COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1619-CR **Cir. Ct. No. 2006CF5264**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXIS O. WEST,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Alexis O. West appeals from judgments entered after a jury found him guilty of carrying a concealed weapon, possession with intent to deliver cocaine, substantial battery and possession of marijuana; and the

denial of his postconviction request for a ***Machner*** hearing.[1] West argues that he was denied effective assistance of trial counsel because his lawyer failed to seek admission at West's trial of a transcript of Frank Herbert's testimony at an earlier motion hearing. We affirm the trial court's order denying the request for a ***Machner*** hearing because the record conclusively demonstrates that West was not prejudiced by the absence of Herbert's previous testimony. Further, there is no reasonable probability that Herbert's earlier testimony would have changed the outcome of the trial. Accordingly, we affirm.

BACKGROUND

¶2 On January 29, 2006, City of Milwaukee police officers responded to a domestic violence call at 3856 North 62nd Street, Milwaukee, Wisconsin. There they were met by Paris McDaniel who told them that her boyfriend, West, punched her in the face several times until she fell down, and that after she fell, West continued to beat her until she lost consciousness. The police broadcast that they were looking for West, a nineteen-year-old driving a 1987 gray Mercury Grand Marquis. While patrolling in his squad car, Officer Mark Pollard observed a driver and car matching that description turn off of 62nd Street and onto West Melvina Street. Officer Pollard activated his squad car's lights and siren, and initiated a traffic stop on North 58th Street.

¶3 Officer Pollard reported that the driver of the gray Mercury, who was later identified as West, quickly exited his car. Officer Pollard instructed West to get back into his car and West did so, but the manner in which he did

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

concerned Officer Pollard. Officer Pollard testified that West "almost dove back into the car. He didn't just ease back down into the driver's seat. … [H]is whole body went into the car head first." Officer Pollard became concerned from that manner of entry that West was reaching for a weapon. He described West as "going over towards the passenger compartment towards the floor underneath the seat."

¶4 Concerned for his safety, Officer Pollard ran up to the car, pulled West out and placed him in handcuffs. Officer Pollard then observed a closed black plastic bag on the floor in front of the passenger seat of West's car. Inside the bag, Officer Pollard and his partner observed a Hi-Point, semi-automatic, .380 caliber handgun with laser sight, two baggies containing twenty rocks of cocaine, a black jewelry box containing rings and $705 in U.S. currency. Additionally, a search of West's person revealed a baggie of marijuana in his pants pocket.

¶5 In January 2006, West was charged with one count of carrying a concealed weapon and one count of possession of cocaine with intent to deliver. The complaint was eventually dismissed without prejudice upon a motion from the prosecutor.[2] However, in October 2006, before the first complaint was dismissed, West's trial counsel called Herbert as a witness at a motion hearing.

[2] While the parties did not place into the record those filings necessary to confirm the charges and dismissal of the State's first case against West (Milwaukee County Case No. 2006CF683), we take judicial notice of the related CCAP records in that matter. *See* WIS. STAT. § 902.01 (2007-08) (CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online site reflects information entered by court staff.).

The Honorable Charles F. Kahn presided over the October 2006 motion hearing in Milwaukee County Case No. 2006CF683 before the charges were dismissed.

¶6 Under oath and subject to cross-examination, Herbert testified (as relevant to this appeal) that in January 2006 McDaniel lived with him and his Uncle Jonnie at 3856 North 62nd Street and that McDaniel had a sexual relationship with Jonnie. Herbert also testified that he knew West, who lived nearby, and that he knew West had also had a relationship with McDaniel.

¶7 Herbert testified that he had once seen McDaniel with a firearm, which he described as "a nine-millimeter," but that he had "only seen a quick glimpse of it … [before] it was stuffed into the couch." He stated that McDaniel had kept the firearm at Jonnie's house for about two weeks in January 2006. But when he was asked by defense counsel if he could describe the color of the firearm he answered, "Not really 'cause … like I said, I saw a quick glance of it and I was cracking it up 'cause I was gettin' my dope from her. So a lot of it's like really blurry."

¶8 Herbert also testified that he had seen McDaniel drive West's car, which he described as "a gray four-door[,] I want to say Oldsmobile, but I don't think it's right. I think it was a Ford." Herbert also testified that McDaniel would sometimes take West's car to go see Herbert's drug supplier and would "come back with rocks and stuff and then she would tell me don't say nothing to Alex; if the car was moved, just tell him that you haven't seen the car all day."

¶9 The State filed a new complaint against West on October 19, 2006, again charging West with one count of carrying a concealed weapon and one count of possession of cocaine with intent to deliver, but adding one count of

substantial battery and one count of possession of marijuana.[3] At a pretrial hearing in January 2008, West's trial counsel informed the court that he was having trouble locating Herbert for trial and might want to enter into evidence the October 2006 transcript of Herbert's testimony from the motion hearing. But when the first day of the trial arrived, Herbert was present in court. West's trial counsel asked the court if he could call Herbert out of order, i.e., as the trial's first witness, because it had taken counsel a year to secure Herbert's appearance and he didn't want to run the risk of Herbert failing to appear on the subsequent days of the trial. The trial court instead admonished Herbert, and other witnesses, to be sure to come back the next day. Herbert did appear and testified.

¶10 At trial, Herbert testified that he had asked McDaniel to purchase a .380 caliber handgun for him because "she had no felonies, she had no[t] [been] convict[ed] of any crime, so I kind of used her to get a weapon." When asked what type of weapon, Herbert replied, "It was a .380." Herbert had already testified that he had four previous convictions, and because the court presumed that one of those convictions was a felony (thereby prohibiting Herbert from legally owning or carrying a firearm), his testimony was stopped. The lawyers and court conferred, and ultimately, Herbert, upon advice from counsel, took advantage of the protections of the Fifth Amendment and did not testify further.

[3] West does not argue that his trial counsel was ineffective with regard to the substantial battery and possession of marijuana convictions; consequently, we do not repeat the facts relevant to those counts here.

The new case was assigned to the Honorable Thomas P. Donegan who presided over all aspects of the case.

¶11 Trial defense counsel advised the court, after the jury was excused from the room, that he had no previous knowledge that Herbert was going to testify that he had used McDaniel to purchase a gun for him. Defense counsel had previously explained that the defense's strategy was to suggest that the gun belonged to McDaniel, that Herbert had seen her with a firearm, that McDaniel sometimes used West's car without his knowledge, that she had used it on the day of West's arrest and that West did not know that the bag with the gun and drugs was in the car. The trial proceeded without Herbert. However, Herbert's testimony that McDaniel had purchased a .380 caliber handgun for him was not stricken from the record, and the jurors were able to consider that testimony during their deliberations.

¶12 The defense's case rested principally on West's and Herbert's testimonies, although other witnesses were called. McDaniel did not appear. West testified that the car was his, that he was not aware that the bag and its contents (including the gun and drugs) were in the car and that McDaniel had his car that day before their fight and before he drove it away. He also denied telling officers that the rings in the black box were his.

¶13 The State offered the testimony of Special Agent Anna King at trial who testified that West made a statement to her upon his arrest, denying knowledge of the presence of the gun and drugs. He told her he did not know how the marijuana came to be on his person. However, Agent King said that West admitted that the rings found in the black box were his, going so far as to describe them as being in a black box. Agent King testified that she had never told West that the rings were in a black box prior to his offering that statement. West told her he had intended to give one of the rings to McDaniel. King stated she wrote a

summary of his statement, read it to him and he agreed it was true, but would not sign it.

¶14 Agent King testified that although West would not sign the summary she presented, he did ask for paper and pen and wrote his own three-page statement, which was offered at trial. In it, he wrote to an unnamed, but pregnant woman, and said he had a ring he was going to give her, writing, "I brought you a ring but that's gone[] too." When he was cross-examined about his three-page handwritten statement at trial, he described it as a "rap song" and that it was not intended to refer to the rings involved in this case.

¶15 The jury returned verdicts of guilty on all counts on January 17, 2008. West was sentenced to six months of confinement at the House of Corrections for carrying a concealed weapon (count one) to run concurrent to count two; one-year of initial confinement and two years of extended supervision for possession with intent to deliver (count two); one and one-half years of initial confinement and two years of extended supervision for substantial battery (count three) to run consecutive to counts one and two; and his driver's license was suspended for six months for possession of marijuana (count four) to run concurrent to counts one, two and three.

¶16 West's appellate counsel brought a postconviction motion requesting a ***Machner*** hearing because of trial counsel's alleged ineffective representation. The motion based its request on trial counsel's failure to seek admission of Herbert's October 2006 testimony. The trial court denied the motion without a hearing, finding that there was no reasonable probability that the result of the trial would have been different if Herbert's earlier testimony had been admitted. The trial court further noted that Herbert's earlier testimony was irrelevant because he

described a nine millimeter weapon, which was inconsistent with the weapon recovered, a .380 caliber handgun. West appeals.

STANDARD OF REVIEW

¶17 A trial court has the discretion to deny a postconviction request for a ***Machner*** hearing "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or *if 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 (citation omitted) (emphasis added). Whether a motion was sufficiently supported to warrant an evidentiary hearing is a legal question that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

¶18 A defendant claiming ineffective assistance of counsel must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). When reviewing an ineffective assistance of counsel claim, we give deference to the trial court's findings of fact, but review the legal question of whether the representation has been deficient or prejudicial independently of the trial court. *See* ***Roberson***, 292 Wis. 2d 280, ¶24.

¶19 Performance is deficient if not reasonable under prevailing professional norms. ***Strickland***, 466 U.S. at 688. For prejudice, a defendant must affirmatively prove that the alleged defects in counsel's performance "actually had an adverse effect on the defense." ***Id.*** at 693. The defendant cannot meet his burden by merely showing that the errors had "some conceivable effect on the outcome." ***Id.*** Rather, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

DISCUSSION

¶20 West claims his trial counsel was deficient for not seeking to admit the transcript of Herbert's testimony from the motion hearing. West argues that if the jury had heard Herbert's testimony from the motion hearing "confidence in the jury's verdict would have been undermined." He argues that the transcript would have supported the defense's theory that West had no knowledge of the presence of the gun in the car because it would have shown that the gun in the car belonged to McDaniel. We conclude that the trial court properly denied West's request for a ***Machner*** hearing because the record conclusively demonstrates that West's trial counsel was not deficient for failing to seek admission of Herbert's earlier testimony. *See* ***Roberson***, 292 Wis. 2d 280, ¶43 (permitting a trial court the discretion to deny a request for a ***Machner*** hearing "'if the record conclusively demonstrates that the defendant is not entitled to relief'") (citation and emphasis omitted). In fact, the earlier transcript would have impeached Herbert's trial testimony because his trial testimony was inconsistent with his motion hearing testimony. Additionally, West has not met his burden of showing prejudice from the exclusion of the transcript. *See* ***Strickland***, 466 U.S. at 687.

¶21 At trial, Herbert testified that McDaniel purchased a .380 caliber handgun for him. This testimony supported West's theory that the .380 caliber handgun found in his car actually belonged to McDaniel and added weight to West's denials of knowledge of the presence of the gun in his car. The jury heard this testimony, and the court did not strike it from the record even though Herbert later invoked his Fifth Amendment right against self-incrimination and

discontinued his testimony. Although Herbert's trial testimony was shorter than anticipated by West's trial counsel, it still provided West with the basis to argue from it that the gun found in his car, a .380 caliber handgun, was the same .380 caliber handgun that McDaniel had purchased for Herbert and about which West had no knowledge.

¶22 If West's trial counsel had entered into evidence the transcript of Herbert's testimony from the motion hearing, the jury would have had to decide whether Herbert could be believed at all. Herbert testified at the motion hearing that McDaniel's gun was a nine millimeter. At trial, he said it was a .380 caliber handgun. Both times, he was under oath, sworn to tell the truth. It would have been difficult for the defense to explain the inconsistency in gun types. Presumably, a witness such as Herbert—who was describing a firearm by its caliber, as opposed to by its size, color or other layperson description—should have known the difference between a nine millimeter and a .380 caliber handgun.

¶23 Secondly, besides specifically contradicting himself, Herbert's earlier testimony about his drug usage generally rendered his testimony unreliable. When Herbert was asked at the motion hearing if he could describe the color of the gun, he said, "Not really 'cause … like I said, I saw a quick glance of it and I was cracking it up 'cause I was gettin' my dope from her. So a lot of it's like really blurry." Herbert's volunteered admission to drug use seriously undercut his reliability as a witness, calling into question his perceptions and memory. And even without Herbert's credibility problems, his earlier testimony describing the gun as a nine millimeter does not assist the defense's theory that the .380 caliber handgun found in West's car actually belonged to McDaniel.

¶24 The only real value of Herbert's earlier testimony was his statement that McDaniel sometimes used West's car, without West's knowledge, to purchase drugs. This supported the defense's theory that the gun and drugs found in West's car were not his and that he did not know they were there. However, the damage done by Herbert's drug use admission and his contradictory gun descriptions overcame any potential benefit to West from the testimony that McDaniel used West's car to purchase drugs. Additionally, when asked to describe West's car, Herbert did so incorrectly. Herbert (a mechanic by trade) described West's car as an Oldsmobile or a Ford—when it actually was a Mercury Grand Marquis. Such testimony compounded Herbert's credibility problems.

¶25 Had Herbert's earlier testimony come in, West would have had to try to persuade the jury to believe part of Herbert's testimony, but not other parts. The admission of the testimony would have required West argue to the jurors that they should believe Herbert's testimony that McDaniel used West's car for drug purchases, but that they should overlook his inconsistent descriptions of the gun and incorrect description of West's car. Most importantly, West would have faced the difficult challenge of trying to explain away Herbert's admission of blurry perceptions and memory due to drug usage. Accordingly, the record conclusively shows that West's trial counsel was not deficient for failing to seek the admission of Herbert's testimony from the motion hearing.

¶26 Finally, West has failed to show that he suffered any prejudice from the omission of Herbert's earlier testimony. Even assuming West was able to persuade the jury to believe just the favorable parts of Herbert's earlier testimony, the State's case was so strong that it cannot be said that acquittal was reasonably probable. *See* ***Strickland***, 466 U.S. at 693. The gun, drugs and rings were found in a bag visible to West on the front floor of his car. Although he denied

knowledge of the gun and drugs, Agent King testified that West told her that the rings were his and even described the black box they were in before Agent King had told him about the box. Nothing in Herbert's earlier testimony was going to assist West in rebutting the inference that if the rings belonged to West, so did the gun and the drugs. Although at trial West denied telling Agent King that the rings were his, he could not explain away his three-page statement to the unnamed woman, which stated that "I brought you a ring but that's gone[] too." West's proffered explanation—that the statement was not an admission, but merely a rap song he wrote upon arrest—seems unlikely at best.

¶27 Ultimately, the case came down to whether the jury believed West's testimony (that the gun and drugs were not his and that he did not know they were in the car) and Herbert's trial testimony (that McDaniel had a .380 caliber handgun), or whether the jury believed the police officers' testimony (that the gun, drugs and rings were found in plain sight in a bag on the floor of his car, that West was reaching toward the bag when they arrested him and that West admitted to Agent King that the rings were his). Admission of Herbert's motion hearing testimony, even under the best case scenario for the defense, cannot be said to offer a reasonable probability that West would have been acquitted. *See* ***id.*** We conclude that the trial court properly exercised its discretion in denying West's request for a ***Machner*** hearing because the record conclusively established that Herbert's earlier testimony would not have caused a different result. Accordingly, we affirm.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.