COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-1325-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC PITTMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Eric Pittman has appealed pro se from a judgment convicting him after a jury trial of one count of delivery of cocaine and one count of delivery of heroin. He has also appealed from an order denying his motion for a new trial. We affirm the judgment and the order.

¶2 Pittman's first argument is that the trial court erroneously exercised its discretion by denying his motion for a mistrial. Pittman moved for a mistrial when, during testimony as to how he was identified as the seller from whom a drug buy was made, Steven Madsen, an investigator with the Racine police department, testified that he checked Racine police records for the nickname "Stuff" and came up with the name "Eric Pittman." When asked what action he took after obtaining Pittman's name, Madsen stated that he checked Pittman's criminal history and found that he was on probation.

¶3 Admission of this testimony was erroneous, as acknowledged by the prosecutor, who stated that it was not her intention to elicit this testimony and that the trial court should strike Madsen's response.[1] The error was also recognized by the trial court, which gave a curative instruction directing the jury to disregard the statement. However, the trial court refused to order a mistrial.

¶4 A decision to grant or deny a motion for mistrial is addressed to the sound discretion of the trial court. *See* ***State v. Adams***, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998), *review denied*, 225 Wis. 2d 488, 594 N.W.2d 382 (1999). This court will reverse an order denying a mistrial only upon a clear showing that the trial court erroneously exercised its discretion. *See* ***id.*** The trial court must consider the entire proceeding and determine whether the error is sufficiently prejudicial to warrant a new trial. *See* ***id.*** A manifest necessity must

[1] We recognize that the prosecutor's questions were not designed to elicit the answer given by Madsen. However, we emphasize that prosecutors must clearly instruct their witnesses that they cannot discuss a defendant's criminal history unless the trial court has ruled that such evidence is admissible and must abide by limiting orders of the trial court. In this case, the trial court had deferred ruling on the issue of whether information regarding Pittman's status could be given to the jury, stating that it would address the issue if and when the prosecutor wished to present such evidence at trial. It stated that no evidence should be admitted on the subject until it ruled.

exist to terminate the trial. *See* ***State v. Givens***, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). Moreover, when admonitory instructions are given by the trial court, potential prejudice is presumptively erased. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App.), *review denied*, 221 Wis. 2d 655, 588 N.W.2d 632 (1998).

¶5 As already noted, the trial court gave the jurors an admonitory instruction directing them to disregard Madsen's statement. Most importantly, the evidence of Pittman's guilt was so strong as to render the error in admission of Madsen's statement harmless. Pittman's convictions arose from a controlled drug purchase on the night of March 18, 1996. The purchase was made by Willie Stewart, an informant working undercover for the Drug Enforcement Agency (DEA), which was assisting Racine authorities in investigating drug trafficking. Evidence indicated that Stewart informed the DEA that an individual named "Stuff" lived in the 1600 block of Packard Avenue in Racine and was trafficking in heroin and crack cocaine. On March 18, 1996, Stewart met with two DEA agents, who gave him $100 for a drug buy. The agents searched Stewart when they gave him the money and recorded the serial numbers of the bills. Stewart testified that the agents dropped him off near Pittman's residence and that Pittman let him into the home. He testified that Pittman sold him two $20 bags of heroin plus a rock of cocaine for $40. Both Stewart and one of the agents testified that Stewart met the agents at a nearby location after leaving Pittman's residence, and that Stewart turned over two bags of heroin, a rock of crack cocaine and $20.

¶6 An investigator from the Racine police department testified that he was present when Stewart was searched by a DEA agent both before and after he entered Pittman's residence, and that he personally observed Stewart enter Pittman's residence at 1644 Packard Avenue. In addition, Madsen testified that

Stewart identified a photo of Pittman as the man who was known as "Stuff" and who sold him the drugs. Evidence indicated that the DEA had video surveillance on the front of the house while Stewart was inside and that a DEA agent watched the back of the house. The videotape showing Stewart entering and exiting the house was introduced into evidence. Stewart also identified Pittman at trial as the man who sold him the drugs.

¶7 Based upon the overwhelming evidence of Pittman's guilt, no basis exists to conclude that Madsen's statement regarding Pittman's probation status was sufficiently prejudicial as to warrant a new trial.[2] Because there was no manifest necessity to terminate the trial, no basis exists on appeal to overturn the order denying a mistrial.

¶8 Pittman next raises various claims of ineffective assistance of trial counsel. To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.***

> Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at

[2] Pittman argues that other units in his building could be accessed through his apartment. However, nothing in the evidence indicated that Stewart purchased the drugs from anyone else in the building, nor does it reveal a motive for Stewart to purchase drugs from someone else while falsely identifying Pittman as the seller. Since the evidence also indicated that Stewart was acquainted with Pittman and his family, the record provides no basis to conclude that he falsely identified Pittman, either intentionally or unintentionally. Pittman's theory that the drugs were purchased in another apartment is therefore pure speculation.

> the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.

State v. Johnson, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The appropriate measure of attorney performance is reasonableness, considering all the circumstances. *See* ***State v. Brooks***, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

¶9 "Even if deficient performance is found, judgment will not be reversed unless the appellant proves that the deficiency prejudiced his defense." ***Johnson***, 153 Wis. 2d at 127. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. "The 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 "The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact." ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The trial court is the ultimate arbiter of witness credibility. *See* ***State v. Wilson***, 179 Wis. 2d 660, 682, 508 N.W.2d 44 (Ct. App. 1993). "An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous." ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See* ***id.***

¶11 Pittman's first claim is that counsel was deficient for failing to more effectively argue on behalf of his motion for mistrial. Because we have concluded that the mistrial request was properly denied, this claim must also fail.

¶12 Pittman's next argument is that his trial counsel rendered deficient performance when he failed to ensure that Pittman was present for all pretrial proceedings. Specifically, he objects that he was not present for two hearings. The hearings dealt with a defense request for discovery and a jury view, and a prosecution request for joinder of Pittman's trial with that of Yolanda Trice, who was alleged by the prosecution to have been present at the time of the March 18, 1996 drug sale and to have assisted Pittman in it.

¶13 A defendant has a due process right to be present at a hearing whenever his or her presence has a reasonably substantial relationship to the opportunity to fully defend against the charge. *See* ***Kentucky v. Stincer***, 482 U.S. 730, 745 (1987). However, the defendant's presence is not guaranteed when it would be useless or meaningless. *See* ***id.*** His or her presence is required only "to the extent that a fair and just hearing would be thwarted by his [or her] absence." ***Id.*** (quoting ***Snyder v. Massachusetts***, 291 U.S. 97, 108 (1934)). "Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure." ***Id.***

¶14 Pittman's absence did not affect the fairness of the pretrial hearings, and therefore provides no basis for finding ineffective assistance of counsel. The discovery motion was made by defense counsel and was granted. Because no evidence or argument was presented on the motion, Pittman's presence was unnecessary and counsel's failure to produce him cannot be deemed deficient. In

addition, because Pittman was granted the relief requested by him in the motion, no basis exists to conclude that his absence was prejudicial.

¶15 The joinder motion was made by the State and was granted. Again, no evidence was taken. Moreover, the State was alleging that Pittman and Trice were parties to the same delivery. The arguments at the hearing centered on whether the same witnesses would be required for both trials. Because the record provides no basis to conclude that Pittman's absence had an effect on the disposition of the issue and the fairness of the proceeding, counsel's failure to produce him cannot be deemed either deficient or prejudicial. Finally, although Pittman's motion for a jury view was denied, nothing set forth in the record or his brief provides a basis to determine that his presence for the argument on that issue was necessary for its fair adjudication. Moreover, the trial court permitted a private investigator and Pittman's mother to present a videotape depicting the premises and to describe the premises in great detail at trial. Because no basis therefore exists to conclude that the denial of the jury view was prejudicial to Pittman, a finding of ineffective assistance cannot be premised upon his absence from the hearing on the jury view.

¶16 Pittman's next argument is that counsel rendered deficient performance when he allowed a written statement of Stewart's to go to the jury. The jury requested the statement during its deliberations. Pittman contends that the statement was prejudicial because in it Stewart stated that Pittman told him that he was on "house arrest."

¶17 At the postconviction hearing, Pittman's trial counsel testified that he agreed to send Stewart's statement to the jury room because he believed there were things in the statement that had been raised during the trial which were

beneficial to Pittman's defense. He believed that it was beneficial to permit the jury to review those portions of the statement, and he elected not to strike out the reference to "house arrest" because he was concerned that it would draw the jurors' attention to the stricken language, leading them to speculate as to what was excluded.

¶18 Because this was a reasonable strategic decision for counsel to make, his conduct did not constitute deficient performance. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Moreover, because the reference to "house arrest" consisted of only two barely legible words in a detailed, two-page statement, submission of the statement to the jury does not undermine our confidence in the outcome of the trial and render counsel's performance prejudicial.

¶19 The final allegation of ineffective assistance of counsel made by Pittman is that counsel failed to adequately investigate the role of Shannon Ingram in these offenses. He asserts that "Willie Stewart gave testimony at trial, but it was Shannon Ingram's informing activities that were at issue, and it was Ingram who should have testified at trial if in fact he purchased drugs from Pittman." In related arguments Pittman contends that the prosecutor engaged in misconduct by withholding information regarding Ingram's involvement, and that a new trial should be ordered in the interest of justice because the real controversy has not been tried. Pittman did not allege prosecutorial misconduct in the trial court, but alleges that this court may reach the issue because it constitutes plain error.

¶20 All of Pittman's arguments concerning Ingram fail on the same ground. "A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed

and how it would have altered the outcome of the trial." ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (quoting ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989)). A defendant must base a challenge to his representation on more than speculation. *See* ***id.*** Similarly, Pittman cannot demonstrate that a new trial is warranted under WIS. STAT. § 752.35 (1997-98) absent a showing that the jury was deprived of an opportunity to hear important testimony, *see* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996), nor can he establish prosecutorial misconduct absent such a showing.

¶21 Pittman's claim that Ingram, rather than Stewart, was the informant who purchased the drugs on March 18, 1996, is mere speculation. He bases his argument on a payment record and police reports which contain a file name of "Ingram" and a file number for Ingram. However, the record does not establish that the file name and number are that of the informant who purchased drugs from Pittman on March 18, 1996, rather than the name and number of another buyer, suspect or defendant. Moreover, Stewart testified that he purchased drugs from Pittman on March 18, 1996, and three law enforcement officers identified Stewart as the person who went to Pittman's residence to purchase drugs on that date. The videotape of Stewart entering and exiting Pittman's residence was shown to the jury. Because the record fails to establish that anyone other than Stewart was the person who purchased drugs from Pittman, Pittman's claims of ineffective assistance of counsel and prosecutorial misconduct fail, as does his request for a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).