COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2952-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN FOSTER FANT,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. John Foster Fant appeals from a judgment of conviction entered after a jury found him guilty of possession of cocaine, with intent to deliver. *See* §§ 161.16(2)(b)(1), 161.41(1m)(cm)(5), STATS., 1993–94.[1]

[1] Effective July 9, 1996, §§ 161.16(2)(b)(1) and 161.41(1m)(cm)(5), STATS., 1993–94 were recodified in chapter 961, STATS., 1995–96. *See* 1995 Wis. Act 448, §§ 173, 245, 515.

He also appeals from an order denying his motion for postconviction relief. Fant argues: (1) that the trial court erred in denying his motion to suppress the cocaine that was found in the basement of the building in which he lived; (2) that he was arbitrarily denied his statutory right to five peremptory challenges; (3) that his attorney's waiver of one of his peremptory challenges was invalid; and (4) that he received ineffective assistance of counsel because his attorney waived one of his peremptory challenges. We affirm.

BACKGROUND

On the morning of February 16, 1996, a 911 call was received reporting that Fant's infant had stopped breathing. Both emergency personnel and the police were dispatched to Fant's home, which was the lower flat of a duplex. While investigating the death of the infant, the police found both marijuana and cocaine in Fant's flat. The police also found a bag containing a large amount of rock cocaine in the basement of the duplex. Fant admitted to the police that the cocaine from his flat and from the basement of the duplex belonged to him.

On July 20, 1996, the State charged Fant with possession of cocaine with intent to deliver. Fant filed a motion to suppress the cocaine, arguing that it was the fruit of an illegal search. The trial court denied the motion. Fant was tried and convicted by a jury in January of 1997. The trial court entered judgment accordingly. Thereafter, Fant filed two motions for postconviction relief, raising the issues he now argues on appeal. The trial court denied Fant's postconviction motions.

DISCUSSION

1. Suppression

Fant argues that the trial court erred in denying his motion to suppress the cocaine that the police found in the basement of his building. He asserts that he had a reasonable expectation of privacy in the basement of the duplex, and that the warrantless search of the basement violated his state and federal constitutional rights to be free from unreasonable searches and seizures.[2] We affirm the trial court's conclusion that Fant did not have a reasonable expectation of privacy in the area of the basement where the cocaine was found.

"Whether police conduct constitutes an unreasonable search and seizure in violation of the state and federal constitutions depends, in the first place, on whether the defendant had a legitimate, justifiable or reasonable expectation of privacy that was invaded by the government action." ***State v. Rewolinski***, 159 Wis.2d 1, 12, 464 N.W.2d 401, 405 (1990) (footnotes omitted). Whether a defendant had a reasonable expectation of privacy depends on two separate questions. *See* ***id.***, 159 Wis.2d at 13, 464 N.W.2d at 405. "The first question is whether the individual by his conduct exhibited an actual, subjective expectation of privacy. The second question is whether such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable." ***Id.*** A defendant bears the burden of proving by a preponderance of the evidence both that he or she had an actual, subjective expectation of privacy, and that the expectation was legitimate or justifiable. *See* ***id.***, 159 Wis.2d at 13–16, 464 N.W.2d at 405–407.

[2] Fant correctly notes that the search and seizure provisions of the Wisconsin Constitution and the United States Constitution are identical, and that the Wisconsin courts have consistently conformed state law of search and seizure under the state constitution to that developed by the United States Supreme Court under the Fourth Amendment to the United States Constitution. *See* ***State v. Rewolinski***, 159 Wis.2d 1, 12 n.5, 464 N.W.2d 401, 405 n.5 (1990).

Fant did not satisfy his burden to establish that he had an actual, subjective expectation of privacy in the area of the basement where the police discovered the cocaine. At the suppression hearing, Detective Leroy Shaw testified that he discovered a brown paper bag containing cocaine in a cabinet in the basement of the duplex. Fant testified that both he and the other tenant of the duplex had access to the basement from a common entryway, and both were free to store things in the basement. Fant said that he had a separate assigned storage area in the basement, but that he had never been in the basement and had never stored anything in the basement.[3] Fant further testified that the cabinet in which the police found the cocaine did not belong to him, and that he did not know if the cabinet was within his assigned storage area. Fant's conduct and his statements regarding the basement reveal that he did not have an actual, subjective expectation of privacy. Fant failed to identify any specific area of the basement in which he had a personal interest, and he denied that he had even been in the basement. We therefore conclude that Fant failed to satisfy his burden to show that he had an actual, subjective expectation of privacy in the cabinet where the cocaine was discovered.

Moreover, Fant did not satisfy his burden to establish that his alleged expectation of privacy in the basement cabinet is an expectation that society is willing to recognize as reasonable. The following factors are relevant in determining whether a defendant has an expectation of privacy that society is willing to recognize as reasonable: (1) whether the defendant had a property interest in the premises; (2) whether the defendant is lawfully on the premises; (3)

[3] As noted, Fant had previously confessed to the police that the cocaine in the basement belonged to him. Nonetheless, at the suppression hearing, Fant testified that he had never been in the basement, and that he had never stored anything in the basement.

whether the defendant had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy. *See* ***State v. Dixon***, 177 Wis.2d 461, 469, 501 N.W.2d 442, 446 (1993). These factors are neither controlling nor exclusive, and we must determine under the totality of the circumstances whether a defendant has an expectation of privacy that society is willing to recognize as reasonable. *See* ***id.***

The testimony from the suppression hearing reveals that although Fant had a property interest in the duplex basement and could legitimately enter and use the basement, under the totality of the circumstances, Fant's alleged expectation of privacy in the basement cabinet where the cocaine was found is not an expectation of privacy that society is willing to recognize as reasonable. Fant did not have complete dominion and control over the basement, and he did not have the right to exclude all others from the basement. The other tenant of the duplex, and the owner of the duplex both had access to the basement, as did any person that they permitted to enter the basement; Fant had no right to exclude those persons from the basement. Moreover, Fant testified that he did not own the cabinet in which the cocaine was discovered, and that he did not know if it was within his assigned storage area; therefore, Fant did not exercise dominion and control over the cabinet, and he had no right to prevent others from accessing the cabinet. Fant did not take precautions to protect his privacy in any area of the basement, and he did not put any area of the basement to his private use. Fant's claim of privacy in a common area that he claims never to have entered is not consistent with historical notions of privacy. We therefore conclude that, under the totality of the circumstances, Fant did not have an expectation of privacy that

society is willing to recognize as reasonable. *See* ***Rewolinski***, 159 Wis.2d at 13, 464 N.W.2d at 405. The trial court did not err in denying Fant's motion to suppress.

2. Peremptory Challenges

Prior to jury selection, the State requested that an alternate juror be impaneled. The trial court expressed concern that there were not enough jurors available to allow for an alternate juror, because the parties were statutorily entitled to five peremptory challenges if an alternate juror was impaneled, and only twenty-five potential jurors were available.[4] Therefore, the State suggested that the parties agree to impanel an alternate juror but to limit themselves to four peremptory challenges, rather than the five peremptory challenges provided by statute. The defense agreed to accept four peremptory challenges and an alternate juror. Only two of the potential jurors were struck for cause; therefore, there were

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[4] Section 972.03, STATS., provides, in relevant part:

> **Peremptory challenges.** Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section…. Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under s. 972.04 (1).

Section 972.04, STATS., provides, in relevant part:

> **Exercise of challenges. (1)** The number of jurors [to be] selected … plus the number of peremptory challenges available to all the parties, shall be called initially and maintained in the jury box by calling others to replace jurors excused for cause until all jurors have been examined. The parties shall exercise in their order, the state beginning, the peremptory challenges available to them, and if any party declines to challenge, the challenge shall be made by the clerk by lot.
>
> **(2)** A party may waive in advance any or all of its peremptory challenges and the number of jurors called pursuant to sub. (1) shall be reduced by this number.

enough jurors available to permit the parties to impanel an alternate juror and exercise five peremptory challenges. The parties, however, did not utilize the full jury pool, and exercised only four peremptory challenges, as they had agreed.

Fant argues that he was arbitrarily denied his statutory right to five peremptory challenges. He argues that he was entitled to five peremptory challenges, and that, under ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997), he was denied due process because he received only four peremptory challenges.

In ***Ramos***, the defendant argued that his due-process rights had been violated because the trial court had improperly refused to dismiss a juror for cause, forcing the defendant to use a peremptory challenge to remove the biased juror. The supreme court agreed, and held that "the use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because it arbitrarily deprives the defendant of a statutorily granted right." ***Id.***, 211 Wis.2d at 14, 564 N.W.2d at 329. The supreme court reasoned that, because of the trial court's error, the defendant had not "receive[d] that which state law provides," *see* ***id.***, 211 Wis.2d at 19, 564 N.W.2d at 331, that is, he had been deprived of his "right to exercise all seven of his statutorily granted peremptory challenges," *see* ***id.***, 211 Wis.2d at 24, 564 N.W.2d at 333.

Unlike ***Ramos***, in the case before us, the trial court committed no error, and Fant received precisely that to which he was statutorily entitled. He received the full number of peremptory challenges to which his attorney had agreed, pursuant to § 972.04(2), STATS. Section 972.04(2) provides: "A party may waive in advance any or all of its peremptory challenges and the number of jurors called pursuant to sub. (1) shall be reduced by this number." As noted, the

parties agreed in advance to waive one peremptory challenge. Thus, the jury was properly impaneled pursuant to § 972.04. Fant fully exercised his statutory rights regarding peremptory challenges. He "receive[d] that which state law provides," and he is not entitled to reversal under ***Ramos***. *See* ***Ramos***, 211 Wis.2d at 18–19, 564 N.W.2d at 331 (the right to peremptory challenges is denied or impaired only if the defendant does not receive that which state law provides).

Fant also argues that his attorney's waiver of the peremptory challenge was invalid. Specifically, Fant argues that his attorney could not waive a peremptory challenge without either consulting Fant or getting his express consent. We conclude that Fant's attorney had the authority to waive the peremptory challenge on Fant's behalf.

Some decisions regarding a criminal case are so fundamental that they must be waived by the defendant personally. *See* ***State v. Brunette***, 220 Wis.2d 431, 443, 583 N.W.2d 174, 179 (Ct. App. 1998). "These decisions include whether to plead guilty, whether to request a trial by jury, whether to appeal, whether to forgo the assistance of counsel, and whether to obtain counsel and refrain from self-incrimination." ***Id.***, 220 Wis.2d at 443, 583 N.W.2d at 179.[5] These decisions are considered to be so fundamental that they "go to the very heart of the adjudicatory process." ***Id.***

With these few exceptions, however, when a defendant accepts counsel, the defendant delegates to counsel the decisions whether to assert or waive constitutional rights, "as well as the myriad tactical decisions an attorney

[5] The defendant's right to testify on his or her own behalf has also been recognized as a fundamental right. *See* ***State v. Brunette***, 220 Wis.2d 431, 443 n.2, 583 N.W.2d 174, 179 n.2 (Ct. App. 1998).

must make during a trial." ***Id.*** "The rationale for considering most decisions to be delegated to counsel is that they require the skill, training and experience of the advocate and therefore the advocate must ultimately have the power to make the decisions." ***Id.***, 220 Wis.2d at 444, 583 N.W.2d at 179. When the decision whether to exercise or waive a right is delegated to counsel, counsel may validly waive the right; the defendant need not personally waive the right. *See* ***id.***, 220 Wis.2d at 444, 583 N.W.2d at 180.

We conclude that the decision to waive peremptory challenges is not a decision that "goes to the very heart of the adjudicatory process," *see* ***id.***, 220 Wis.2d at 443–444, 583 N.W.2d at 179, and that it is not a fundamental decision that must be made by the defendant personally. *Cf.* ***id.***, 220 Wis.2d at 443–444, 583 N.W.2d at 179–180 (the decision of whether to strike a juror for cause is not a fundamental decision that must be made by the defendant personally); ***State v. Guck***, 176 Wis.2d 845, 853, 500 N.W.2d 910, 913 (1993) (counsel may waive on defendant's behalf the right to a competency hearing); ***T.R.B. v. State***, 109 Wis.2d 179, 199, 325 N.W.2d 329, 338 (1982) (decisions whether to forgo cross-examination of witness, whether to forgo presentation of evidence, and whether to contest waiver of juvenile jurisdiction are tactical decisions delegated to counsel); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 266–268, 135 N.W.2d 753, 764–765 (1965) (counsel may waive the right to challenge admission of confession); ***State v. Strickland***, 27 Wis.2d 623, 629–630, 135 N.W.2d 295, 300 (1965) (counsel may waive objection to validity of guilty plea); ***State v. Eckert***, 203 Wis.2d 497, 509–511, 553 N.W.2d 539, 544–545 (Ct. App. 1996) (decisions whether to request instruction on lesser-included offense and whether to poll jury are delegated to counsel); ***State v. Wilkens***, 159 Wis.2d 618, 622–623, 465 N.W.2d 206, 208 (Ct. App. 1990) (counsel may waive the right to a preliminary

hearing that is open to the public). Significantly, unlike the rights previously found to require the defendant's personal waiver, the right to a specific number of peremptory challenges and the right to waive peremptory challenges are not constitutionally rooted; rather, both are provided by statute. *See* ***State v. Wyss***, 124 Wis.2d 681, 723, 370 N.W.2d 745, 765 (1985) ("peremptory challenges have not acquired a constitutional footing"), *overruled on other grounds by* ***State v. Poellinger,*** 153 Wis.2d 493, 451 N.W.2d 752 (1990). There is no statutory provision requiring that the defendant personally waive peremptory challenges, however. Moreover, in the present case the decision to waive one peremptory challenge was a tactical decision that Fant's counsel made in order to ensure that the trial court would permit the parties to impanel an alternate juror. The record reveals that the trial court was reluctant to impanel an alternate juror unless the parties agreed to limit themselves to four peremptory challenges. We therefore conclude that Fant's attorney validly waived the peremptory challenge on Fant's behalf.

Fant's final argument is that his attorney's waiver of the peremptory challenge constituted ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996).

To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant has not been denied effective assistance of counsel merely because he or she did not receive "the best counsel that might have tried the case, nor the best defense that might

have been presented. 'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***State v. Williquette***, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993) (quoted source omitted), *aff'd*, 190 Wis.2d 677, 526 N.W.2d 144 (1995). Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***Strickland***, 466 U.S. at 690. Counsel is strongly presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.***

To show prejudice, the defendant must demonstrate "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." *See* ***id.***, 466 U.S. at 694.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

We conclude that Fant's attorney was not deficient in waiving one peremptory challenge. As noted, Fant's attorney waived the additional peremptory challenge to ensure that the trial court would allow the parties to impanel an alternate juror. This decision was within the range of professionally competent assistance. Moreover, Fant has not shown any prejudice to him as a

result of not challenging a fifth member of the venire panel as a result of his attorney's failure. *See* ***Strickland***, 466 U.S. at 687. Fant argues that we should apply ***Ramos***, and presume that he was prejudiced because he allegedly did not receive all of the peremptory challenges to which he was statutorily entitled. As noted, ***Ramos*** is distinguishable from the case before us. First, ***Ramos*** did not address a claim of ineffective assistance of counsel. "[T]here is a significant distinction between the consequences on appeal of trial-court error and the consequences of that same error when it is raised in an ineffective-assistance-of-counsel context." ***State v. Damaske***, 212 Wis.2d 169, 200, 567 N.W.2d 905, 919 (Ct. App. 1997). A defendant asserting an ineffective-assistance-of-counsel claim ordinarily must demonstrate that he has been prejudiced. *See* ***id.*** Second, unlike ***Ramos***, the trial court did not improperly force Fant to use a peremptory challenge; rather, Fant's peremptory challenge was waived pursuant to statute. Finally, unlike ***Ramos***, both the State and Fant gave up one peremptory challenge; thus, the State did not gain an unfair advantage over Fant. We therefore decline Fant's invitation to presume prejudice. *Cf.* ***Wyss***, 124 Wis.2d at 723–724, 370 N.W.2d at 765 (declining to "require a new trial to be granted whenever a party's right of peremptory challenge has been impaired" in the context of a situation where "[n]either the trial court nor the prosecution deprived the defendant of his right to the effective exercise of his peremptory challenges").

By the Court.—Judgment and order affirmed.

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