COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2002

Cornelia G. Clark
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. 02-0153-CR **Cir. Ct. No. 00 CF 2479**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH F. JILES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Joseph F. Jiles appeals from a judgment entered after he pled guilty to one count of first-degree reckless injury with the use of a dangerous weapon, as a party to a crime, and one count of armed robbery with the

use of force, as a party to a crime. *See* WIS. STAT. §§ 940.23(1)(a); 939.63; 939.05; and 943.32(2) (1999-2000).[1] He also appeals from an order denying his postconviction motion. Jiles claims that his trial counsel was ineffective when the lawyer did not object to alleged errors at a ***Miranda-Goodchild*** hearing and at sentencing because: (1) the trial court's reliance on police reports instead of live testimony at the ***Miranda-Goodchild*** hearing violated due process; (2) police reports upon which the trial court relied were not properly authenticated; and (3) the trial court relied on inaccurate sentencing information. Jiles also alleges that the trial court erred when it: (1) erroneously concluded that it was not required to follow the rules of evidence at the ***Miranda-Goodchild*** hearing; and (2) denied his motion to suppress because, he contends, the State failed to meet its burden of proof.[2] We affirm.

I.

¶2 Joseph F. Jiles and Lyron T. Wilson robbed Evelyn Payton and shot her in the head. According to the complaint, the robbery occurred when Payton stopped at a gas station on her way home from work. Jiles and Wilson approached Payton as she was getting into her car. They tried to grab her purse, but were unable to reach it. Jiles and Wilson then tried to take her car keys. Payton struggled with them and was shot near her temple. Jiles and Wilson took her keys

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] A trial court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and, also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

and ran away. As a result of the shooting, Payton lost her left eye, has two plates in her face, and suffers from extensive facial nerve damage.

¶3 Jiles gave a statement to the police the next day. According to the police report recounting the statement, the interviewing detective informed Jiles of his ***Miranda*** rights. Jiles indicated that he understood and waived those rights. Jiles then told the detective that he and "Ready Rell" (Wilson) walked over to Payton and grabbed her. According to Jiles's statement, she did not have a purse, so he grabbed a key chain with a sack on it because he "figured" that was where she kept her money. Jiles then ran away with the key chain. As he was running, he heard a shot and saw "Ready Rell" running behind him. Jiles and "Ready Rell" were apprehended by the police a few minutes later. Jiles signed his name at the bottom of his written statement.

¶4 Jiles filed a motion to suppress the statement, alleging that: he was not informed of his ***Miranda*** rights, his confession was involuntary because he was intoxicated from using marijuana prior to his arrest, and his statements were the result of overbearing police conduct. At the ***Miranda-Goodchild*** hearing, the trial court relied upon Jiles's police report for the State's version of the facts. As noted, the report indicated that Jiles had been advised of and waived his ***Miranda*** rights. The report also indicated that Jiles gave his statement approximately four and one-half hours after he was arrested and that Jiles told the detective that he was not under the influence of drugs or alcohol.

¶5 Jiles also testified at the hearing. He claimed that the detective did not inform him of his ***Miranda*** rights. Jiles testified that he was still high on marijuana when he gave the statement and that the detective asked him "all kinds of crazy questions … [l]ike how old was I and like do I have any brothers or

sisters; stuff like that." When asked by the State, Jiles admitted that he saw the police report "[t]he same night he [the detective] was asking me questions." Jiles also admitted that the signature on the report was his.

¶6 The trial court denied Jiles's motion to suppress his confession. It found that Jiles was not credible and concluded that Jiles had received and waived his ***Miranda*** rights. The trial court also concluded that Jiles's statement was voluntary because "Mr. Jiles'[s] ability to make informed choices was not overborne by any marijuana which he may have consumed prior to his arrest."

¶7 Jiles pled guilty and the trial court sentenced him to twenty years in prison on count one (first-degree reckless injury) and forty years in prison on count two (armed robbery), consecutive to count one.[3] Jiles filed a postconviction motion requesting, among other things, a ***Machner*** hearing.[4] He alleged that his trial counsel was ineffective for failing to object to several alleged errors that occurred at the ***Miranda-Goodchild*** hearing and at sentencing. The trial court denied the motion without a hearing.

II.

A. Ineffective Assistance of Counsel

¶8 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice.

[3] The trial court imposed Jiles's twenty-year sentence for first-degree reckless injury to consist of fifteen years of confinement and five years of extended supervision and his forty-year sentence for armed robbery to consist of twenty years of confinement and twenty years of extended supervision.

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

Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶9 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. To succeed, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶10 Our standard for reviewing an ineffective-assistance-of-counsel claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, are questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. We need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶11 Before a trial court must grant a ***Machner*** hearing on an ineffective-assistance-of-counsel claim, the defendant must allege sufficient facts to raise a question of fact for the court. ***State v. Washington***, 176 Wis. 2d 205, 214–215, 500 N.W.2d 331, 335–336 (Ct. App. 1993). A conclusory allegation, unsupported by factual assertions, is legally insufficient and does not require the trial court to conduct a ***Machner*** hearing. ***Id.*** Although the "nature and specificity of the

required supporting facts will necessarily differ from case to case … a defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim." ***State v. Bentley***, 201 Wis. 2d 303, 313–314, 548 N.W.2d 50, 55 (1996). This presents a question of law that we review *de novo*. ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53.[5]

¶12 First, Jiles alleges that his trial counsel was ineffective for failing to object when the trial court relied upon the police report at the ***Miranda-Goodchild*** hearing.[6] Jiles claims that this violated his due-process right to a full and fair hearing because the trial court could not determine the credibility of "the police officer … based upon paper." We disagree.

¶13 Under WIS. STAT. RULE 901.04(1), a trial court is not bound by the rules of evidence when it makes a preliminary determination on the admissibility of evidence. RULE 901.04(1) provides:

> **Preliminary questions. (1)** QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). *In making the determination*

[5] In addition to a ***Machner*** hearing, Jiles requests "reversal of the court's denial of the suppression motion[;] withdrawal of [his] guilty pleas; and/or a new sentencing hearing." (Capitalization and underlining omitted.) A ***Machner*** hearing, however, is a prerequisite to granting relief on an ineffective-assistance-of-counsel claim. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554–555, 582 N.W.2d 409, 410 (Ct. App. 1998). Thus, we address Jiles's allegations under an ineffective-assistance-of-counsel standard to determine whether a ***Machner*** hearing is warranted.

[6] Jiles alleges that his trial lawyer "was prejudicially ineffective for failing to properly object to the trial court's conducting the Motion to Suppress hearing based solely upon the police reports." (Underlining omitted.) There are two problems with this allegation. First, the trial court only relied upon one police report (Jiles's) at the hearing. Second, the trial court did not conduct the hearing based solely upon the police report—it also heard Jiles's testimony.

> *the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.*

(Emphasis added.) Under RULE 901.04(1), the trial court was not bound by the rules of evidence at Jiles's ***Miranda-Goodchild*** hearing—it was making a determination on the admissibility of Jiles's confession.[7] Whether police properly informed a defendant of his or her ***Miranda*** rights is a decision made by the court under RULE 901.04(1). *See* ***United States v. Raddatz***, 447 U.S. 667, 679 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial."); *see also* ***United States v. Matlock***, 415 U.S. 164, 172 (1974) ("[T]he rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the

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[7] This proposition is reinforced by the Judicial Council Committee's Note to WIS. STAT. RULE 901.04(1) and WIS. STAT. RULE 911.01(4)(a). The Judicial Council Committee's Note provides:

> This subsection is consistent with Wisconsin decisions that the trial court determines: a witness's qualification, existence of a privilege, and *the admissibility of a confession*. Exoneration of the trial judge from the rules of evidence in making his [or her] determination has not been articulated in Wisconsin decisions, but s. 262.17 (1) (b) provides for proof of service by affidavit and ss. 269.32, 269.45, 270.50 and 270.635 permit rulings on motions based upon affidavits. The second sentence deviates from the federal rule only in the interest of clarity; no change of substance is needed.

Wisconsin Rules of Evidence 59 Wis. 2d Rp. 15–16 (citations omitted) (emphasis added). Moreover, RULE 911.01(4)(a) provides:

> **(4)** RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations:
>
> (a) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under s. 901.04 (1).

judge to determine the admissibility of evidence."). Thus, the trial court properly relied upon the police report—RULE 901.04(1) permitted its use at the hearing regardless of whether it would have been admissible under the rules of evidence at trial. *See also* ***State v. Frambs***, 157 Wis. 2d 700, 704, 460 N.W.2d 811, 813 (Ct. App. 1990) (confrontation clause does not apply to trial court's responsibilities under RULE 901.04(1)). Accordingly, Jiles has neither shown that his trial counsel's performance was deficient nor shown that he suffered any prejudice—any objection that counsel would have made to the admission of the police report would have been meritless.

¶14 Second, Jiles alleges that his trial counsel was ineffective when the lawyer did not object to the admission of the police report at the hearing because the report was not properly authenticated. We disagree. As noted, the rules of evidence did not apply to Jiles's hearing. Moreover, a document is authenticated when "evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. RULE 909.01. At the hearing, Jiles testified that he recognized the police report and that the signature on the report was his.[8]

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[8] On direct-examination, Jiles testified as follows:

> Q. I'm going to show you three pages here of writing [the police report]. And have you ever seen this before?
>
> A. Yes.
>
> Q. When did you see it?
>
> A. The same night he was asking me questions.
>
> Q. All right. I'm going to show you on page two there what looks like a signature, Joseph Jiles. Is that your signature?
>
> A. Yes.

Thus, the police report was properly authenticated. *See* WIS. STAT. RULE 909.015(1) and (2) (examples of authentication include the testimony of a witness with knowledge and a non-expert opinion on the genuineness of handwriting). Further, Jiles does not point us to anything, other than his mere unsupported assertion, that raises a question that the report was not what it purported to be. Jiles has not established that he was deprived of the effective assistance of counsel in connection with the trial court's use of the police report.

¶15 Third, Jiles alleges that his trial counsel was ineffective because the lawyer did not object to the trial court's reliance upon alleged inaccurate information when it sentenced him. At sentencing, the trial court commented:

> In many respects though it's an accident as to whether it was you [Wilson] or Mr. Jiles who held the gun in your hands because I understand that the two of you passed the gun back and forth. Mr. Jiles told me when he pled guilty that the two of you passed the gun back and forth as you walked on 27th Street.

Jiles alleges that this information is inaccurate because he never made this statement.

¶16 Jiles's allegation concerning the trial court's statement at sentencing is conclusory and undeveloped. While Jiles correctly asserts that *he* never made this statement, Jiles does not allege that the critical element of his allegation, the underlying fact that he passed the gun back and forth to Williams, is incorrect. Indeed, even in his reply brief, Jiles fails to allege or offer any proof that the information itself, not the source of the information, is false. Jiles simply claims that "[h]e does not have to disprove such non-information." Jiles misinterprets the standard for an ineffective-assistance-of-counsel claim—before a trial court must grant a ***Machner*** hearing, *the defendant* must allege sufficient facts to raise a

question of fact for the court. *See* ***Washington***, 176 Wis. 2d at 214–215, 500 N.W.2d at 335–336. Here, Jiles fails to allege facts sufficient to raise a question of fact regarding the accuracy of the information. Accordingly, the trial court properly denied Jiles's postconviction motion without a ***Machner*** hearing.

B. Trial Court Error

¶17 Jiles also alleges that the trial court erred in two respects when it conducted the ***Miranda-Goodchild*** hearing. First, Jiles claims that the trial court's order denying his motion for postconviction relief was "improper" because the trial court erroneously concluded that it was not required to follow the rules of evidence at the ***Miranda-Goodchild*** hearing. Again, we disagree. We have already decided that the trial court was not bound by the rules of evidence because the ***Miranda-Goodchild*** hearing concerned a determination on the admissibility of Jiles's confession.

¶18 Second, Jiles alleges that the trial court erred when it denied his motion to suppress because, "[f]or all of the reasons indicated, the State failed to meet its burden of proof at the Miranda-Goodchild hearing." This argument is simply a rehash of Jiles's prior allegations—it adds nothing to the arguments that we have already rejected. Accordingly, we decline to further address it. *See* ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989) ("[l]arding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; 'zero plus zero equals zero'") (quoted source omitted).

By the Court.—Judgment and order affirmed.

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