COURT OF APPEALS DECISION DATED AND FILED

March 16, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP10-CR

Cir. Ct. No. 2007CF5488

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELARKIAN FITZGERALD HARDISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and KEVIN E. MARTENS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Elarkian Fitzgerald Hardison appeals from a judgment of conviction for possessing a firearm as a felon and from a postconviction order denying his motion for a new trial.[1] The issues are whether Hardison's trial counsel ("defense counsel") was ineffective for failing to peremptorily strike a particular (prospective) juror for allegedly subjective bias, and for failing to present evidence of the absence of Hardison's DNA on the gun. Hardison also challenges the sufficiency of the evidence. We conclude that defense counsel's explanations for peremptorily striking other prospective jurors as opposed to the one Hardison now identifies, and for failing to present evidence of the absence of Hardison's DNA on the gun, constitute trial strategies that were objectively reasonable, rendering those decisions virtually unchallengeable as ineffective assistance claims. Further, the evidence, albeit entirely circumstantial, was sufficient to support the guilty verdict. Therefore, we affirm.

¶2 Hardison was a passenger in a vehicle stopped by police. The driver and Hardison exited the vehicle and were ordered to put their hands up. Hardison instead crouched; although Hardison's head was visible to police, his hands were not. Hardison crouched and was looking at the ground, but after several seconds, he stood and put his hands in the air, as ordered. After Hardison had been placed in custody, a police officer noticed a firearm lying on the ground where Hardison had been crouching next to the vehicle.

¶3 A jury found Hardison guilty of possessing a firearm as a felon, in violation of WIS. STAT. § 941.29(2)(a) (2007-08), as a habitual criminal pursuant

[1] The Honorable Jeffrey A. Kremers presided over Hardison's jury trial and imposed sentence. The Honorable Kevin E. Martens presided over postconviction proceedings.

to WIS. STAT. § 939.62 (2007-08).[2] The trial court imposed a seven-year sentence, comprised of three- and four-year respective periods of initial confinement and extended supervision, to run consecutive to any other sentence. Hardison filed a postconviction motion for a new trial, claiming several instances of defense counsel's ineffectiveness. Following a ***Machner*** hearing, the trial court denied the motion.[3] Hardison appeals, pursuing two of the ineffective assistance claims, and challenging the sufficiency of the evidence.

¶4 To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To show deficient performance, [the defendant] must show that his counsel's representation was objectively unreasonable." ***State v. Oswald***, 2000 WI App 2, ¶63, 232 Wis. 2d 62, 606 N.W.2d 207. Specifically, "[w]e will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment." ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). Stated otherwise, matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

[3] An evidentiary hearing to determine counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

> ¶5 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. However, the ultimate conclusion of whether the attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law, and we do not give deference to the trial court's decision.

State v. Johnson, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986) (citations, brackets and internal quotation marks omitted).

¶6 Hardison's two ineffective assistance of counsel claims challenge the failures to use a peremptory strike and to present the absence of DNA evidence linking the gun found on the ground to Hardison. Both claims were litigated at the ***Machner*** hearing where defense counsel explained why he failed to strike the juror Hardison now challenges, and why he failed to present the absence of DNA evidence.

¶7 Hardison contends that defense counsel was ineffective for failing to use a peremptory strike to remove David C. Waldheim for subjective bias. Subjective bias is "bias that is revealed through the words and the demeanor of the prospective juror…. [S]ubjective bias refers to the bias that is revealed by the prospective juror on *voir dire*: it refers to the prospective juror's state of mind." ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). Stated otherwise, "[subjective] bias inquires whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior

knowledge that the juror might have." ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999).

¶8 Hardison contends that Waldheim was subjectively biased because Waldheim said during *voir dire* that he would be inclined to believe a police officer. Waldheim admitted that he "would give [a cop] the benefit of the doubt. [He] would assume they're telling the truth."

¶9 During *voir dire*, one of the prospective jurors responded: "My brother is in law enforcement. I'd be more inclined to believe a law – a police officer than to not believe him." Continuing, that prospective juror said: "I am inclined to believe – If they told me something, I'd be more inclined to believe them than not. They would have to – It would have to be proven that they were wrong." Prospective Juror Waldheim then responded: "I know that a cop can be, you know, mistaken in what they [said] or what they saw, but as far as whether they're telling the truth, I would give … the benefit of the doubt to the officer. I would assume they're telling the truth." The trial court then explained to Waldheim and the other prospective jurors that it would instruct them

> to consider a whole list of things in assessing the credibility of a – of a particular witness, would you apply that test – That list of factors that [the trial court] give[s] you, would you apply that to witnesses who are police officers as well as witnesses who aren't police officers[,]

to which Waldheim responded "Yes, Judge." The trial court continued by telling the prospective jurors that

> your job as jurors in this case [is] that you take an oath and you will consider whether or not in this case the officers or people who testify, whether they're officers or not, you'll consider and assess the credibility of each of them based on – on how they testify and what they say as well as the other factors I give you. Will you do that?

Waldheim responded: "I'm – I'm not sure exactly how to answer it. I – I think I would do all of that. It's just that I would assume, unless there was evidence to the contrary, that they were telling the truth."

¶10 Hardison does not contend that there was a legitimate basis for defense counsel to seek Waldheim's removal for cause. Consequently, he must first demonstrate that Waldheim's state of mind was subjectively biased against Hardison.

¶11 Hardison has not demonstrated that Waldheim was subjectively biased. Although Waldheim said that he would be inclined to give a police officer "the benefit of the doubt," he also said that he realized that a police officer could be "mistaken." The trial court also explained to Waldheim the importance of judging each witness's credibility on a variety of different factors, and that each person selected to serve as a juror would be obliged to judge each witness's credibility fairly and impartially. Waldheim claimed that he understood and would abide by his obligation as a juror. Hardison has not shown that defense counsel was ineffective for failing to use a peremptory strike to remove Waldheim.

¶12 We also consider how defense counsel used his peremptory strikes. Hardison (and the State) were each permitted four peremptory strikes. Unless Hardison could persuade the trial court to remove a prospective juror for cause, regardless of how many prospective jurors Hardison would have liked to remove, he could only remove four. We therefore examine who defense counsel elected to remove and his reasons for doing so to determine how Waldheim's alleged bias compared to those of the prospective jurors that defense counsel actually removed. "We will not second guess trial counsel's selection of trial tactics or strategies in

the face of alternatives that he or she has considered." ***State v. Nielsen***, 2001 WI App 192, ¶26, 247 Wis. 2d 466, 634 N.W.2d 325. Defense counsel used his four peremptory strikes to remove John R. Smith, the prospective juror whose brother was in law enforcement, and three other prospective jurors, Sheila C. Jackson, Judith G. Schultz and David M. Klein.

¶13 At the ***Machner*** hearing, defense counsel explained how he decided to exercise his four peremptory strikes. He used his first peremptory strike to remove Smith, explaining that "it [wa]s clear in the transcript he talked about the credibility of police officers and his leaning towards credibility of police officers." Smith also mentioned that his brother was in law enforcement. Defense counsel's decision to use a peremptory strike on prospective juror Smith was not an objectively unreasonable trial strategy. *See* ***Oswald***, 232 Wis. 2d 62, ¶63.

¶14 Defense counsel believed that it was necessary for him to use a peremptory strike to remove Smith. He then explained why he did not strike Waldheim:

> I had four strikes to use and I chose the other three [after Smith] based on the people I thought I did not want to have on the jury the most. I don't recall who I thought would be the best or worst on the jury, but those were the three that I decided at the end I would use to strike.

¶15 Defense counsel's second peremptory strike was used to remove prospective juror Jackson. Defense counsel's notes on Jackson indicated that she was a paralegal. Defense counsel explained that "I tend to strike people who are involved with the legal field, either through attorneys, and paralegals of attorneys. People who work in law enforcement." He explained that: "I think they tend to get too focus[]ed on their job outside the duty as a juror and that is my impression. I have a great misgiving to having attorneys or people who work in the legal field

focus[]ing on the jurors cases." He elected to strike Jackson because she was a paralegal employed by Milwaukee County. Defense counsel also explained his belief that government employees are more likely to believe other government employees, such as police officers. Jackson's status as a paralegal employed by the county was an objectively reasonable consideration for removing Jackson from the jury.

¶16 Defense counsel was next asked about using his third peremptory strike to remove prospective juror Schultz. Defense counsel reviewed his notes relating to Schultz that indicated "RET.MILW". Defense counsel explained that, although Schultz was seemingly retired, his note indicated that she had worked "for Milwaukee," which he deemed significant because "[i]t shows a bias possibly towards Milwaukee, towards employment within the city." Striking a prospective juror who had been employed by the same or a related governmental entity that employed the prosecution's police officer witnesses is not "objectively unreasonable." ***Id.***

¶17 Defense counsel elected to use his last peremptory strike to remove Klein because he "had body language [nodding] that would be supportive of Mr. Smith's statements [the first prospective juror defense counsel removed]. I recall they were right next to each other and I recall it appeared that those two jurors had a like mind on that opinion of police officers[' credibility]." This is similarly not an "objectively unreasonable" trial strategy. ***Id.*** Defense counsel used his final strike on Klein, who exhibited the alleged subjective bias most similar to that Hardison alleged of Waldheim. Defense counsel explained that Klein's arguable bias was potentially enhanced because he was seemingly influenced by Smith, who he had previously stricken. These circumstances collectively demonstrate

how Hardison's decision not to use one of his four peremptory strikes to remove Waldheim was objectively reasonable.

¶18 Moreover, Hardison is unable to demonstrate prejudice, in that

> we can do no better than speculate on what would have been the result if [Hardison]'s counsel had used his peremptory strikes differently. Because [Hardison] cannot demonstrate that he was prejudiced by how counsel chose to use [his] peremptory strikes, we conclude [Hardison] was not denied the effective assistance of counsel.

Nielsen, 247 Wis. 2d 466, ¶27.

¶19 Hardison's second ineffective assistance claim is defense counsel's failure to present evidence from the state crime laboratory that Hardison's DNA was not detected on the gun when tested. Hardison claims that this lack of his DNA evidence on the gun was exculpatory. At the ***Machner*** hearing, defense counsel explained:

> I have learned through experience that DNA is often not recovered from firearms and that when I have an officer get on the stand and discuss, that they often, through the state, bring out the fact that it's hard to get DNA off of firearms and my general practice now and throughout last year was that, why build up [an] argument for the D.A. to knock down.
>
> If I were to ask a police officer or other witness; there was no DNA recovered? You tested all this. You did this and [the] State would be able to come back and use the same police officer to act as kind of a quasi C.S.I. expert, saying, isn't it true from your experience you don't get DNA from many firearms? It brings out [the] officer's experience in taking and testing firearms. Makes them look like a better witness than I want them to be.
>
> I think it is counter productive.

¶20 Defense counsel explained that in his experience as a criminal defense lawyer in cases involving a firearm, frequently DNA evidence is not

detected on the firearm. To prime the jury by presenting the absence of the defendant's DNA evidence on the firearm involved, only to have the prosecutor refute the significance of the absence of such evidence demonstrates the risks of such a tactic and as such, does not constitute ineffective assistance. *See* ***Strickland***, 466 U.S. at 690-91.

¶21 Hardison's remaining challenge is to the sufficiency of the evidence. Although there was no direct evidence that Hardison possessed the gun, circumstantial evidence has the same legal significance as direct evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990).

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507. The appellate court independently reviews the sufficiency of the evidence necessary to sustain a conviction as a question of law. *See* ***State v. Horton***, 151 Wis. 2d 250, 260, 445 N.W.2d 46 (Ct. App. 1989).

¶22 Milwaukee Police Officer Jeffrey Krueger testified that he observed the driver and the passenger, Hardison, in the vehicle that was ordered to stop after almost colliding with his squad car. Krueger, however, was focused on the driver, as opposed to Hardison. Milwaukee Police Officer Jeffrey Cline offered more factually significant testimony about Hardison. Cline testified that he saw Hardison and the driver exit the vehicle, and that he was concerned that they would run, so he approached them, ordered them to stop and to raise their hands in

the air. Cline saw Hardison exit the vehicle, but then noticed that: "I'm seeing the defendant, Mr. Hardison who also exited the car, crouch down. At that point, like I said, I'm already alarmed. My firearm comes out, I believe and at that time I'm ordering … him to stand up and place his hands in the air." Cline testified that Hardison "got out and he is immediately ducking down and crouching down like this." Cline could see Hardison's head, but not his hands. Cline "specifically told [Hardison] he is doing the complete opposite of what I instructed him to do." Cline repeated, "[s]tand up. Let me see your hands." Cline then described that Hardison "looked down and he looked at me. His head is making several movements. His body is going down. But he's looked at me and I believe he looked forward." Cline then testified that, after several seconds, Hardison finally "stood up and put his hands in the air." Another officer found the firearm in the location where Hardison had been crouching, and showed it to Cline.

¶23 Hardison contends that this evidence is insufficient to prove that he possessed the firearm. We disagree. Although the evidence is entirely circumstantial, it was sufficient for the jury to reasonably infer that Hardison possessed a firearm when seen crouching outside the vehicle, in direct contradiction to police orders to stand and raise his hands in the air, coupled with the discovery of the gun in that same location where he had been crouching.

¶24 Hardison also contends that Cline's testimony is insufficient to establish possession of the gun because Cline did not initially discover the gun and Krueger saw no gun at all. There was no conflict in the evidence, and even if there was, it is within the jury's province to reconcile those conflicts and inconsistencies. *See* ***Poellinger***, 153 Wis. 2d at 506-07; ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Krueger saw no gun; he admitted that he was focused on the driver. Cline did not see the gun initially, but had been

watching Hardison crouch next to the vehicle; behavior directly contradicting police orders. Cline was then shown the gun by another officer who found it where Hardison had been crouching; movements that would explain why Hardison disobeyed Cline's direct and repeated orders. There was no conflict in the evidence. The jury was entitled to find the facts consistent with Cline's testimony describing Hardison's actions and to reasonably infer from that evidence that Hardison had discarded the gun he had possessed.

By the Court.—Judgment and order affirmed.

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