COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2691 **Cir. Ct. No. 2001CF2743**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IVAN C. MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Ivan Mitchell appeals from an order denying his postconviction motion. We affirm.

¶2 Mitchell was convicted of several felonies, including first-degree intentional homicide, after a jury trial. This appeal arises from the denial of a postconviction motion filed under WIS. STAT. § 974.06 (2007-08).[1]

¶3 All of Mitchell's arguments are based on a legal theory of ineffective assistance of counsel. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). To demonstrate prejudice, the defendant must show that 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 one sufficient to undermine confidence in the outcome. ***Id.***

¶4 Mitchell first argues that his trial counsel was ineffective by not renewing at trial a pre-trial request to sever his joint trial from that of co-defendant Leshaun Benson. Mitchell originally moved for severance to prevent a situation in which Benson might decline to testify at trial, and thus not be subject to cross-examination by Mitchell about statements police claimed Benson made to them implicating Mitchell. *See* ***Bruton v. United States***, 391 U.S. 123 (1968) (similar

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

situation violated defendant's right to cross-examination). The court denied the motion after the State agreed to proceed without Benson's references to Mitchell.

¶5 Mitchell argues that counsel should have renewed the request because events at trial were different than originally expected. At trial, when called as a witness by the defense, Benson testified to having an alibi at the time of the shooting, while continuing to implicate Mitchell in the crime. On cross-examination, the State asked Benson about whether he made certain statements to police, including the parts that inculpated Mitchell, but Benson denied having made many of the statements. Then, in its rebuttal case, the State presented the testimony of detectives who described Benson's statements.

¶6 Mitchell argues that his counsel should have sought severance because Benson's denial of having made the statements deprived Mitchell of the right to meaningful cross-examination of Benson about the statements, and therefore severance was the only way to prevent Benson's statements from being considered by the jury without cross-examination.

¶7 As to deficient performance, we conclude that counsel's performance was not deficient, because there was little reason for counsel to think such a severance motion would have been granted. The situation as it unfolded at trial was not a ***Bruton*** situation. Benson did testify, and was available for cross-examination by Mitchell about the statement used by the State.

¶8 As to prejudice, Mitchell explains in detail how Benson's statements were prejudicial to Mitchell, but he is silent as to what Benson could have said on cross-examination that would have assisted Mitchell's cause more than what actually occurred at trial. As we understand Mitchell's argument, he believes Benson could not effectively be cross-examined because Benson denied making

the statements that implicated Mitchell. This leaves us asking, what more could Mitchell hope to achieve on cross-examination? If Benson entirely denied making the statements, it is difficult to see how Mitchell could obtain a result better than this complete repudiation. It is important to recall that Mitchell is not entitled to exclusion of Benson's statements under *all* circumstances, but only to preserve his right to cross-examine Benson and try to shake the jury's confidence in their truth. Here, Benson himself testified, in essence, that the jury should have no confidence in any of it.

¶9 Mitchell next argues that his trial counsel was ineffective by not requesting a lesser-included instruction on felony murder. Most of his argument is directed at counsel's alleged failure to discuss with Mitchell whether such a request should have been made. For example, in disputing the circuit court's conclusion that Mitchell pursued an "all-or-nothing" defense, he states that a more accurate recitation would be that *counsel* pursued such a strategy while Mitchell remained oblivious to the option.

¶10 Mitchell appears to assume it is the defendant, not counsel, who must make the decision on whether to ask for a lesser-included instruction. This is generally not correct. In ***State v. Ambuehl***, 145 Wis. 2d 343, 355 n.4, 425 N.W.2d 649 (Ct. App. 1988), we quoted from the *ABA Standards for Criminal Justice*, Standard 4-5.2, commentary (2d ed. 1980), which opined that the defendant should be the one to decide. However, we later concluded that ***Ambuehl*** did not actually adopt that standard, and we held that the decision to ask for the instruction is generally counsel's. ***State v. Eckert***, 203 Wis. 2d 497, 508-11, 553 N.W.2d 539 (Ct. App. 1996). More specifically, we wrote that

> a defendant does not receive ineffective assistance where defense counsel has discussed with the client the general

> theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense.

Id. at 510.

¶11 The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, even if trial counsel lacked a strategic reason at the time, a claim of deficient performance fails if counsel's action was one that an attorney could reasonably have taken after considering the question, in light of the information available to trial counsel at the time. Case law has already recognized that it can be a reasonable strategic decision for counsel to forego a lesser-included instruction in the hope of forcing the jury into complete acquittal, rather than giving it a second option for conviction. *See, e.g.*, ***id.***, ¶¶24-35. This is referred to as the "all-or-nothing" position.

¶12 Here, Mitchell makes little argument as to why it was unreasonable for trial counsel to decline to pursue the lesser-included instruction. Indeed, he concedes that the circuit court was "correct in stating that Mitchell's testimony did not interlock well with a charge of felony murder." While it might have been reasonable for counsel to request the instruction, Mitchell has not convinced us that it was not also reasonable to forego the instruction and seek complete acquittal.

¶13 Finally, Mitchell argues that his trial counsel was ineffective by not filing a suppression motion based on what Mitchell claims was his illegal stop and arrest. As prejudice, Mitchell argues in a single sentence that the incriminating

statements police took from him were derivative of that stop and arrest. However, the one case he cites concerns suppression of lineups and identifications, not statements. ***State v. Walker***, 154 Wis. 2d 158, 185-89, 453 N.W.2d 127 (1990). And, in that context, even if the arrest was unlawful, the determination must still be made, on specific facts, whether the evidence to be suppressed was the fruit of the poisonous tree. *See* ***id.*** Here, Mitchell does not develop any argument based on more-relevant case law or on specific facts connecting the stop and arrest with his statement, and therefore we decline to address the issue further.

By the Court.—Order affirmed.

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