COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2016-CRNM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ORZELL P. GRINNAGE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Orzell Grinnage appeals judgments entered upon a jury verdict convicting him of one count of robbery with use of force, one count of robbery with use of force as party to a crime, and two counts of fraudulent use of a credit card, party to a crime. He also appeals an order denying postconviction relief. He received a six-year prison sentence for one count of robbery and, for the

second robbery count, sentence was withheld and he received ten years probation consecutive to the prison sentence. For the remaining counts, sentence was withheld and he received two probation terms of three years each to be served concurrently with one another and with count two. Appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Grinnage has been provided a copy of the report and has filed a response. After our independent review of the record, we affirm the judgment.

The no merit report discusses four potential issues: (1) the sufficiency of the evidence; (2) whether Grinnage was entitled to a mistrial; (3) whether the trial court erroneously exercised its sentencing discretion; and (4) whether Grinnage received ineffective assistance of trial counsel.

We construe Grinnage's response to raise the following issues: (1) the sufficiency of the evidence; (2) the veracity of witnesses at trial; (3) ineffective assistance of trial counsel for lack of adequate investigation; and (4) ineffective assistance of appellate counsel. He asserts that his life and freedom are not wholly frivolous.

The evidence adduced at trial included the following testimony. Patricia Mocco testified that in the late afternoon of January 23, 1997, as she entered a mall, an African-American male grabbed her purse and "ripped it off [her] shoulder." She chased him and saw him get into a car that was waiting for him. She testified that it was getting dark and she saw only one other person in the car, the driver, whom she described as having African-American features. Mocco was able to write down the license plate number. Her purse was recovered later that evening in an apartment building parking lot.

Jean Davis testified that after 6 p.m. on January 23, 1997, a white male offered to help her put her purchases in her car outside K-Mart and grabbed her purse. She held on, and he ran off with only the strap to her purse.

Curtis Lyon testified at trial that he had been convicted of a crime six times, four of which arose out of the events for which Grinnage was being tried. He testified that he entered into a plea agreement that required that he testify truthfully. He testified that on January 23, he went to Grinnage's home and discussed with Grinnage and Lamont Booker, another friend, a purse snatching plan. Lyon testified that after driving around, he let Grinnage out and a few minutes later Grinnage jumped in the car with a purse. Grinnage found an ATM credit card and threw the purse out into the parking lot of an apartment complex. They tried to use the ATM card at two places, but were unsuccessful.

Lyon testified that he then drove to K-Mart and attempted to snatch a woman's purse, but got away only with the strap. Lyons returned and entered the waiting car, and Grinnage drove away. They were followed by a police officer, who pulled them over. Lyons was arrested; Grinnage and Booker ran.

Officer Sally Newman testified that on January 23 at 5:24 p.m., she received a report of a purse snatching in the mall area. The suspect vehicle was a white car with license plates starting LZE with one white and two black males. At approximately 6:55 p.m. she received another call about an attempted purse snatching at the K-Mart. She drove in the direction of the K-Mart and saw a vehicle matching the description. She testified that she stopped the vehicle and the two black occupants took off running. She pursued the one who had been driving, later identified as Grinnage, and found him lying under a big spruce tree trying to hide. He was taken into custody and transported to jail.

Joseph Dunham, a police detective, testified that in response to a call from Grinnage on January 25, he went over to the jail to speak to Grinnage and advised him of his rights. Grinnage told Dunham that he and Lyons and Booker went to K-Mart because Lyons said that he wanted to get something. Grinnage waited in the car, and the next thing he knew Lyons came back to the car stating that he had tried to steal a purse. Grinnage told Dunham that the reason he ran was because he did not have driving privileges and was on probation.

Dorothy Beaston testified that Grinnage called her and asked her to lie for him. He asked her to say that she called him at his house at 4:15 p.m. on January 23. Beaston claims that she never actually made the call, but at Grinnage's request had told an investigator that she did. The purported call was apparently to support an alibi that Grinnage was at home during the mall robbery.

Grinnage filed a notice of alibi, claiming that he was at home at the time of the Mocco robbery. His defense to the charge involving the purse snatching at K-Mart was that he did not know what Lyons had in mind when they went to K-Mart and was not involved in any purse snatching.

Kristen Grinnage, Grinnage's wife, testified on his behalf. She stated that on January 23, she was at home with Grinnage and their baby and at 6 p.m. Grinnage walked to the store to pick up beer. Although Grinnage told her that he was going to be right back, he did not return home that night. Kristen's girlfriend testified to the effect that Kristen called that evening around 6 p.m. and told her that Grinnage had just left for the store.

Lamont Booker testified that he had been convicted of a crime eleven times; that he entered into plea negotiations that required him to provide truthful testimony in Grinnage's prosecution. He testified that after drinking at

Grinnage's home, he, Lyons and Grinnage went to the mall, that Grinnage came running back to the car with a purse containing an ATM card, and that Grinnage unsuccessfully attempted to use the card at two different locations.

The jury returned a guilty verdict. Grinnage brought a motion alleging ineffective assistance of counsel. After an evidentiary hearing, the trial court denied his postconviction motion.

Based upon our independent review, we conclude that a challenge to the sufficiency of the evidence would lack arguable merit. The no merit report correctly describes the record and engages in an appropriate analysis of this issue. An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value 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. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

Robbery by threat of force is committed by one who, with intent to steal, takes property from a person in possession by using force against the person with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking. *See* § 943.32(1)(a), STATS. Fraudulent use of a financial transaction card is committed by one who, with intent to defraud, uses a financial transaction card that is stolen for the purpose of obtaining money, services, or anything of value. *See* § 943.41(5)(a), STATS. Based upon the testimony presented, we are satisfied that a jury could conclude beyond a reasonable doubt that the elements of these offenses were proven.

Grinnage's response primarily attacks the veracity of the State's witnesses and focuses on inconsistencies in their testimony. He argues that there

are discrepancies in the witnesses' testimonies and that witnesses were lying. Grinnage's contentions lack arguable merit because it "is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts." ***Poellinger,*** 153 Wis.2d at 506, 451 N.W.2d at 757. Grinnage further argues that his accomplices testified falsely as part of their plea negotiations to obtain concessions from the State. The record, however, does not disclose any support for this claim.

Next, we conclude that the record discloses no arguable merit with respect to Grinnage's motion for mistrial. The no merit report accurately describes the record and correctly analyzes this issue. Grinnage's counsel moved for a mistrial because the court refused her offer to testify that she saw a pair of work-type pants in Grinnage's locker at jail. She contended that her testimony was material to corroborate Grinnage's claim that he was not wearing jogging or sweatpants at the time of the offenses and arrest as described by a victim and the jailer who booked him.

The trial court pointed out that counsel was not a witness to whether the work pants were on Grinnage at the time of arrest and booking. Because several months had elapsed since the time of the booking, the trial court concluded that the presence of an extra pair of pants in the jail locker would be immaterial. He denied counsel's motion to permit her to testify and denied her motion for a mistrial. The trial court properly reasoned that because there was no showing that the pants were with Grinnage at the time of his arrest and booking, it was immaterial that they showed up at much later date. Because the record discloses a reasonable exercise of discretion, it fails to reveal an issue of arguable merit. *Cf.* ***State v. Pankow,*** 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988).

Next, the record discloses no arguable merit to a challenge to sentencing. The no merit report accurately describes the record and correctly analyzes this issue. The sentence was within the range of permissible penalties. A penalty enhancer was applied to each of the four counts due to habitual criminality under § 939.62(1)(a) and (b), STATS. The trial court considered Grinnage's prior record, the seriousness of the offenses, his rehabilitative needs, and protection of the public. The court also considered his work habits and family relationships. These are appropriate factors. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984).

Next, the record reveals no arguable merit to a challenge based upon ineffective assistance of trial counsel. We conclude that the no merit report correctly describes the record and that its analysis is correct. In his response, Grinnage argues that no one bothered to do police investigation work, like checking fingerprints on the cards or purse. He also rhetorically asks why there were no videotaped pictures of him attempting to use the cards. We interpret his argument as a challenge to the effective assistance of trial counsel based upon inadequate investigation.

Ineffective assistance of counsel results when counsel's conduct or inaction constituted deficient performance and that deficiency caused the defendant prejudice. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). Deficient performance results when counsel's representation falls below an objective standard of reasonableness. *See* ***id.*** at 687-88. Prejudice has occurred when counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id***. at 687. To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *See* ***State***

v. Johnson, 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *See* ***id***. Whether that conduct constitutes constitutionally deficient representation or prejudice is an issue this court reviews de novo. *See* ***id***. at 127-28, 449 N.W.2d at 848.

The record, however, fails to disclose that evidence of latent fingerprints and a videotape existed. Absent any suggestion that this evidence existed and would have been helpful, there is no indication of prejudice. Without an indication of prejudice, we need not address the performance prong of the ineffective assistance test. *See* ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993). We note that at his postconviction hearing, with respect to "information gathering," Grinnage testified: "I was satisfied. I felt she was preparing, you know, best she could and for the best that she had to work with. I mean, I'm not an attorney, but I feel she was taking every step available to her to prepare a defense." We conclude that the record fails to reveal arguable merit to a claim that counsel was ineffective for failing to investigate alleged latent fingerprints or videotapes.

Finally, Grinnage's complaints with respect to postconviction and appellate counsel are not properly before us. A claim of ineffective assistance of appellate counsel is properly raised by a petition for a writ of habeas corpus in the appellate court that heard the defendant's direct appeal. *See* ***State v. Knight***, 168 Wis.2d 509, 512-13, 484 N.W.2d 540, 541 (1992). However, where the alleged deficiencies relate to action or inaction by postconviction counsel, the ineffective assistance claim should be raised in the circuit court either by a petition for a writ of habeas corpus or a motion under § 974.06, STATS. *See* ***State ex rel. Smally v. Morgan,*** 211 Wis.2d 795, 797-98, 565 N.W.2d 805, 807 (Ct. App.) *review*

dismissed, 211 Wis.2d 535, 568 N.W.2d 301 (1997). In any event, this direct appeal is not the appropriate mechanism for raising the issues of ineffective assistance of postconviction and appellate counsel.

The record discloses no other potential issues of arguable merit. The judgments and order are therefore affirmed. Attorney Mark L. Goodman is relieved of further representing Grinnage is this matter.

By the Court.—Judgments and order affirmed.

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