COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-1855-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MUSTAFA M. MOHAMMAD,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: LEE E. WELLS and MICHAEL J. BARRON, Judges. *Affirmed.*

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

¶1 PER CURIAM. Mustafa M. Mohammad appeals from the judgments of conviction entered after a jury found him guilty of one count of arson of building and two counts of first-degree recklessly endangering safety, and

from the order denying postconviction relief.[1] He contends that he received ineffective assistance of trial counsel who, Mohammad claims: (1) ignored and failed to advise the court of his repeated requests for an interpreter, thus rendering him unable to understand the proceedings and depriving him of his constitutional rights to due process, confrontation, and knowledge of the charges against him; (2) elicited testimony from a prosecution witness regarding prior bad acts, failed to request that any portion of that testimony be struck from the record, and failed to request a curative jury instruction regarding limited admissibility of the evidence; (3) ignored his desire to call as witnesses at trial two employees who were with him when he closed the store on the day of the arson, thus depriving him of his constitutional right to present his defense; and (4) failed to review the presentence investigation report with him, and failed to call the court's attention to alleged errors in the report, on which the court relied in sentencing him. Additionally, Mohammad contends that the evidence was insufficient to sustain the convictions. We reject Mohammad's arguments and affirm.

I. BACKGROUND

¶2 Shortly after 9:00 p.m. on February 13, 1995, Eugene Graham was in his apartment located above Milwaukee Super Foods when he heard a "muffled boom" come from directly below his apartment. He smelled gasoline, left his apartment, noticed a stronger odor of gasoline in the hallway, and went to alert his neighbor, Charles Miller. After conferring with Miller, Graham went downstairs, exited the building, noticed that glass from one of the building's exterior doors had

[1] We note that the judgment of conviction for the two counts of recklessly endangering safety erroneously indicates that Mohammad pled guilty. We direct the trial court to enter a corrected judgment of conviction upon remittitur of the record.

been "blown out on the sidewalk and into the street," noted the odors of smoke and gasoline emanating from the ground floor of the building, reentered the building, went back upstairs, and called 911 for the fire department.

¶3 A fire engine dispatched by the Milwaukee Fire Department arrived on the scene at 9:15 p.m. Michael Kruegar, the fire engine's captain, noted the glass on the sidewalk. Fire department personnel entered the building by cutting the padlock off the front door. Upon entering, Captain Kruegar smelled gasoline, noticed a gasoline can near the doorway, slipped on what he believed to be gasoline, and saw a fire burning in a white plastic container on the floor. He noted that the container was burned down to about two inches in height and that it held what appeared to be gasoline.

¶4 Detective Antonio Martinez of the Milwaukee Police Department's arson unit was sent to investigate. He observed that a glass door had been blown out onto the sidewalk and street, and that a red plastic gasoline can found inside the building, near the door, was about half full of what he believed to be gasoline. He inspected the scene and concluded that a large amount of an accelerant had been poured across the floor. Detective Martinez discovered that all doors to the building had been securely locked (the basement entrance having been secured from the inside with lumber), that no evidence indicated any forced entry into the building, and that the store's cash register contained approximately $100. Detective Martinez also determined that the building was owned by the Next Door Foundation and that Milwaukee Super Foods was owned by Mohammad.

¶5 Detective Martinez interviewed Mohammad and learned that he had $200,000 insurance coverage on Milwaukee Super Foods that was due to expire in

two days unless the premium was paid. Mohammad told him that he had gone home after he and two employees left the store at about 9:07 p.m.

¶6 Detective Percy Dorsey, also of the Milwaukee Police Department, interviewed the two employees, Wajhee Hussin and Farah Farah. Farah recalled that he, Hussin, and Mohammad all left the store at about 8:50 p.m. Hussin, however, said that they all left at about 9:00 p.m., that the only person who had a key to the store was Mohammad, and that only Mohammad was able to activate and deactivate the burglar alarm system.

¶7 The police also obtained information from Dawn Fulkerson, manager of the building and part-time cashier for Milwaukee Super Foods, and from John Grant, a representative for the company hired by the Next Door Foundation to manage the building. Fulkerson reported that Mohammad owed the Internal Revenue Service a large amount of money, that three of his last four rent checks for the store had bounced, that he was $850 behind on his rent, and that most of the vendors with whom he did business would supply him with merchandise only on a cash basis. Grant said that neither he nor any of the foundation's employees had granted anyone permission to damage the building. Mohammad went to trial and was convicted of arson and recklessly endangering the safety of Graham and Miller. He was sentenced to sixteen years in prison, followed by probation.

¶8 Mohammad filed a motion for postconviction relief, requesting that the court set aside the guilty verdicts, judgments of conviction, and sentences. The motion alleged ineffective assistance of trial counsel and asked the court to appoint an interpreter to translate between Arabic, Mohammad's native language, and English at all hearings, and to assist postconviction counsel in the proceedings. After appointing an interpreter and conducting a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), the postconviction court denied the motion.

II. DISCUSSION

A. Ineffective Assistance of Counsel

¶9 In ***State v. Foy***, 206 Wis. 2d 629, 557 N.W.2d 494 (Ct. App. 1996), we explained:

> To succeed on a claim of ineffective assistance of counsel, [a defendant] must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. There is a strong presumption that the attorney has rendered effective assistance and made all significant decisions exercising reasonable professional judgment. In addition, [a defendant] must show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. Claims of ineffective assistance of counsel present mixed questions of law and fact. The trial court's findings of fact will not be disturbed unless clearly erroneous. However, the determinations of whether counsel's performance was deficient and whether the defendant was prejudiced are questions of law, which we review de novo.
>
> ….
>
> Deficient performance means that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment [to the United States Constitution]." In determining whether there was deficient performance, we make every effort to avoid relying on hindsight. We focus on counsel's perspective at

> the time of trial, and the burden is on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."

Id. at 497-98 (citations omitted). Because a defendant, to prevail on a claim of ineffective assistance of counsel, must establish both deficient performance and prejudice, we need not consider the prejudice prong if the defendant fails to prove that counsel's performance was deficient. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

1. Interpreter

¶10 Mohammad first contends that trial counsel was ineffective by ignoring and failing to advise the trial court of his repeated requests for an interpreter. He argues that counsel's conduct violated "both a constitutional and statutory right to know and understand the criminal proceedings brought against him." Additionally, he maintains that due to counsel's deficient performance, his "rights under both the United States and Wisconsin Constitutions were violated as to due process, the right to be informed of the nature and cause of the accusations, to be confronted with the witnesses against him and to have assistance of counsel."

¶11 Mohammad cites both ***State v. Neave***, 117 Wis. 2d 359, 344 N.W.2d 181 (1984), *overruled in part by* ***State v. Koch***, 175 Wis. 2d 684, 499 N.W.2d 152 (1993), and ***State v. Yang***, 201 Wis. 2d 725, 549 N.W.2d 769 (Ct. App. 1996), as supporting his contentions. In ***Neave***, our supreme court concluded:

> [D]ue regard for the right of a criminal defendant who does not understand English to the services of an interpreter requires that whenever a trial court is put on notice that the accused has a language difficulty, the court must make a factual determination of whether the language disability is

> sufficient to prevent the defendant from communicating with his attorney or reasonably understanding the English testimony at the preliminary hearing or trial. If the court determines that an interpreter is necessary, it must make certain that the defendant is aware that he has a right to an interpreter and that an interpreter will be provided for him if he cannot afford one. Any waiver of the right to an interpreter must be made voluntarily in open court on the record.

Neave, 344 N.W.2d at 188-89 (footnote omitted). WISCONSIN STAT. § 885.37 codifies this holding. *See* ***Yang***, 549 N.W.2d at 771. When a court "becomes aware that a criminal defendant's difficulty with English may impair his or her ability to communicate with counsel, to understand testimony in English, or to make himself or herself understood in English," it "has notice of a language difficulty within the meaning of § 885.37(1)(b)" and has "an obligation to make the factual determination on the need for an interpreter required under § 885.37(1)(b)." ***Id.*** at 772.

¶12 Since the right to an interpreter is triggered by an actual need for an interpreter, we must first review the postconviction court's factual finding that Mohammad did not need an interpreter. At the conclusion of the ***Machner*** hearing, the postconviction court stated:

> There is no doubt in my mind that Mr. Mohammad is probably more conversant in Arabic than he is in English. That is not the issue, however. The issue is whether or not he is conversant in English as well as Arabic, sufficient so that he, as a defendant, can assist his counsel in making sure that the defendant is properly represented.
>
> ….
>
> … I looked at some transcripts. On November 2nd, 1995, [trial counsel] Mr. Boyle explained that he had discussed with the defendant the defendant's right … to testify or not to testify, and that the defendant told Mr. Boyle that he did not want to testify. At that point Judge Wells interrogated the defendant …. All of the defendant's answers were in English. He agreed with what Mr. Boyle said. The trial judge then clearly explained the right of the

defendant, and the defendant understood fully his discussion with Mr. Boyle and that he elected not to testify. This is all in English.

….

… It was revealed at the sentencing … that the defendant had told the police, quote, "You got nothing on me," closed quote. That was not in Arabic, it was in English. The defendant then told the presentence investigation writer, somebody else must have started [the fire]. Maybe the two guys who were arguing in the store or a former manager who knows how to deactivate the fire alarm. He told that to the presentence writer in English, not Arabic. He also told that writer while on bail on the arson charge that he committed food stamp fraud, and as an explanation for that, the defendant said he was goodhearted and concerned for the woman who sold him stamps. That was in English, not Arabic. He also said that he never cheated nobody, but had debts all over. That was in English, not Arabic. He also told the PSI writer that his earnings at the store were around $35,000. Again in English.

… [I]t's sometimes the little things that trip people up.… [O]n page 16 of the transcript of the sentencing hearing, when … [trial counsel] Miss Boyle was arguing and mentioning what a great guy Mr. Mohammad was, she then mentioned how long he had been married. Right during her colloquy the defendant corrected her on how long he had been married. In other words, he understood everything that was being said. As soon as there was a mistake made, the defendant in English corrected that mistake.

Then on the bottom of page 20 of the sentencing transcript as the defendant's exercising his allocution rights.… There is no problem in speaking by the defendant in English during those allocution rights. Or with Judge Wells on the right to testify as I said before, or him talking to the two police officers on the scene or with the PSI writer. Probably just as important, with all the different people that were involved here, not one ever mentioned any difficulty in communicating with the defendant in English. If even one person had mentioned that, either to Mr. Boyle, Miss Boyle, the Judge, or anyone else, that would have been noted by somebody. It never occurred and the reason it didn't occur is because there never was a problem.

So I'm finding that there was in fact no need for an interpreter ….

¶13 The record reveals that on November 2, 1995, after the State rested its case, the trial court asked trial counsel, Gerald Boyle, if he had talked with Mohammad about his right to testify. Following Mr. Boyle's response, the trial court initiated this colloquy:

> THE COURT: … Mr. Mohammad, you've heard that explanation by your attorney, Mr. Boyle. Is that a correct statement of your discussion with Mr. Boyle and your decision in this case?
>
> DEFENDANT MOHAMMAD: Yes, sir.
>
> THE COURT: You understand that it is your decision whether to testify or not to testify; is that correct?
>
> DEFENDANT MOHAMMAD: Yes, sir.
>
> THE COURT: And you understand once you make that decision you can't write a letter to Mr. Boyle or to the court a month from now or a year from now, judge, I really would like to change my mind. Once you make that decision, it's done, and there's no room for change of decision. You understand that?
>
> DEFENDANT MOHAMMAD: Yes.
>
> THE COURT: Has anybody made any promises or threats to force you to take that position?
>
> DEFENDANT MOHAMMAD: No.
>
> THE COURT: And you understood fully that discussion that you had with Mr. Boyle; is that correct?
>
> DEFENDANT MOHAMMAD: Yes, sir.
>
> THE COURT: Mr. Mohammad, what is it that you'd like to do? Would you like to testify in this case or is it your decision not to testify?
>
> DEFENDANT MOHAMMAD: Not to testify.
>
> THE COURT: Okay.

¶14 The sentencing transcript reveals that when defense counsel, Bridget Boyle, said that Mohammad had been married for "approximately twenty years," Mohammad interjected, "Fifteen." The sentencing transcript also reflects that when the trial court asked Mohammad whether he would like to say anything prior to sentencing, Mohammad responded in English:

> Yes. I would like to thank the Courthouse for everything. I want to say one more time I don't know nothing about this crime. I swear to God I didn't do it. I know nothing about that. I would never jeopardize my wife's or my kids, family for something like that. I know I was in financial problem. That does not mean I have to do this to stay away from my children and my wife.
>
> I love my children and my wife so much, which would never make me do such a thing like that. God knows who did it and God says just to send me home. Thank you very much.

¶15 Based on the record, we conclude that the postconviction court's finding that Mohammad did not need an interpreter is not clearly erroneous. Mohammad therefore "cannot meet his burden of proving that trial counsel was deficient in not asking for an interpreter." *See* ***Yang***, 549 N.W.2d at 775.

2. Fulkerson Testimony

¶16 Mohammad next contends that trial counsel was ineffective by eliciting testimony from Dawn Fulkerson regarding prior bad acts, by failing to request that any portion of that testimony be struck, and by failing to request a curative jury instruction, pursuant to ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). During cross-examination, Mr. Boyle asked Fulkerson, "While you were an employee of [Milwaukee Super Foods] did you ever become aware of any break-ins to the store or the adjacent store; any part of that building …?" She answered:

> There were probably four to five. It was from the back of the building into the basement. We boarded that door …. I couldn't figure out how anybody was kicking in these two by fours.… Finally we decided to brick up the back door to the basement of that building to try to protect [the] store.… [W]e went out to Builders Square, bought all the cement bricks to do that, told [Mohammad] that they were all piled up in the back there and that next morning this would be done. That night there was a near explosion in that basemen[t]. The same type of apparatus had been set up only it was a baby bottle with a candle in it; gasoline

> poured all over the basement, a brand new red gas can just like in the incident in his store, and I think that's probably when I came to realize what had happened the first time only we didn't know it … until the second incident happened. So … we realized that the two by fours were being taken down off that door from the inside, not from the outside. We thought that … would have been very difficult for somebody to do … from the outside.
>
> ….
>
> This was in December of '94.

Fulkerson testified that prior to December 1994, there were at least four other break-ins into the basement. Her cross-examination testimony continued:

> A … It appeared that someone was breaking in the basement to sleep down there[]. Maybe … a street person; but after every break-in, we secured the door more and more and more until there were so many two by fours across that door we couldn't understand how they were able to kick it in from the outside.
>
> Q But the door you're talking about gets one into the basement, not … into [Mohammad's] store?
>
> A No. Right. It goes into the basement of that building. You can—there is a stairway in that basement that would lead up to his store.
>
> ….
>
> Q And it became clear to you that no matter what you tried to do to keep people from coming in the basement, somebody obviously was undoing what you were doing?
>
> A Right.
>
> Q From the inside?
>
> A Right.

¶17 During recross-examination, Fulkerson testified that although she never witnessed it, she believed that Mohammad was the person who repeatedly removed the two by fours. Recross-examination continued:

> Q He was going down, removing the fortifications so people could sleep in the basement you believe?
>
> A I believe that all of the attempts to … make it appear as if someone were sleeping in the basement were leading up

> to him actually blowing up the building and then us saying, well, we had a lot of break-ins ….
>
> Q Okay. You think that [Mohammad] attempted to set this fire?
>
> A Yes, I do.
>
> Q Did you believe that of the incident in December of 1994?
>
> A In December I did not believe that—I didn't even think of this until the incident in February.
>
> ….
>
> A … I liked and respected [Mohammad]. I had no reason whatsoever to suspect him.
>
> Q You are making an opinion?
>
> A Yes, I am.
>
> Q You're guessing at the truth of things?
>
> A Yes, I am.
>
> ….
>
> Q As much as you have your opinion how [Mohammad] was doing this, you have no idea as you sit here whether or not somebody else went down and removed those fortifications to allow entry into that place after it was closed, do you?
>
> A I think that anything is possible.

¶18 After the State rested, and after the defense advised that it would not be calling any witnesses, the trial court returned to an issue the State had raised earlier: whether a ***Whitty*** jury instruction would be appropriate. Both the State and the defense advised the court that they were not requesting such an instruction. The trial court agreed, commenting:

> [B]asically the defense position is, hey, look, Mr. Mohammad didn't start this fire and he sure didn't start that fire in December; and even though a witness has indicated that she thought that was the case, it may be that the jurors will find that her basis for that information, that analysis was inadequate; and if her basis for that decision was inadequate, then maybe her decision that Mr. Mohammad started this fire is also inadequately based or based on lack of common sense or understanding.

> So, my reaction is the jurors can do with that incident as they seem [sic] appropriate.

Mr. Boyle said, "I think the court has articulated the reasons as well as, if not better[] than I could have, but the long and the short of it is that I just don't think it's a ***Whitty*** matter."

¶19 At the ***Machner*** hearing, postconviction defense counsel questioned Mr. Boyle regarding his cross-examination of Fulkerson:

> Q You wanted to elicit the prior incidents that she testified to?
>
> A … I wanted to elicit the fact there has been obviously motive on the part of person or persons unknown to blow up that building that were not traceable or connected to Mr. … Mohammad.… Mr. Mohammad was not involved in any of those other situations that Fulkerson testified about, and I was anxious because of the dire problems that Mr. Mohammad had in his defense of trying to bring to the jury's attention that something else was going on out there that may very well have been … a basis for some doubt in what was otherwise an airtight case by the state against Mr. Mohammad. So I knew about them and I brought it out in cross[-]examination, but not under ***Whitty*** or prior bad acts evidence. I brought it out as defensive evidence to show that … it was very well possible that somebody else did those things that were attributed to Mr. Mohammad.
>
> ….
>
> Q Why didn't you object to any of her testimony and move that it be struck once you established that she was speculating?
>
> A Because I wanted it just the way it was, … because it worked to my advantage …. I'm the one who brought it out and I'm the one who wanted to show that this woman's opinions were so prejudicial against Mr. Mohammad that they had to be set aside. No one could have believed that based upon what she said, I wanted the jury to hear that and I also wanted the jury to hear that there were a person or persons unknown who had reasons and attempted to blow up that building. That's exactly what I wanted in that record and there was not going to be any moving to have anything stricken, I wanted it all in.
>
> Q So then this was a tactical decision on your part, is that right?

> A Absolutely it was a tactical decision. There wasn't [sic] many tactics out there that could be used, this is the only one we had.
>
> ….
>
> A I told you that I went into that trial to bring out that prior happening in December because I thought that any chance that Mr. Mohammad had based upon all of the bad evidence that was coming in about the explosion that took place that caused him to be arrested and charged and go to trial, that the only chance that he had was by bringing out this other information that other people other than he were engaging in conduct of trying to blow up that building.…
>
> Q I take it then that you didn't want the ***Whitty*** jury instruction … because of what you just testified.…
>
> A … There had been a prior happening, and I submitted to the jury that those person or persons unknown were the people who might have been involved in the explosion in Mr. Mohamm[a]d's store, and I tried to use as an example how one could come in that store, pour gasoline around the area where the gasoline was found, pour gasoline in the other area if Mr. Mohammad was busy at the cash register in another part of the store, that they could go undetected and they could set up the ignition for the explosion of that in spite of the fact that the gasoline ended right at the cashier [sic] where Mr. Mohammad was … working, and that the alarm was probably set about five minutes after the last drop of gasoline was dropped and the explosion took place within a few minutes after the door was closed up. So we had a very, very difficult case, and if there was going to be any doubt, it was going to be that it was done by somebody other than Mr. Mohammad and not at his urging.

¶20 The postconviction court subsequently commented on Fulkerson's testimony:

> Judge Wells ruled that it was not ***Whitty*** evidence and I 100 percent agree with him. ***Whitty***-type evidence is usually introduced by the district attorney's office in a criminal case to show that a defendant has acted in a similar fashion on prior occasions in order to show either plan, motive, identity, or the other items that are listed in that section of the Code of Evidence. Normally those kinds of pieces of evidence would not be permitted unless one of those exceptions applies.
>
> That wasn't what happened here. This was brought out by Mr. Boyle. And the reason he brought it out was

> because it seemed, after you read over the transcript, that unless the defense could show that someone else other than Mr. Mohammad might have done this dastardly deed, there is absolutely no way the jury was going to acquit Mr. Mohammad. The timing factor was too close for anyone else to have been involved. And so he brought out this evidence through Dawn Fulkerson that there was a fire that had occurred [a] couple of months earlier in December of 1994. To leave an inference to the jury that someone other than Mr. Mohammad, who apparently was not involved in the December 1994 incident, that someone else might have done this dastardly deed, including some homeless person. There was no other opportunity for Mr. Boyle with what he considered an airtight case and what I would agree with him on that. He had to leave some doubt in the mind of a jury and that's why this evidence came out. It's not ***Whitty*** evidence.… And it sure shows a tactical decision on the part of a highly experienced criminal defense lawyer in order to possibly get the jury thinking that someone other than Mr. Mohammad would have caused this explosion.
>
> He wasn't successful. That has nothing to do with whether he was effective or ineffective.…
>
> ….
>
> … I don't think there's any question that … the ***Whitty*** evidence is in fact not ***Whitty*** evidence and it was a tactical decision and a justifiable one on Mr. Boyle's part.

¶21 We conclude that the trial court's finding that Fulkerson's testimony was not ***Whitty***-type evidence was not clearly erroneous. We also conclude that the postconviction court correctly characterized counsel's questioning of Fulkerson as a reasonable strategic decision. *See* ***State v. Brewer***, 195 Wis. 2d 295, 536 N.W.2d 406, 409 (Ct. App. 1995) (We must uphold a strategic decision of trial counsel "as long as it is founded on rationality of fact and law."). Therefore, we conclude that trial counsel was not ineffective in declining to request: (1) that any portion of Fulkerson's testimony be struck; and (2) a jury instruction regarding her testimony.

3. Presentation of Defense Witnesses

¶22 Mohammad next contends that trial counsel was ineffective by ignoring his desire to call as witnesses two employees who were with him when he closed the store on the day of the arson, thus depriving him of his constitutional right to present his defense. He argues that "[t]hese witnesses were important to [him] given the fact that he returned to the store shortly after [being] notified by the alarm company, and was interviewed by police personnel who did not smell evidence of gasoline on him or in his car."

¶23 At the ***Machner*** hearing, Miss Boyle testified regarding why the two employees were not called as defense witnesses at trial:

> [T]hose two individuals would have said they left that store, that they went outside, that Mr. Mohammad came out of the store approximately two minutes later because he was setting the alarm.
>
> And then I don't know the specific time periods, but I believe it was about three or four minutes later, that's when the store exploded.
>
> The reason why we did not call them as witnesses is because they would have said they did not put the gasoline on the floor and they left before Mr. Mohammad.
>
> Therefore, it can be inferred that Mr. Mohammad being the last person out of the store also had enough time to put the gasoline down, set the alarm and leave the store.

Miss Boyle continued: "I specifically recall that one of the employees said that he [the employee] was the first one out. And he had to sit and wait in his car because his car was blocked between the other employee's car [sic] so he could not leave the area."

¶24 Also at the ***Machner*** hearing, Mr. Boyle testified regarding the decision not to call Mohammad's employees as witnesses:

> A It would have been absurd to have called either one of them.
>
> Q Did you fear that both of those witnesses, before the eyes of the jury, might have the tendency to point the finger at the defendant in this circumstantial case, leaving the jury to believe that the defendant did in fact commit this offense?
>
> A I knew that's what they would do, and therefore they were not going to be called no matter what.
>
> Q Did you also believe that … in the jury's eyes, these two witnesses may … appear to have been complicit in this attempt to burn down the defendant's grocery store?
>
> A Had I called either one of them, I would have notified the court that I think they should have entitlement to counsel prior to testifying because it looked to me they had some real problems suggesting that they didn't see gasoline poured and smell gasoline when they left the store with Mr. Mohammad.
>
> Q And isn't it a fact that—
>
> A Or I'm sorry, they didn't leave with him, they left right before him.
>
> ….
>
> A Besides the fact that one of them had a prior and the other one had, I don't know if it was the same one who testified at the preliminary, they weren't going to be called whether they had a clean record or not because they would have so incriminated the defendant that they would have been—I would have been ineffective had I called them.

¶25 Denying Mohammad's postconviction motion, the postconviction court explained:

> The biggest problem that the defendant had in this case was … testimony that he left around 9 o'clock. Bridget Boyle testified that the two men who were with the defendant at the time he closed, one of them was sitting out in a car and had left at least five minutes earlier than the defendant.
>
> On the other [hand], the interview that [the defense investigator] had with that other witness, and I believe he's the same one who testified at the preliminary hearing, that

he had left two minutes before the defendant. That would have been more than sufficient time for someone in the position of Mr. Mohammad to have had the candle set up in the bleach bottle and to distribute the gasoline from there over to the place where the alarm was going to be set, near the counter.

Mr. Evans from the alarm company testified that the alarm was set at 9:06, and the 911 call was testified by someone else was at 9:11. It was only five minutes and obviously less time than that for the explosion that occurred. The door was locked, there was no other signs [sic] of entry to that building. There is no question that the explosion occurred inside the store and blew the windows and glass outward.

… The timing was so close, there was no one other than the defendant who could have caused this explosion. The police and fire were dispatched at 9:14, three minutes after 911 was called.… So with the alarm going off from being set at 9:06, and the explosion occurring within minutes thereafter, and the defendant being the last one to leave the store, it was inescapable that no one other than the defendant could have caused this.

….

… [T]he decision not to call those two employees who left the store just prior to Mr. Mohammad was … a tactical decision on Mr. Boyle's part and was probably the correct one.

Now I looked at the preliminary hearing examination transcript … because one of those two persons did in fact testify. And basically he said he left at 9 o'clock with Mr. Mohammad. And he said leaving with somebody at 9 o'clock does not necessarily mean the two of you walked out the door together. And if he left at 9 o'clock or shortly before 9 o'clock as he indicated and the alarm was set at 9:06, that meant that he was outside the store for five minutes, six minutes prior to Mr. Mohammad coming out.… [Miss Boyle] was asked why neither man was called by the defense. They were not, why not. They said they were outside—went outside and two minutes later defendant came out. It could be inferred that defendant put the gasoline down and then set the fire, then he set the alarm and then came out. It also said the other one, the other guy was sitting in his car waiting. So that would have just put the nail in the coffin as far as Mr. Mohammad is concerned if in fact Mr. Boyle had in fact called that one man. With their not being called, there's an inference that

> the defendant might not have been involved. With that testimony, he sure as heck would have been convicted.

¶26 We conclude that the postconviction court's finding, that trial counsel's decision not to call the two witnesses was a reasonable strategic decision, was not clearly erroneous. Based on the record, we also conclude that Mohammad failed to show that counsel's performance was deficient in this regard.

4. Presentence Report

¶27 Mohammad also contends that trial counsel was ineffective for failing to review the presentence investigation report with him. He argues that there were errors in the report, that trial counsel failed to call the court's attention to these errors, and that the court relied, in part, on the erroneous information when sentencing him.

¶28 The sentencing transcript reveals that in response to the trial court's inquiry regarding whether the presentence report was accurate, both the prosecutor and defense counsel disclaimed knowledge of any error. The trial court briefly referred to the report when articulating its sentencing rationale:

> Looking at the presentence report, part of my conclusions are that the defendant may have been motivated for improper activity here because of loss of, of course, or maybe a dwindling income from his place. But it also looks to me like a person who incorrectly used monies for such things as gambling and drugs, and may have saw [sic] a profit motive here or a benefit of taking care of some of his debt and taxes by engaging in the activity that he did.

¶29 At the ***Machner*** hearing, Miss Boyle testified that she had reviewed the presentence report with Mohammad. She stated that she did not recall specifically how the review was conducted, but that her usual procedure was to read the report, word for word, to the defendant. She further testified:

> Q Did [Mohammad] raise any questions with you about the content of that report?
>
> A Not that I recall.
>
> Q Did he ever become irritated about the presentence report or upset about its content?
>
> A Not that I recall.
>
> Q Did Mr. Mohammad as you read that report to him make any comments about corrections or things that were in the report that were not correct?
>
> A As far as I can recall, no.
>
> Q Did he ask you any questions about the content of the report?
>
> A I don't recall.

¶30 The defendant's brother, Nael Mohammad, also testified at the ***Machner*** hearing:

> Q You at some point in time became aware of a presentence report that was written for your brother?
>
> A Right.
>
> Q And that presentence report quotes an interview between the presentence writer and yourself?
>
> A Yes.
>
> Q Did a presentence writer ever contact you?
>
> A Never.
>
> ….
>
> Q Did you at some time review that presentence report?
>
> A No.
>
> Q But it's your testimony you never talked to the presentence writer?
>
> A Never whatsoever talked to anybody about what happened. No one ever talked to me about [the] case. None whatsoever. No police officers, no law enforcement, no one, no parole agent, no one.

¶31 Although the trial court made no explicit credibility finding, its conclusion implies acceptance of trial counsel's account. *See* ***Englewood Community Apartments Ltd. Partnership v. Alexander Grant & Co.***, 119 Wis. 2d

34, 349 N.W.2d 716, 719 n.3 (Ct. App. 1984). Accordingly, we conclude that the trial court findings related to the report are not clearly erroneous. Consequently, we also conclude that Mohammad has again failed to establish that counsel was ineffective.

B. Sufficiency of the Evidence

¶32 Finally, Mohammad contends that the evidence was insufficient to sustain his convictions. He asserts that "[t]he trial record is void of any direct evidence that [he] set up the premises for the purposes of arson or recklessly endangered safety."

¶33 In ***State v. Johannes***, 229 Wis. 2d 215, 598 N.W.2d 299 (Ct. App. 1999), we reiterated:

> Our review for sufficiency of the evidence supporting a criminal conviction is limited. It is the State's burden to prove the elements of each allegation beyond a reasonable doubt. We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." We do not substitute our judgment for the jury's. The jury determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from the evidence. Our review is the same whether the evidence is direct or circumstantial. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn a verdict even if we believe that the trier of fact should not have found guilt based on the evidence before it.

Id. at 303 (citations omitted). Based on the trial record, as discussed at length in our analysis of Mohammad's ineffective assistance of counsel claims, we conclude that the evidence was sufficient to support Mohammad's convictions.

By the Court.—Judgments and order affirmed.

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