turney had falsely told L.W. on September 17 that the car was in the shop for repairs. Late on the night of September 19, accompanied by her brother, L.W. had located the car parked on the street near Turney's house and called a locksmith to make a key for

it.[2] The locksmith arrived and started to work, going back and forth between the Honda and his car.

¶5 Turney, who was accompanied by several men, then walked to the Honda, shut the door, and said, "[A]in't nobody taking this car." Turney and L.W. argued, and she saw that he had a gun. L.W. said Turney was angry that she had brought people into his "hood." When the locksmith walked back to his car to finish making the spare key for the Honda, Turney told a teenage boy, C.G., to drive the Honda away. L.W. saw Turney raise a gun. She turned and ran. She heard multiple shots being fired. Her brother started yelling and drove off in the car she had arrived in. The locksmith, sitting in his own car to finish making the key, heard shots, heard his rear window shatter, and quickly drove away. A bullet grazed the ear of the locksmith's passenger, leaving a wound that required stitches. After the shooting, the passenger seat headrest had a bullet hole in it. Police later found nine 9 mm casings at the scene.

¶6 On September 24, 2013, police received an anonymous tip that Turney was possibly armed with a gun and was walking down the street by a stolen car. The caller gave Turney's location and a description of the clothing he was wearing. Detective Jeffrey Sullivan, who was passing by, knew there was an outstanding warrant for Turney for the August 22, 2013 incident. Turney was arrested on the warrant and Detective Sullivan searched Turney. No gun was found on Turney, but a vehicle registration for the 2000 Honda Accord, registered

[2] L.W., seeking to have an officer present while the locksmith worked, flagged down a passing police cruiser. The officer had been en route to investigate an unrelated shooting in the area. In light of that call, she patted down L.W. and her passengers and found no guns on them. The officer left before the locksmith arrived due to the need to respond to the other call.

to L.W., was found in Turney's pocket. The police located the Honda in an alley two or three blocks away.

¶7 Turney was charged separately, on October 2, 2013, in connection with the September shooting incident, with three counts of first-degree recklessly endangering safety by use of a dangerous weapon and one count of being a felon in possession of a firearm. The State later amended the information in this case to add two more counts: a count of armed robbery as a party to a crime and a count of endangering safety with a dangerous weapon by discharging a firearm into a vehicle.

¶8 The cases were assigned to different judges, the August 22, 2013 incident case to the Hon. Rebecca Dallet and the September 19, 2013 incident to the Hon. J.D. Watts. Arraignments were held in both and no motions for judicial substitution were filed. Turney filed speedy trial demands in both cases. Both were set for jury trial on the same date, although in different courts. On December 5, 2013, the State moved for joinder before Judge Dallet, the court presiding over the case arising from the first shooting.

¶9 On December 13, 2013, Judge Dallet heard the joinder argument and granted the motion over defense objection. The trial court noted that the crimes were "so similar" and occurred in "such a short time frame" that joinder was appropriate. It addressed the issue of prejudice as to the joinder, stating, "really there is no prejudice other than prejudice that attends to being charged with a crime, period, but no prejudice that would require this court to sever." After the joinder decision, the judge announced she would keep the joined cases in her court because the August incident was a domestic violence charge which belonged in domestic violence court. Turney did not object. Because the State had filed new

charges in the September incident, another arraignment was required. The court then read to Turney the two new charges in the amended information for the second case. Turney then entered not guilty pleas on the two new counts.

¶10 Counsel for Turney then requested a moment to speak with Turney. Counsel next informed the court that Turney wished to substitute on the judge and was "prepared to file that." After a recess, the trial court stated that it had concluded that Turney no longer had a right to substitute at that point. He had made three appearances in the older case, including arraignment, and had not filed a substitution request. The trial court had ruled on joinder in both cases and had conducted an arraignment on the two new charges in the newer case. Therefore the trial court ruled he had no right to substitution.

¶11 The case proceeded to trial. Turney did not testify. The State asked Detective Sullivan on direct if he knew whether Turney lived at the address where they arrested him on September 24, 2015, and he gave the following answer:

> Q: Do you know if [Turney] lived at that address?
>
> A: When I stopped, when myself and the officers stopped him, we already knew his name. So as a procedural thing, we ask people their name and their address, he wouldn't give me his address.
>
> Q: Okay.
>
> A: So we had no idea where he actually listed his address was. He wouldn't answer any question I asked him.

¶12 On re-cross by defense counsel, the same witness gave a similar answer when asked about the encounter with Turney:

> Q: Did you ask Mr. Turney how he came into possession of that registration?
>
> A: No, I didn't. Not at that time he was not asked, he was under arrest. Questions I asked him -- I knew his name

> -- his address, and he didn't answer any of those questions.

¶13 Defense counsel made no objection to the detective's testimony.

¶14 At the close of its case in chief, the State moved to dismiss one misdemeanor count of endangering safety, conceding that no testimony had been introduced to support the charge that Turney had pointed a gun at a person in the August shooting.

¶15 Turney presented an alibi witness for the first shooting; his brother testified that Turney had been working on a renovation of a property he owned for the entire day, though he acknowledged that they were not working together. The defense theory about the second shooting was that Turney had been standing in a different location than where the shots were fired from and could not have been the shooter.

¶16 The jury convicted Turney on all eight counts.

Postconviction motion

¶17 Turney filed a postconviction motion, seeking an evidentiary hearing on his claim that trial counsel had rendered ineffective assistance by making no objection to Detective Sullivan's statements about Turney's post-arrest silence. The trial court denied the motion on the grounds that counsel's performance was not deficient because "the record does not reveal any intent by the State to elicit this testimony or use it as a comment on the defendant's silence." The trial court distinguished this case from the facts of ***State v. Mayo***, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115, in which our supreme court found a violation of a defendant's rights where officers testified that the defendant did not respond to accusations of robbery and where the State commented on that silence in opening

and closing arguments.[3] The trial court held that because there was no evidence of the State's deliberate intent to present the evidence, and because the State did not use the comments in its arguments, there was no violation of Turney's rights and thus no deficient performance. The court also found that there was no prejudice because an objection by counsel to the testimony would not have changed the outcome.

¶18 This appeal follows.

DISCUSSION

¶19 The analysis of the first issue on appeal, joinder, has two steps, each with a different standard of review. '"Whether charges are properly joined in a criminal complaint is a question of law.'" ***State v. Davis***, 2006 WI App 23, ¶13, 289 Wis. 2d 398, 710 N.W.2d 514 (citation omitted). However, the question of whether there is substantial prejudice to the defendant that requires severance is one we review for an erroneous exercise of discretion. ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982). Turney's second issue, the denial of substitution under WIS. STAT. § 971.20, is also a question of law. ***State v. Bohannon***, 2013 WI App 87, ¶18, 349 Wis. 2d 368, 835 N.W.2d 262. The third issue has two parts: the sufficiency of a motion for an evidentiary hearing is a question of law, ***Balliette***, 336 Wis. 2d 358, ¶18, but whether the facts in the postconviction motion constitute ineffective assistance of counsel presents a

[3] In that case, our supreme court stated that "the prosecutor's references to Mayo's pre-***Miranda*** silence in her opening statement and examination of the State's witnesses, prior to Mayo's testimony, were a violation of Mayo's constitutional right to remain silent." ***State v. Mayo***, 2007 WI 78, ¶46, 301 Wis. 2d 642, 734 N.W.2d 115. On the facts of that case, the Court held that the State had proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" and that the error was harmless. ***Id.***, ¶47.

constitutional issue subject to a mixed review, ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. Appellate courts will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** The ultimate question of whether trial counsel's representation was deficient is a question of law. ***Id.***

1. Joinder was proper.

¶20 The joinder statute states that crimes may be charged together "if the crimes charged … are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan …." WIS. STAT. § 971.12(1). Where such crimes are charged separately, they may still, by court order, be tried together pursuant to sec. 971.12(4): "[T]he court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment." However, a court has discretion to sever joined charges and order separate trials "if it appears that a defendant or the state is prejudiced by a joinder of crimes … for trial together …." Sec. 971.12(3). The Wisconsin Supreme Court has determined that the joinder statute must be interpreted broadly, "consistent with the purpose of joinder, namely trial convenience for the state and convenience and advantage to the defendant." ***Francis***, 86 Wis. 2d at 558. The Court noted that it has historically favored joinder. ***Id.*** at 559. "Under Wisconsin law, the proper joinder of criminal offenses is presumptively non-prejudicial." *See* ***State v. Prescott***, 2012 WI App 136, ¶13, 345 Wis. 2d 313, 825 N.W.2d 515; *see also* ***State v. Linton***, 2010 WI App 129, ¶20, 329 Wis.2d 687, 791 N.W.2d 222.

¶21 However, even in a case of charges properly joined, the defendant has the opportunity (and burden) to show that they should be severed due to substantial prejudice. ***Hoffman***, 106 Wis. 2d at 209. "We will not find an abuse of discretion unless the defendant can establish that failure to sever the counts caused 'substantial prejudice' to her defense. It is not sufficient to show that some prejudice was caused." ***Id.*** (Citation omitted.)

¶22 Turney argues that the trial court erred in joining these charges for three reasons: (1) they are not crimes of a same or similar character and have insufficient common factors under the statute; (2) the evidence of the charges in one case would not be admissible in the other under WIS. STAT. § 904.04(2)(a) because it is impermissible propensity evidence;[4] and (3) the joinder prejudices him. We disagree.

¶23 First, the cases joined here have common factors and overlapping evidence. As the trial court here noted, there were numerous common factors between Turney's two alleged crimes. Broadly speaking, both started with intense arguments and escalated to Turney brandishing a weapon when he did not get his way, and then to firing shots. There is overlapping evidence, such as the same type of bullet casings (9 mm) from both scenes and the involvement of the Honda. (Turney left in the Honda in the August incident, it was the subject of the armed robbery incident in September, and the vehicle registration to the Honda was in Turney's pocket at the time of his arrest). Additionally, both incidents occurred

[4] Specifically, he argues that "the shootings are not a plan or modus operandi but more indicative of Mr. Turney's alleged character for violence and bullying" and a "propensity for violence."

within a month of each other. We conclude these are sufficient common factors to support joinder.

¶24 Turney relies on ***Francis*** for his argument against joinder. But in ***Francis*** our Wisconsin Supreme Court rejected the same narrow construction of the interrelatedness that Turney would have us adopt here. In ***Francis*** the defendant had taken the position that for joinder to be proper, "the separate crimes must be interrelated so that one offense is committed to aid in accomplishing the other or that each crime is a part of a single transaction or series of transactions motivated by a common scheme or plan, such as occurs in an embezzlement or check-kiting scheme." ***Francis***, 86 Wis. 2d at 558. In explicitly rejecting that approach the court said:

> If the phrase is construed as the defendant urges joinder might not be proper in the case at bar. *None of the three crimes charged was committed to aid in accomplishing either of the other crimes charged. The three crimes were arguably not parts of a single transaction or of a series of transactions motivated by a common scheme*.
>
> We find no reason to construe sec. 971.12(1) this narrowly.
>
> A *broad interpretation of the joinder provision is consistent with the purposes of joinder, namely trial convenience for the state and convenience and advantage to the defendant*.

Francis, 86 Wis. 2d at 558 (emphasis added). It reasoned that the broad interpretation of the interrelatedness requirement for joinder was consistent with the court's historical favoring of joinder. ***Id.*** at 559.

¶25 Next, Turney argues that evidence of the crimes in one case would not be admissible in a separate trial of the other case, citing ***Francis***, 86 Wis. 2d at 561. While Turney argues that the shootings do not evince a common plan or

modus operandi under WIS. STAT. § 904.04(2)(a) and were offered by the State only to prove Turney's propensity for violence, his argument is conclusory and thus is unpersuasive. He does not even mention ***Sullivan***[5] in either brief, much less develop a ***Sullivan*** analysis to support his misjoinder claim.

¶26 Finally, he makes a conclusory argument that the joinder was prejudicial. As the trial court noted, Turney has the burden of showing not just any prejudice (all criminal charges by their nature expose the defendant to prejudice), but substantial prejudice. *See* ***Hoffman***, 106 Wis. 2d at 209. Here the only argument Turney makes about prejudice is his speculation that possibly the jury rejected Turney's alibi on the August incident (provided by his brother's testimony) because of the evidence of the September incident. Speculation is not evidence of substantial prejudice.

2. It was not error for the trial court to deny substitution because Turney's request was not timely.

¶27 WISCONSIN STAT. § 971.20(2) provides a statutory right to one substitution of judge, upon a timely request. *See* ***State v. Harrison***, 2015 WI 5, ¶2, 360 Wis. 2d 246, 858 N.W.2d 372. The plain language of the statute requires compliance with the terms of the statute: "The right of substitution shall be exercised as provided in this section." Sec. 971.20(2). We have previously determined that the statute requires *strict adherence*: "[D]eviation from the requirements would allow for substantial problems that are prevented by strict

[5] ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998) (setting forth three-step analytical framework for admissibility of other acts evidence: whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2); whether the evidence is relevant; and whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence).

adherence to the statute." ***State v. Austin***, 171 Wis. 2d 251, 257, 490 N.W.2d 780 (Ct. App. 1992).[6]

¶28 Several scenarios for substitution are explicitly addressed in the statute. First, for substitution of *the originally assigned* judge, clear time limits are set forth: "A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and *before arraignment.*" WIS. STAT. § 971.20(4) (emphasis added). Second, for substitution of a trial judge *subsequently assigned,* if the defendant has not used up his one substitution, he may file on the new judge but has varying time limits for doing so, based on how imminently his trial is set. The defendant must file the substitution request fifteen days from receipt of actual notice of the new judge assignment; if the trial is coming up within twenty days, he has up to forty-eight hours after actual notice; and if the trial is within forty-eight hours, the defendant must file his request before "commencement of the proceedings." Sec. 971.20(5). There is no precise subsection addressing substitution following *consolidation* of cases, but we conclude that a plain reading of the statute shows that any substitution request on a newly assigned judge must be made before the new judge conducts an arraignment on new charges. Therefore, even assuming there is a right to substitution following consolidation, Turney was required to file his substitution request before

[6] An exception to strict adherence was noted by this court "when the constitutional right to a fair trial would be denied because a defendant is unable *at the time of arraignment to know what judge is to try his case*." ***State ex rel. Tessmer v. Circuit Court Branch III***, 123 Wis. 2d 439, 443, 367 N.W.2d 235 (Ct. App. 1985) (emphasis added). Because there is no claim from Turney that this exception applies here, we need not discuss it.

arraignment before the new judge, which he failed to do here. *See* sec. 971.20(4), (5).

¶29 The record shows that the first case to be charged (appellate case number ending in -1651), the August incident, was originally assigned to Judge Mel Flanagan. At the October 8, 2013 preliminary hearing, CCAP shows Turney was notified of the change in assignment from Judge Flanagan to Judge Dallet. He made no substitution request. On December 10, 2013, Turney filed a Witness List, a Response to State's Discovery Demand, and a Notice of Alibi, all in Judge Dallet's court. Turney made no substitution request at that time either. Then on December 11, 2013, Turney appeared before Judge Dallet for the Final Pretrial, which was adjourned until the following day because the court was in trial. On December 12, 2013, Turney again appeared before Judge Dallet and asked for an adjournment. On December 13, 2013, Turney appeared before Judge Dallet and argued the State's Motion to Consolidate. Pursuant to WIS. STAT. § 971.20(4), Turney had lost his right to substitute on Judge Dallet on the first case because she was the originally assigned judge, and he had filed motions and been arraigned before her on that charge. *See* sec. 971.20(4), (5).

¶30 The record on the second case, the September incident, shows that the case was originally assigned to Judge Watts. However, on December 10, 2013, Turney filed the above-described motions in front of Judge Dallet, and on December 13, 2013, he argued the joinder motion before Judge Dallet, and when she announced her decision to join, Turney failed to request substitution. In fact, Turney went through the whole arraignment on the two new charges added to the second case—the case for which Judge Dallet was the "new" judge before he made his untimely substitution request. *See* WIS. STAT. § 971.20(4), (5). Turney failed to make a timely substitution request under either subsection. The plain

intent of each section of the statute is to require the substitution request before arraignment on new charges and Turney failed to comply.

¶31 Turney argues that "no logical nor significant difference can be attached to that (sic) he pleaded first and then immediately substituted her or whether he filed substitution first and then pleaded." But where we have stated that strict adherence to a rule is required, the argument that adherence produces harsh consequences is unavailing. *See* ***Newkirk v. Wisconsin DOT***, 228 Wis.2d 830, 833, 598 N.W.2d 610 (The requirements of WIS. STAT. § 893.82 '"must be strictly complied with even though it produces harsh consequences.'") (citation and one set of quotation marks omitted) (*abrogated on other grounds by* ***Estate of Hopgood ex rel. Turner v. Boyd***, 2013 WI 1, 345 Wis. 2d 65, 825 N.W.2d 273). The only exception in the law for strict adherence to the substitution statute is where a defendant is arraigned before he knows which judge will hear the case, and that does not apply here.

¶32 Turney also points to WIS. STAT. § 971.20(9), the subsection of the substitution statute that permits the original judge, after being substituted on, to conduct the initial appearance, accept pleas, and set bail—in other words, to keep a case moving procedurally without undue delays. But that provision does not function to cancel out the time limits of substitution established in the other subsections; Turney's reading of the statute would nullify the "before arraignment" requirement, rather than giving effect to it. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty***., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (whenever possible we will read statutory language to give reasonable effect to every word, thereby avoiding surplusage).

¶33 It therefore was not error for the trial court to deny Turney's substitution motion.

3. Turney is not entitled to a *Machner* hearing because he has not alleged sufficient facts which if true would show that counsel's failure to object to testimony about his silence during questioning was deficient performance or that he was prejudiced by it.

¶34 Turney claims that his trial counsel rendered ineffective assistance when he failed to object to testimony that, Turney argues, the State impermissibly put before the jury and that penalized him for exercising his constitutional right to remain silent. To prevail on a claim of ineffective assistance of counsel requires a showing of both deficient performance and prejudice, which means showing a reasonable probability that absent the deficient performance, the result would have been different. ***Strickland***, 466 U.S. at 687 (1984). "Claims of ineffective trial counsel ... cannot be reviewed on appeal absent a postconviction motion in the trial court." ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). "[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). To be entitled to a ***Machner*** hearing, a defendant must allege sufficient facts which, if true, would satisfy the prongs of the ineffective assistance of counsel test. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). There is no need for this court to make a determination of deficiency if Turney has failed to show that the alleged deficiency prejudiced him. *See* ***Strickland***, 466 U.S. at 697 (a court need not address both components of the inquiry if the defendant makes an insufficient showing on one).

¶35 Our supreme court has held that "it is a violation of the right [under the Fifth Amendment of the United States Constitution, and article I, section 8 of

the Wisconsin Constitution] to remain silent for the State to present testimony in its case-in-chief on the defendant's election to remain silent during a custodial investigation, after arrest." ***State v. Brecht***, 143 Wis. 2d 297, 310-11, 421 N.W.2d 96 (1988). Up until the point that the defendant testifies, any references by the State to the defendant's pre-***Miranda***[7] silence in opening or closing statements or testimony elicited during examination of the State's witnesses constitute a violation of the defendant's constitutional right to remain silent. ***Mayo***, 301 Wis. 2d 642, ¶46.

¶36 Not all testimony about a defendant's refusal to answer police questions amounts to an impermissible comment on the right to remain silent. We have held that the test is to determine from the context what the intent of the question was and how the jury would reasonably perceive it:

> The test for determining if there has been an impermissible comment on a defendant's right to remain silent is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent. The court must look at the context in which the statement was made in order to determine the manifest intention that prompted it and its natural and necessary impact on the jury.

State v. Cooper, 2003 WI App 227, ¶19, 267 Wis. 2d 886, 672 N.W.2d 118.

¶37 And in ***State v. Wedgeworth***, 100 Wis. 2d 514, 526-27, 302 N.W.2d 810 (1981), our supreme court concluded that if the words are explanatory and not intended to suggest a "tacit admission of guilt on the part of the defendant," it was not an impermissible comment on the defendant's exercise of his Fifth

[7] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Amendment rights. That is the case here. When asked on direct if he knew if Turney lived where he was arrested, Detective Sullivan answered that he did not know—that Turney would not give his address:

> Q: Do you know if [Turney] lived at that address?
>
> A: When I stopped, when myself and the officers stopped him, we already knew his name. So as a procedural thing, we ask people their name and their address, he wouldn't give me his address.
>
> Q: Okay.
>
> A: So we had no idea where he actually listed his address was. He wouldn't answer any question I asked him.

¶38 In context, both the question and the answer were merely explanatory of whether Turney lived near the arrest location and whether the police knew that. The trial court concluded that the State did not intend to elicit a tacit admission by silence. That finding is reasonable in context. Police were attempting to verify Turney's identity to arrest him on a warrant. Name and address were relevant to the inquiry. The State's question was not "What did he say to you, detective?" The question was directed to the detective's knowledge. He answered as to his knowledge of Turney's name and address, but then he added the fact that Turney would not answer the question. On review we analyze the State's intent, and under the facts here, it is clear the State did not intend to elicit Turney's refusal to answer the question. *See* ***Cooper***, 267 Wis. 2d 886, ¶19.

¶39 Additionally, because the question and answer came in the course of testimony, and no mention was made of it either in the State's opening or closing argument, it is not reasonable to conclude that the jury would perceive it as a comment on Turney's right to remain silent or an admission of guilt. *See* ***id.*** It was not a question of consequence to the charges. And there is no reasonable

inference to be drawn from the fact of refusing to give his address or name that Turney was making a tacit admission of the shootings. Turney argues that the jury would think that Turney's failure to provide his address and name shows he was guilty. But that is speculation. So, under the analysis of ***Wedgeworth*** and ***Cooper***, trial counsel was not deficient for failing to object, and there is no basis for believing the trial court would have stricken the testimony if counsel had objected.

¶40 We conclude that trial counsel's failure to object did not constitute deficient performance; we further conclude that even if it did, Turney cannot show that he was prejudiced. *See* ***Strickland***, 466 U.S. at 694. The State presented testimony from eyewitnesses who put Turney at the scene of both shootings, who testified that they were involved in heated arguments with him, and who saw him raise and fire a gun. There is not a reasonable probability that an objection to the officer's testimony would have changed the result. We therefore affirm the trial court's denial of the motion for an evidentiary hearing.

¶41 Because we conclude that the trial court did not err in its rulings on joinder and substitution, and because we conclude that Turney has not alleged sufficient facts to establish that he is entitled to a ***Machner*** hearing on his ineffective assistance claim, we affirm the circuit court.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.