COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0279-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATTHEW M. ENGEVOLD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

ROGGENSACK, J. Matthew Engevold appeals his convictions for armed robbery and aggravated battery, both of which were committed in association with criminal gang activity, and an order of the circuit court denying his motion for postconviction relief. Engevold claims he was not provided the number of peremptory challenges established by §§ 972.03 and 972.04(1), STATS.

Because his attorney did not object, he asserts he was denied effective assistance of counsel. On motions after verdict, the circuit court denied Engevold's request for a new trial. We agree with the circuit court that a new trial is not warranted. Because defense counsel failed to object and to request an additional peremptory strike, we are not required to presume prejudice. Additionally, Engevold has not shown actual prejudice. Accordingly, we affirm the circuit court.

BACKGROUND

Matthew Engevold was convicted of armed robbery in violation of § 943.32(2), STATS., and aggravated battery while armed with a dangerous weapon in violation of §§ 940.19 and 939.63, STATS. Each offense was committed in association with criminal gang activity in violation of § 939.625(1)(a), STATS.

At the time of jury selection, the circuit court announced that each side would get four peremptory challenges. Section 972.03, STATS., provides that each side be given four peremptory challenges for the types of crimes involved in this case. However, under § 972.04(1), STATS., if additional jurors beyond twelve are impaneled, each side is to receive one additional peremptory challenge. Because fourteen jurors were impaneled, Engevold and the State each should have received five peremptory challenges.

After his convictions, Engevold moved for a new trial alleging that he had a statutory right to five peremptory strikes. He contends this error, to which defense counsel did not object, constituted ineffective assistance of counsel for which we must presume prejudice under ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997). The circuit denied defendant's request for a new trial, and this appeal followed.

DISCUSSION

Standard of Review.

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 698 (1984)). The circuit court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS. However, whether counsel's conduct violated Engevold's right to effective assistance of counsel is ultimately a legal determination, which this court decides without deference to the circuit court. ***State v. (Oliver) Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986).

Ineffective Assistance of Counsel.

The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution which guarantee a criminal defendant a fair trial. *See* ***Strickland***, 466 U.S. at 684-86; ***State v. Sanchez***, 201 Wis.2d 219, 227-28, 548 N.W.2d 69, 72-73 (1996). The test for ineffective assistance of counsel has two components: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. A defendant has the burden of proof on both components. ***Id.***

Although a defendant must prove both that his attorney's conduct was deficient and that the conduct prejudiced him, courts need not determine whether counsel's performance was deficient before examining the prejudice

suffered by the defendant. ***Strickland***, 466 U.S. at 697; ***State v. Erickson***, No. 98-0273, slip op. at 10-11 n.7 (Wis. July 8, 1999) (citations omitted).

Engevold urges this court to presume prejudice. He argues that under ***Ramos***, any infringement of a defendant's right to receive the number of peremptory challenges established by statute requires a new trial without a showing of prejudice. The State, on the other hand, argues that we should affirm the circuit court's decision on Engevold's ineffective assistance of counsel claim because no actual prejudice occurred.

The supreme court recently decided ***Erickson*** which squarely addresses the consequences of a defendant's failure to receive the number of peremptory strikes established by statute. ***Erickson*** instructs that if a defendant fails to object to a circuit court's error, we analyze that claim under the ineffective assistance of counsel standard, rather than the automatic reversal afforded in ***Ramos***. However, the supreme court reasoned that even though a failure to object removes the obligation to presume prejudice with no further analysis, nevertheless, there are instances where a court will presume prejudice when considering a claim of ineffective assistance of counsel. ***Erickson***, No. 98-0273, slip op. at 11. In declining to presume prejudice under the facts present in ***Erickson***, the court focused upon two factors which it concluded rebutted a presumption of prejudice: (1) Erickson was judged by an impartial jury; and (2) the error complained of did not create an unlevel playing field between the prosecution and the defense. ***Id.*** at 13-14.

Similar to ***Erickson***, Engevold does not argue, nor is there any evidence in the record, that he was not judged by an impartial jury. Additionally, the circuit court's error of granting four peremptory strikes, instead of the five

required by statute, equally affected both Engevold and the State. The error did not lead to "an unlevel playing field." Therefore, we conclude that Engevold has not produced sufficient evidence for us to presume prejudice, under the criteria established in ***Erickson***.

Without a presumption of prejudice, in order to prevail on his ineffective assistance of counsel claim, Engevold must make a showing of actual prejudice. ***Erickson***, No. 98-0273, slip op. at 15. It is not sufficient for a defendant to demonstrate that the error "'had some conceivable effect on the outcome' of the trial." ***Id.*** (quoting ***Strickland***, 466 U.S. at 693). A defendant must show that but for counsel's error, there was a reasonable probability that the result of the trial would have been different. ***Strickland***, 466 U.S. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." ***Erickson***, No. 98-0273, slip op. at 15 (quoting ***Strickland***, 466 U.S. at 694).

Engevold's argument that his attorney's performance was prejudicial is premised upon this court *presuming* prejudice from his failure to object. Engevold does not attempt to argue that he suffered actual prejudice. In fact, appellant's brief states that "it is impossible to properly measure the prejudice suffered by Mr. Engevold." Further, it states that "no one can say with any certainty how [an additional peremptory challenge] might have affected the outcome in this case." This falls far short of showing that "absent the errors, the factfinder would have had a reasonable doubt respecting guilt." ***Strickland***, 466 U.S. at 695. Engevold must offer more than speculation to prove actual prejudice. *See* ***Strickland***, 466 U.S. at 693; ***State v. Johnson***, 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990). Because Engevold has not met his burden to demonstrate actual prejudice, we conclude his claim of ineffective assistance of

counsel is without merit. Therefore, we affirm the order of the circuit court and the judgment of conviction.

CONCLUSION

We conclude that a new trial is not warranted. Because defense counsel failed to object and to request an additional peremptory strike, we are not required to presume prejudice. Additionally, Engevold has not shown actual prejudice. Accordingly, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

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