COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2000

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

No. 99-0761-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Paul Johnson appeals from a judgment of conviction of party to the crime of armed robbery while masked as a repeat offender. He also appeals from an order denying his motion for postconviction relief based on alleged ineffective assistance of trial counsel. We conclude that

trial counsel was not constitutionally deficient and affirm the judgment and the order.

¶2 At 11:30 p.m. on October 27,1994, the Economy Inn in Fond du Lac was robbed by two men who concealed their faces and hair. One man displayed a gun and ordered the night clerk to give up the money or he would be shot. Cash in the amount of $189 was taken.

¶3 On his way to the hotel in response to the clerk's report, Officer Doug Reim of the Fond du Lac police department saw a vehicle coming from the direction of the hotel with three men in it. As Reim continued on to the hotel, he broadcasted a description of the vehicle and shortly after another officer found the vehicle pulled over to the side of the road. Michael Taylor and Philip Johnson, Johnson's nephew, were the only occupants of the car. The car was owned by a female who had loaned the car to Paul Johnson earlier in the evening. A right-hand black glove, air pistol, black ski jacket, dark vest, knit cap, bandana and $100 cash were among the items recovered from the car. Outside the hotel a matching left-hand black glove and black baseball hat were found.

¶4 At trial, police officers testified about statements made by witnesses early in the investigation. This included Philip Johnson's statement to Reim upon being stopped shortly after the robbery that a man had just tried to "carjack" the vehicle and left the gun behind when the man fled upon seeing the police approach. Another officer testified that Michael Anthony said Michael Taylor had called him earlier in the evening on October 27, 1994, and said, "We're going to do that 211 tonight." Anthony knew what Taylor was talking about because Johnson had tried to recruit Anthony to do the hotel robbery earlier that summer. Anthony also told police that Johnson discussed the details of the robbery several

days after it happened. Statements by several other witnesses which implicated Johnson in the robbery were also brought out in the officers' testimony. These included statements that Johnson was out of breath and looking to borrow a coat right after the robbery occurred and that he later told people, "If the police come, you don't know nothin."

¶5 Johnson sought postconviction relief on the grounds that his trial counsel was ineffective for not objecting to and precluding the use of what he characterizes as hearsay evidence. The trial court conducted an evidentiary hearing on Johnson's postconviction motion. At the conclusion of the evidentiary hearing, the trial court noted that the motion for postconviction relief should have been denied without a hearing because the motion failed to contain sufficient factual allegations which, if true, would entitle Johnson to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Had the trial court made that discretionary ruling, we would have affirmed it on appeal because we also conclude that the postconviction motion is insufficient to require an evidentiary hearing. *See* ***State v. Tatum***, 191 Wis. 2d 547, 551, 530 N.W.2d 407 (Ct. App. 1995) (we review a trial court's denial of an evidentiary hearing de novo). However, we address Johnson's claim on the merits, as the trial court did.

¶6 "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). What the attorney did or did not do are questions of historical or evidentiary fact that we will not upset on appeal unless they are clearly erroneous. *See* ***State v. Byrge***, 225 Wis. 2d 702, 719, 594 N.W.2d 388 (Ct. App. 1999). The ultimate determination of

whether the attorney's conduct resulted in a violation of the right to effective assistance presents a legal question which we review de novo. *See* ***id.***

¶7 Johnson contends that his trial attorney failed to object or respond to hearsay evidence utilized by the State. Reim's testimony about Phillip Johnson's story of the attempted carjacking was not hearsay evidence because it was not offered to prove the truth of the matter asserted. *See* WIS. STAT. § 908.01(3) (1997-98).[1] The statements of numerous witnesses were admissible as prior inconsistent statements because these witnesses were uncooperative at trial and testified either that the statements were not made or were knowingly false when made. *See* ***State v. Whiting***, 136 Wis. 2d 400, 420-21, 402 N.W.2d 723 (Ct. App. 1987); WIS. STAT. § 972.09. A confrontation objection to the use of these statements would not have been successful because the witnesses were present at trial. *See* ***Vogel v. State***, 96 Wis. 2d 372, 388-90, 291 N.W.2d 838 (1980). Statements attributed to Johnson or Taylor were made in furtherance of the conspiracy and therefore are admissible regardless of a potential hearsay objection. Finally, to the extent Johnson utilized Anthony's statement about Taylor's involvement in the robbery, the remainder of his statement was admissible under the rule of completeness. *See* ***State v. Eugenio***, 219 Wis. 2d 391, 411-13, 579 N.W.2d 642 (1998). Because objections to the admission of the evidence would have been unsuccessful, trial counsel is not deficient for not making the objections. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

¶8 Trial counsel indicated that he did not object to admission of the statement Phillip Johnson made about the attempted carjacking because he anticipated that Phillip would testify and the outrageousness of the story could lead the jury to conclude that none of what Phillip said was truthful. It was counsel's strategy to have all the State's citizen witnesses appear to be liars so that not even what they had said to the police would be believed. A court considering the performance prong of the test must assess the reasonableness of trial counsel's performance under the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***State v. Marcum***, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶9 Johnson complains that trial counsel did not ask for a limiting instruction with respect to the evidence of the witnesses' prior statements. He also suggests that a curative instruction should have been requested once it became known that Phillip Johnson and Taylor would not testify at trial.

¶10 Counsel indicated that he did not wish to call attention to certain statements by requesting a special instruction. The desire not to emphasize certain portions of evidence is reasonable strategy. *Cf.* ***Watson v. State***, 64 Wis. 2d 264, 279, 219 N.W.2d 398 (1974) (recognizing that defense counsel faces a difficult choice when considering a corrective instruction which again calls to the jury's attention a potentially prejudicial circumstance); ***State v. Williquette***, 180 Wis. 2d 589, 608, 510 N.W.2d 708 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 677, 526 N.W.2d 144 (1995) (if counsel considered the pros and cons of an instruction which highlights some feature of the trial and rejects its use, counsel's performance is not ineffective). A limiting instruction may also have undermined counsel's strategy

of having the State's witnesses appear to be liars. Counsel need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992), *cert. denied*, 510 U.S. 830 (1993). Finally, Johnson does not identify what type of limiting or curative instruction would have been appropriate or why the instructions given were inadequate. He has not demonstrated prejudice from counsel's failure to request special instructions.

¶11 The only other specific claim of ineffective counsel that can be gleaned from Johnson's brief is that counsel failed to call certain witnesses who would have attacked the credibility of the persons who made statements that Johnson was out of breath and looking to borrow a coat after the robbery and that he had taken a coat from a certain person. Counsel indicated that his investigator was unable to locate one such proposed witness. An adequate offer of proof that the proposed witnesses existed and what their testimony would be was not made. A defendant who alleges that his or her attorney was deficient for failing to call a witness must demonstrate what that witness would have testified about. *See* ***Byrge***, 225 Wis. 2d at 724; ***State v. O'Brien***, 214 Wis. 2d 328, 349, 572 N.W.2d 870 (Ct. App. 1997), *aff'd*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999).

¶12 Further, Johnson has not established that he was prejudiced by the absence of additional impeaching evidence of the State's witnesses. To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). A reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. *See* ***id.*** Even if evidence that Johnson was out of breath and looking for a coat after the robbery was impeached, other sufficient circumstantial evidence

existed. Our confidence is not undermined by counsel's failure to call the witnesses Johnson identified.

By the Court.—Judgment and order affirmed.

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