COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2000

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

No. 99-1833-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL A. TURNER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Michael A. Turner appeals from a judgment of conviction as a habitual criminal of possession of burglarious tools and four counts of burglary. Turner's appellate counsel has filed a no merit report pursuant to WIS. STAT. RULE 809.32 (1997-98),[1] and ***Anders v. California***, 386 U.S. 738

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

(1967). Turner has filed a lengthy response.[2] Upon consideration of the report, Turner's response and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

¶2 Turner was charged with entering four homes without permission. In the early morning of August 26, 1996, two households reported that a man was discovered in the household. The man fled the homes upon being confronted with the rousing occupants. The man was noted to be wearing white shorts and a white shirt.

¶3 Turner was taken into custody in the vicinity of the homes. Turner had been observed throwing something as officers approached. A crowbar was recovered from the area where Turner had tossed an object. An unlocked car, with the keys in the ignition, was also found in the vicinity. A power cord was hanging out of the trunk. Turner's social security card and other identification were found in the car's trunk along with a purse and other items taken from one of the reporting households. A purse belonging to another person was discovered and when the owner was contacted she reported the purse stolen from its place on the kitchen table. The owner also reported that earlier that same morning she had been awakened by her dog barking; she got up to discover her front door ajar. Savings bonds belonging to yet another household were recovered from the trunk. A broken window was discovered at the home of the bond owners.

[2] Turner has also filed a motion to supplement the record with the transcripts of the proceedings in Racine county case number 96-CM-1941 and a motion seeking a remand for the purpose of conducting a hearing on his claim of ineffective assistance of trial counsel. Our disposition of this appeal results in the denial of these pending motions.

¶4 Shortly after his apprehension, Turner was shown to one homeowner who identified him as presenting the right build, the right race and the right clothing she observed in her home. Another homeowner observed Turner in police custody just around the corner from his house. He indicated that Turner was the intruder based on his physical build and clothing.

¶5 The jury found Turner guilty of all counts charged. Turner was sentenced to a total of seventy-two years in prison.

¶6 The no merit report first addresses whether the evidence was sufficient to support the verdict. Turner questions the strength of the evidence in this case because there is no "proven nexus" between himself and the bounty discovered in the car. But the absence of direct evidence that Turner was in possession of the burglarious tools, the bounty and the car is not fatal. This is a circumstantial evidence case. The evidence was sufficient to permit the jury to infer Turner's possession.

¶7 ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990), teaches that the standard of review when the defendant challenges the sufficiency of the evidence to support a conviction is the same whether it is a direct or circumstantial evidence case.[3] Thus, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. *See* ***id.*** at 507-08. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See* ***id.*** at 508.

[3] In ***State v. Poellinger***, 153 Wis. 2d 493, 505, 451 N.W.2d 752 (1990), the court acknowledged that previous cases had mistakenly stated that a conviction based on circumstantial evidence is sustainable only if the evidence is strong enough to exclude to a moral certainty every reasonable hypothesis of innocence. Turner's reliance on this phraseology is misplaced.

The record here establishes that the evidence, and the reasonable inferences drawn from the evidence by the jury, is sufficient. There is no arguable merit to a challenge to the sufficiency of the evidence.

¶8 The no merit report includes a lengthy examination of whether Turner was denied the effective assistance of counsel. Turner faults the report for the lack of case law citation in the discussion and claims that the issue is therefore waived. The standards for a claim of ineffective assistance of trial counsel are well-known to this court. *See* ***State v. Byrge***, 225 Wis. 2d 702, 718, 594 N.W.2d 388 (Ct. App. 1999) (defendant must show deficient performance and prejudice). The lack of citation in the no merit report, even if deemed inadequate, is not determinative of whether the issue lacks merit.

¶9 Generally, the lack of a ***Machner***[4] hearing prevents our review of a claim of ineffective assistance of trial counsel. *See* ***State v. Curtis***, 218 Wis. 2d 550, 555, 582 N.W.2d 409 (Ct. App. 1998). However, in this case we are asked to determine whether appointed appellate counsel is required to pursue a postconviction motion raising a claim of ineffective assistance of trial counsel. It is appropriate to review counsel's discussion of the issue, particularly because Turner requests that a ***Machner*** hearing be ordered.

¶10 The no merit report discusses six separate categories of potential ineffective assistance of counsel. They are whether counsel was ineffective for: (1) failing to seek removal of juror number 150 when it was disclosed on the second day of trial that the juror knew one of the victims; (2) stipulating to have

[4] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Turner's booking photo from the date of the arrest shown to the jury; (3) failing to present evidence suggesting that the State's witness, Gregory Woods, actually committed the burglaries; (4) failing to call an expert witness retained to give an opinion on how people's identification of suspects can be influenced; (5) failing to present the alibi defense; and (6) advice given with respect to Turner's decision to reject the final plea offer from the prosecution.[5] We conclude that counsel's description and analysis of these potential claims as without merit are correct. There was no cause to seek removal of the juror once she assured the court that her past acquaintance with one of the victims was not enduring and would not affect her ability to be fair and impartial. *See* ***State v. Faucher***, 227 Wis. 2d 700, 717-18, 596 N.W.2d 770 (1999). Sound strategy reasons existed for not objecting to the publication of the booking photo to the jury,[6] for not suggesting that witness Woods committed the burglaries[7] and for not presenting the only identified alibi witness.[8] As counsel correctly notes, none of the victims directly identified Turner

[5] On the first day of trial, the State placed on the record its final offer to have Turner plead guilty to one count of burglary with all other charges dismissed and a ten-year sentence recommendation. The trial court conducted a personal colloquy with Turner confirming his desire to reject the offer.

[6] Turner's response acknowledges that trial counsel stipulated to publication of the booking photo in an effort to prove that Turner was not wearing a tee shirt or white shorts as described by the witnesses.

[7] Gregory Woods is the boyfriend of the owner of the car found near the site of Turner's apprehension and in which Turner's identification was found. Although a police officer testified that Woods said Turner had his permission to use the car that night, Woods denied that he said that to the officer. Woods indicated that Turner could have left his identification in the car on a previous occasion when he was given a ride in the car. This testimony was favorable to Turner.

by his face as the intruder. The expert's testimony on identification was subject to exclusion as useless and irrelevant. *See* ***State v. Pittman***, 174 Wis. 2d 255, 267-68, 496 N.W.2d 74 (1993) (expert testimony admissible only when the trial court, exercising its discretion, determines that expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue). Finally, the colloquy with Turner about his rejection of the plea offer establishes that counsel adequately advised Turner and permitted him to make that decision on his own.

¶11 With respect to ineffective assistance of counsel, Turner maintains that his trial counsel, Attorney Domingo S. Cruz, had a conflict of interest and it was reversible error to permit Cruz to represent Turner. Turner does not explain what he believes to be the conflict of interest. A pro se motion he filed prior to sentencing suggests that Cruz had a relationship with adverse parties. Without more we are unable to address Turner's argument.

¶12 Turner correctly points out that Cruz was allowed to withdraw from representation in Racine county case number 96-CM-1941, a case in which Turner was charged with escape. Cruz withdrew from that case on March 9, 1998. Cruz filed a motion to withdraw in this case on March 13, 1998. At a hearing held on March 27, 1998, Cruz withdrew his motion to withdraw indicating to the court that he and Turner had "reconciled." Turner was not present at that brief hearing. Turner claims that Cruz was "reappointed" without his permission.

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[8] The no merit report indicates that trial counsel did not call the alibi witness because the witness indicated to an investigator that she would not assist Turner's alibi defense by lying. This fact is not of record but not refuted by Turner. Rather, Turner presents an affidavit of Elizabeth Kingor which merely attests that she dropped Turner off at the home of the alibi witness and later was unable to give Turner a ride home. Turner makes an assertion that trial counsel was deficient for not calling Kingor as a witness. Kingor could not account for Turner's whereabouts after she dropped him off. Turner was not prejudiced by counsel's failure to call her as a witness for the defense.

¶13 First, Cruz was never discharged in this case.[9] Second, not once in all the subsequent hearings nor at trial did Turner object to Cruz's continued representation or voice a desire to proceed pro se.[10] Having concluded that there is no merit to a claim that Cruz's performance was deficient, Turner cannot accept the benefit of that performance and now claim that counsel should have been discharged.

¶14 The no merit report also concludes that there is no merit to a claim that the trial court erroneously exercised its discretion in concluding that evidence that Turner was supposed to be incarcerated in the county jail on the night of the burglaries would be admissible if Turner testified that he was in the area of the burglarized homes only because he was walking home to his sister's house. We agree.[11] The trial court's ruling, although it never came to fruition because Turner did not testify, was within its discretion. The ruling comports with the rule of completeness. *See* ***State v. Eugenio***, 219 Wis. 2d 391, 408-09, 579 N.W.2d 642 (1998) (inherent within the rule of completeness is the notion that fairness should prohibit a party from presenting an inaccurate depiction of an event through the admission of partial evidence). Contrary to Turner's assertion, the evidence was

[9] To the extent that Turner objects to Cruz's further participation, if any, in Racine county case number 96-CM-1941 after being discharged, we cannot address that claim. Because of Turner's convictions in this case, case number 96-CM-1941 was dismissed and no appeal is taken from that case.

[10] Cruz was the third attorney appointed by the state public defender to represent Turner. When Cruz first appeared in the case in May 1997, the trial court warned Turner: "[Y]ou have to be satisfied with this attorney, because this is going to be your last attorney, and if you don't get along with this attorney … you will be your own attorney."

[11] Turner claims that his decision not to testify was tainted by a Hobson's choice occasioned by the trial court's ruling. *See* ***State v. Faucher***, 220 Wis. 2d 689, 702, 584 N.W.2d 157 (Ct. App. 1998) (no waiver when the defendant is confronted with a Hobson's choice because it is really no choice at all). Our conclusion that a challenge to the trial court's ruling lacks merit removes any possible taint on Turner's decision not to testify.

not admissible solely for its prejudicial nature of showing Turner's prior bad acts, but it would have served to impeach his testimony that he was lawfully returning home.

¶15 Turner again claims that the no merit report is deficient because the discussion of the waiver of his right to testify does not cite a single legal authority. However, no legal authority is necessary to determine that the colloquy conducted on the record established that Turner's waiver of his right to testify was knowing and voluntary. Turner's belated claims that he wanted to testify at trial and had repeatedly told trial counsel that he would testify fly in the face of the waiver made in the colloquy. There is no merit to a claim that Turner was improperly denied his right to testify.

¶16 The last issue addressed by the no merit report is sentencing. Appellate counsel concludes, and we agree, that the trial court properly exercised its sentencing discretion and that an appeal on that question would be frivolous. The sentence is based on the facts of record and appropriate considerations. We cannot conclude that the sentence is unduly harsh or excessive.

¶17 Turner's response indicates that on appeal he again wants to challenge the sufficiency of the evidence at the preliminary hearing. A petition for leave to appeal on that issue was denied by this court. No relief can be afforded on that claim following a conviction resulting from a fair and errorless trial. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

¶18 Turner claims that the trial court erred in allowing the police officer to testify that when apprehended and searched Turner was in possession of a pipe commonly used for smoking cocaine. No objection was posed to the testimony following a discussion between the court and counsel off the record. Even if

objectionable, the error is harmless. Turner's potential drug usage was far afield from the crimes charged here and the other sufficient evidence.

¶19 Turner contends that witness Woods should have been required to admit to some prior criminal convictions. The court explored the nature of Woods's prior convictions and found them to be remote in time and lacking in relevancy to require admission. Even if Turner is correct in his allegation that at the time of trial Woods had a charge pending against him for possession of drug paraphernalia, it was not yet a conviction that would have to be admitted. Further, any error in the determination that Woods would not admit to any prior criminal convictions was harmless error. Woods gave testimony favorable to Turner by giving a plausible explanation for Turner's identification being in the car. It would have misserved Turner to impeach Woods with the admission of prior convictions. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992) (trial attorney may select a particular strategy from the available alternatives and need not undermine the chosen strategy by presenting inconsistent alternatives).

¶20 Turner also claims that the trial court was required to recuse itself after discovering that it was acquainted with one of the victims. Turner has the facts wrong. At a pretrial hearing, the trial court recognized a man who accompanied one of the victims to the hearing. The man was the victim's financé and the trial court was acquainted with him from working at a church festival. The man was not a witness at the hearing or trial. The trial court was not acquainted with the victim. Turner's complaint lacks merit.

¶21 Our review of the record reveals no other issues of arguable merit.[12] We conclude that any further proceedings on Turner's behalf would be frivolous and without arguable merit. Accordingly, the judgment of conviction is affirmed, and Attorney Eduardo Borda is relieved of any further representation of Turner on this appeal.

By the Court.—Judgment affirmed.

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

[12] We have considered whether there is arguable merit to challenging the show-up identification on appeal. We conclude there is not.