COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2000

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

Nos. 99-1282-CR, 99-1283-CR, 99-1284-CR, 99-1285-CR, 99-1286-CR & 99-1287-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY A. HUCK,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Jeffrey A. Huck appeals from judgments entered after a six-member jury found him guilty of eleven counts of violating a domestic abuse injunction, contrary to WIS. STAT. § 813.12(8), two counts of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

criminal damage to property, contrary to WIS. STAT. § 943.01, and six counts of bail jumping, contrary to WIS. STAT. § 946.49(1)(a).[2] He also appeals from orders denying his postconviction motions. Huck claims that: (1) he should be afforded a new trial with a twelve-person jury panel; (2) his trial counsel was ineffective for failing to object to the six-person jury panel; and (3) the trial court erroneously exercised its discretion when it excluded evidence proffered by Huck that the victim was fabricating the charges in response to his accusations that she was forging his name on checks he was receiving. Because Huck failed to object to the six-member jury panel, because he has failed to demonstrate that he received ineffective assistance of trial counsel, and because the trial court did not erroneously exercise its discretion in excluding the proffered fabrication evidence, this court affirms.

I. BACKGROUND

¶2 On September 4, 1997, Kathy Berlin secured a domestic abuse injunction against Huck, her former boyfriend. Huck was charged in six separate cases with violating the injunction eleven times. He was also charged with two counts of criminal damage to property and six counts of bail jumping.

¶3 The trial occurred in March 1998, and a six-person jury convicted Huck on all nineteen counts. He was sentenced to 117 months in prison in five of the six cases and a sentence of fifty-four months in prison was imposed and stayed in the sixth case, with five years probation. Huck filed postconviction motions in each case alleging that he should be re-tried by a twelve-person jury panel, and

[2] The charges stemmed from six separate cases which were consolidated for trial. The cases were similarly consolidated for appellate review.

that he received ineffective assistance of counsel because trial counsel failed to request a twelve-person jury panel. The trial court conducted an evidentiary hearing on the motions, which were subsequently denied. Huck now appeals.

II. DISCUSSION

A. Twelve-person Jury Panel Issue.

¶4 Huck argues that he should be given a new trial before a twelve-person jury panel because the supreme court found WIS. STAT. § 756.096(3)(am) (1995-96), which required a jury in a misdemeanor case to consist of six persons, unconstitutional in ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998). This court, however, in reviewing the identical issue in ***State v. Zivcic***, 229 Wis. 2d 119, 598 N.W.2d 565 (Ct. App. 1999) determined that where a defendant failed to raise the issue during his first trial, the ***Hansford*** decision will not be applied retroactively. *See* ***id.***, 229 Wis. 2d at 124-26. Huck concedes that ***Zivcic*** disposes of this issue, but he raises it merely to preserve the issue for review in the supreme court. Accordingly, this court concludes that this issue is controlled by this court's decision in ***Zivcic***, and that Huck, like Zivcic, is not entitled to a new trial with a twelve-person jury because he failed to raise the issue during his first trial.

B. Ineffective Assistance of Trial Counsel.

¶5 Huck next argues that his trial counsel was ineffective for failing to raise the twelve-person jury panel issue. He points out that at the time of his first trial, trial counsel was aware that the ***Hansford*** case was pending in the supreme court and that there was a chance the supreme court would find the six-person jury statute in misdemeanor cases unconstitutional. He argues that counsel should have researched the issue, discussed it with him and raised it before the first trial to

preserve the issue. The trial court rejected Huck's claim on the basis that Huck could not prove the prejudice prong of the ***Strickland*** test. This court also rejects Huck's ineffective assistance claim, albeit on different grounds.

¶6 A defendant alleging ineffective assistance of trial counsel must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The first prong of ***Strickland*** requires that the defendant show that counsel's performance was deficient. ***Id.***, 466 U.S. at 687. This demonstration must be accomplished against the "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The second ***Strickland*** prong requires that the defendant show that counsel's errors were serious enough to render the resulting conviction unreliable. *See* ***Strickland***, 466 U.S. at 687. In other words, in order to prove prejudice, Huck 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. In assessing Huck's claim that his counsel was ineffective, we need not address both the deficient-performance and prejudice components if Huck cannot make a sufficient showing on one. *See* ***id.*** at 697.

¶7 In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***Johnson***, 153 Wis. 2d at 127-28.

¶8 Trial counsel testified that she did not raise the twelve-person jury panel issue because the law at the time required the six-person jury panel, and that the statute is afforded the presumption of constitutionality. Huck argues that because

counsel knew the supreme court was considering the issue, and because at least one other defense attorney was routinely raising the issue, his trial counsel provided deficient performance by failing to research and raise the issue. This court cannot agree.

¶9 The statute authorizing a six-person jury panel at the time Huck was tried was good law, and counsel's failure to raise the issue, therefore, did not constitute deficient performance. *See* ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Because this court has concluded that trial counsel's conduct was not deficient, this court need not even reach the prejudice prong of the ineffective assistance test.

C. Evidentiary Ruling.

¶10 Finally, Huck complains that his right to present a defense was hindered when the trial court erroneously refused to admit evidence that the victim was accused of forgery, which led to her "fabricated" allegations in this case. The trial court excluded the evidence under WIS. STAT. § 904.03, citing concerns that admission of this evidence would be a waste of time and cause undue delay. The trial court also questioned the relevance and trustworthiness of the documents being proffered. This court cannot conclude that the trial court erroneously exercised its discretion in excluding the proffered evidence.

¶11 This court reviews an evidentiary ruling under the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). This court will not overturn an evidentiary ruling if the trial court considered the pertinent facts, applied the proper law and reached a reasonable conclusion.

¶12 Huck wanted to introduce documents and other evidence which would have allegedly shown that the victim forged his name on checks and kept the money. Huck said that the evidence would show that he confronted the victim about these illegal activities and the confrontation caused the victim to fabricate the charges against him. The trial court reviewed the proffered evidence and ruled in pertinent part:

> [T]o allow a trial in a case where Mr. Huck is charged with essentially nineteen counts … to allow … documentary trial on issues related to his financial records and those of the complaining witness would not only cause considerations of undue delay, a waste of time, but … many of the statements made in the written documents and on the record are irrelevant and attenuating, and that in the first instance, the Court would have to be worried about the trustworthiness of what's being offered.
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> The premise is that he was incapable of turning her in for forgery after he discovered the alleged forgery, and before the first event charged against him in this case on September 6 of '97, the state has offered … that he was on the premises in violation of an injunction when the officers arrived, and for example, the complaining witness was not even present. How could bank records indicate a motive or intent on her part to cause him to be in a place that he was court ordered to stay away from? I don't see the connection.
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> ….
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> On this record … and the defense offer that he has evidence that she was moved to create crimes against him of the type that's alleged in this case in order to continue her forgeries against him … the Court finds … even if … material, [the evidence] is speculative and not trustworthy on the record as presented.

The trial court's ruling certainly demonstrates that the pertinent facts were considered, the proper law was applied and a reasonable conclusion was reached. Accordingly, this court cannot conclude that exclusion of the proffered evidence constituted an erroneous exercise of discretion. Further, a defendant's

constitutional right to present a defense does not entitle him to present evidence that is irrelevant. *See* ***Davis v. Alaska***, 315 U.S. 308 (1974). Here, the trial court found the evidence to be irrelevant. This court agrees with the trial court's analysis.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.