COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0535-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHNNY L. HAMPTON,

DEFENDANT-APPELLANT,

GARY HAMPTON,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Johnny L. Hampton appeals from a judgment entered after a jury convicted him of two counts of armed robbery, party to a

crime, contrary to §§ 943.32(1)(b) & (2) and 939.05, STATS. He also appeals from an order denying postconviction motions. Hampton claims the trial court erred: (1) when it summarily denied his claim that he received ineffective assistance of trial counsel without holding a ***Machner*** hearing;[1] and (2) when it ruled that Hampton's due process right to a fair trial was not violated when a juror fell asleep during the testimony of a police witness. Because Hampton was not entitled to a ***Machner*** hearing, and because the trial court's findings regarding the sleeping juror are not clearly erroneous, we affirm.

I. BACKGROUND

Around midnight on October 22, 1993, Dana and Roya Johnson were robbed by three men in their apartment. One of the robbers was Gary Hampton, whom the Johnsons had known for a couple of months. One of the robbers was Johnny Hampton, whom Gary had identified to the Johnsons as his cousin. The third robber was never apprehended.

Dana gave the investigating police officers Gary Hampton's name and phone number. From this information, the police learned Gary's mother's address and went to the residence around 2 a.m. that morning. Gary's mother consented to a search of the home and police arrested Gary, who was hiding in a basement bathroom. The police also found Johnny at this residence. Dana identified Johnny and Gary as two of the three robbers when she was taken to the home for a "show-up" shortly after the suspects' apprehension. Roya identified both Johnny and Gary in a lineup several days later.

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

During the search of the Hampton residence at the time of the arrests, the police found jackets, bandannas and jogging pants matching the description of the clothing worn by the three robbers at the time of the incident. The police also recovered a VCR, typewriter and leather jackets stolen from the Johnson home.

Johnny and Gary were charged jointly and tried together. The State's case was submitted primarily through the testimony of Dana and Roya Johnson. In addition, the State presented the testimony of several police officers who investigated the crimes, apprehended the defendants and took statements. The jury convicted. Johnny filed a postconviction motion alleging ineffective assistance of trial counsel. The trial court denied the motion without holding a ***Machner*** hearing. Johnny also joined in Gary's postconviction claim that a juror, who was sleeping during the testimony of one of the police detectives, violated his right to a fair trial. After conducting a remand hearing following Gary's direct appeal, *see* ***State v. Hampton***, 201 Wis.2d 662, 673, 549 N.W.2d 756, 760 (Ct. App. 1996), the trial court found that the juror was drowsy for ten minutes and asleep for one or two minutes, and that this inattentiveness was not prejudicial to the defense. Johnny now appeals.

II. DISCUSSION

A. Ineffective Assistance Claims.

Johnny claimed that his counsel was ineffective for: (1) failing to call a necessary witness to a pre-trial motion hearing; (2) failing to object to inappropriate and misleading jury instructions; and (3) failing to object to comments made by the prosecutor during closing argument. He claims that these

claims were raised with sufficient specificity so as to require the trial court to conduct a ***Machner*** hearing. We do not agree.

Whether a motion alleges facts which, if true, would entitle Johnny to relief is a question of law that we review independently. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). However, it is within the trial court's discretion to deny a postconviction motion without holding an evidentiary hearing if the motion fails to allege sufficient facts to raise a question of fact, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***id.*** at 309-11, 548 N.W.2d at 53. Because a claim of ineffective assistance of trial counsel requires proof of both deficient performance and resulting prejudice, *see* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), Johnny's motion must make specific allegations as to both prongs in order for the trial court to hold a ***Machner*** hearing.

Johnny alleges that trial counsel should have called Dana Johnson to testify at the suppression hearing, which was held based on Johnny's claim that the "show-up" identification was impermissibly suggestive. Johnny, however, fails to allege what testimony Dana would have provided, if she would have been called as a witness, which would have supported Johnny's claim. He failed to allege specific facts demonstrating that trial counsel's failure to call Dana as a witness prejudiced his case. Therefore, the trial court was not required to hold a ***Machner*** hearing on this alleged ground of ineffective assistance.

Next, Johnny claimed trial counsel was ineffective for failing to object to jury instructions regarding party to a crime liability. In order to prevail on this claim, Johnny must show that the instructions, as a whole, were misleading

or deficient. *See* ***State v. Lohmeier***, 205 Wis.2d 183, 191-93, 556 N.W.2d 90, 93 (1996). Johnny fails to do either.

In ruling on this issue, the trial court determined:

> The pattern instruction on armed robbery was given to the jury only once, to avoid repetition, but the distinction between the counts was made by reference to the name of the victim, that is, Dana or Roya Johnson. The jury was advised that the elements of the offense applied to each count, as to each defendant and each victim. Johnny argues that the jurors might have construed this to mean that they could "convict Johnny of both counts if either Roya or Dana was found to be the victim of an armed robbery, or if any of the three participants was guilty of an armed robbery." There was, in my judgment, no danger of confusion in this regard, and so trial counsel's failure to object on this ground is not deficient performance.

In other words, the trial court concluded that there was no reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution. *See* ***Lohmeier***, 205 Wis.2d at 193, 556 N.W.2d at 93. We agree. The jury instructions were not misleading and, therefore, there is no basis for an ineffective assistance claim based on this ground.

Finally, Johnny claims he was entitled to a ***Machner*** hearing based on his allegations that his trial counsel failed to object to improper closing remarks made by the prosecutor.[2] During closing, the prosecutor referred to instances in

[2] Johnny lists several examples:

> I got married 12 years ago. That's a long time ago. It is a traumatic incident because anybody here whose been married whether now or in the past, it's something that is really unique and different to you. … Okay, my wedding and wedding reception were -- that was a traumatic happy experience for me. What do I remember about it?

(continued)

her own life to show that important events in one's life cause certain memories and she referred to the fact that the majority of her cases involve defendants robbing people that they know.

A prosecutor's comments during closing are improper if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). The trial court's decision on this issue, however, does not require an evidentiary hearing because it can be resolved based on the existing trial record.

In reviewing the record, we conclude that the prosecutor's closing comments were not "pervasively unfair" and did not "infect the trial with unfairness." Counsel is allowed considerable latitude in closing argument. *See* ***id.***, 171 Wis. 2d at 167, 491 N.W.2d at 500. Although some of the prosecutor's comments about her personal life experiences may have had limited relevance, the comments could not have prejudiced the defense. Accordingly, Johnny's counsel's failure to object to these comments was not ineffective assistance.[3]

> Now when I was in the very same car accident, one of my sisters was seated next to me in the same car. We went through the same car accident. It was a five car collision. She and I remember completely different things about what happened in that particular traumatic incident to us.
>
> ….
>
> Why would Gary rob Dana when he knows her? I would say 90 percent of my case load are people robbing people that they know. Open up a paper.

[3] Johnny claims that the State should be precluded from arguing on appeal that a ***Machner*** hearing was not required because, at the trial court level, the State agreed that a hearing was warranted. We disagree. This court is not bound by concessions of the parties on questions of law. *See* ***State v. Gomaz***, 141 Wis.2d 302, 307, 414 N.W.2d 626, 629 (1987).

B. Sleeping Juror.

Johnny claims that his right to an impartial trial was violated because a juror was sleeping during the testimony of one of the police witnesses. This was the subject of a remand hearing from this court on Gary's direct appeal. *See* ***Hampton***, 201 Wis.2d at 673, 549 N.W.2d at 760. Johnny claims the trial court did not make proper findings at the remand hearing regarding the sleeping juror. We have already addressed and rejected this claim in Gary's case, *see* ***State v. Hampton***, No. 95-0152-CR, slip op. (Wis. Ct. App. Mar. 3, 1998, recommended for publication).

We held:

> Hampton claims the trial court erred in finding that juror [Demian] Blue's inattentiveness was insignificant and that no prejudice occurred as a result. He argues that the period of time juror Blue was sleeping was significant and that the juror missed substantial, important parts of Detective Glasnovich's testimony. He contends that, as a result, the trial court should have granted his motion for a mistrial because his constitutional right to a fair trial with an impartial jury was violated.
>
> Whether to declare a mistrial is directed to the trial court's discretion. *See* ***State v. Copening***, 100 Wis.2d 700, 709-10, 303 N.W.2d 821, 826-27 (1981). The denial of a motion for a mistrial will be reversed only if the trial court erroneously exercised its discretion. *See* ***State v. Grady***, 93 Wis.2d 1, 13, 286 N.W.2d 607, 612 (Ct. App. 1979). The trial court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial as to warrant a mistrial. Our standard of review relative to the constitutional claim is mixed. We will not overturn a trial court's findings of evidentiary and historical facts unless they are clearly erroneous. *See* ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987). However, the ultimate question of whether Hampton's constitutional right to a fair trial was violated is a question of law that we determine independently. *See* ***State v. Turner***, 186 Wis.2d 277, 284, 521 N.W.2d 148, 151 (Ct. App. 1994). We affirm the trial court's ruling.

At the remand hearing, the trial court heard testimony from Hampton, Hampton's trial counsel, juror Blue and the bailiff who was present on the fourth day of trial. As noted, Hampton testified that the juror was asleep for fifteen minutes and his trial counsel testified that the juror was asleep for ten minutes, although the juror was "drowsy" for some time before actually falling asleep. The juror testified that he did not recall how long he had been drowsy, that he "probably actually fell asleep" for a period of about two minutes, and that he recalled that the trial court got his attention as he "was kind of dozing off" after which he woke up. The bailiff, Deputy Matykowski, testified that he did not see juror Blue actually sleeping, but that the juror was sleepy and that the juror's eyes were closing, after which the juror's head would drop down to his chin and then snap back up. Matykowski testified that if he felt a juror had actually fallen asleep, he would alert the trial court immediately. He also said that he recalled the trial court focusing on juror Blue, getting his attention, and that after that, the juror remained more alert for the balance of Detective Glasnovich's testimony.

Based on this testimony, the trial court found that juror Blue's inattentiveness was insignificant in that he was drowsy for approximately ten minutes and actually fell asleep for only one or two minutes. The trial court also found that, based on the brevity of the inattentiveness as well as the strength of the evidence against Hampton, the juror's inattentiveness did not prejudice the defense. There is support in the record for these findings and, therefore, the findings are not clearly erroneous. *See* ***Mowers v. City of St. Francis***, 108 Wis.2d 630, 633, 323 N.W.2d 157, 158 (Ct. App. 1982).

Although Hampton's claim that there is evidence in the record that the juror actually slept for a period of ten-to-fifteen minutes is not inaccurate, this does not render the trial court's findings clearly erroneous. The evidence that Hampton points to is his own testimony as well as the testimony of his trial counsel. The trial court, however, found the testimony of its bailiff and the juror to be more credible. This determination is sound as both Hampton and his counsel had an interest in the outcome. The bailiff and the juror did not. We are not empowered to substitute our own credibility determinations for those made by the trial court. *See* ***Dejmal v. Merta***, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980).

There is also evidence to support the trial court's finding that the juror's inattentiveness during Detective Glasnovich's testimony was not prejudicial to the defense.

> The evidence against Hampton was very strong and Glasnovich's testimony was fairly corroborative and cumulative to the testimony of the victims, Dana and Roya Johnson, as well as other police witnesses. Glasnovich's role in this case was to conduct the post-incident interview with Dana Johnson and to conduct the on-scene identification procedure with her. Dana testified that she knew Hampton prior to the robbery, and she positively identified him as the perpetrator. Glasnovich also testified about the recovery of some of the stolen property in Hampton's home, where Hampton was arrested shortly after the robbery. It was undisputed that the stolen property was discovered in Hampton's home. Hampton's defense theory, however, was that he had purchased the stolen property from the other two robbers.
>
> Because the nature of Detective Glasnovich's testimony was not pivotal to the State's case, juror Blue's brief inattentiveness during this testimony was not prejudicial to the defense.[] Accordingly, we conclude that the trial court did not erroneously exercise its discretion in denying the motion for a mistrial and that Hampton's due process rights to a fair trial were not violated.

Id., slip op. at 6-9.

Therefore, we reject Johnny's claim that the juror's inattentiveness violated his right to a fair trial. The trial court's findings at the remand hearing were not clearly erroneous and, therefore, "the sleeping juror" did not prejudice Johnny's defense.

By the Court.—Judgment and order affirmed.

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