COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1968-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT ALLEN HAMILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

¶1 ROGGENSACK, J. Scott Hamilton appeals a judgment convicting him of robbery by the use of force, contrary to WIS. STAT. § 943.32(1)(a) (1997-

98),[1] and an order denying his motion for postconviction relief. He argues that: (1) he was denied his constitutional right to testify at trial; (2) the circuit court erred in denying his request for a defense of others jury instruction; and (3) he received ineffective assistance of counsel. Because we conclude that Hamilton waived his right to testify, the court did not err in refusing the requested jury instruction, and Hamilton has not demonstrated that his trial counsel's performance was deficient, we affirm.

BACKGROUND

¶2 On December 4, 1997, Richard Denson, Jeff Forrett and Scott Hamilton were riding together in a truck. Denson testified that he was asleep in the truck and awoke to find Forrett reaching into his pocket. When Denson told Forrett to get his hand out of his pocket, Hamilton stopped the truck. Forrett then grabbed Denson and pulled him from the truck. Denson testified that both Hamilton and Forrett beat him, after which Hamilton told Forrett to "get the money …." Forrett then reached into Denson's pocket and took his money.

¶3 At trial, neither Forrett nor Hamilton testified. However, a note, which was purportedly written by Forrett and notarized, was read into the record in the presence of the jury. It stated:

> We were looking for chains as we picked a guy up downtown. Then on our way to give him a ride, I noticed he had my wallet in his coat pocket and I took it back. He then threatened to knock me out and we stopped the truck. We began to fight and Scott got out to break up the fight. Scott and I then got into the truck and left. Scott had nothing to do with the fight.

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

The note was found in Hamilton's possession when he was taken into custody. Additionally, Detective Charles Flood of the Rock County Sheriff's Department testified that when he asked Hamilton what had happened that night, Hamilton told him that Forrett and Denson had gotten into a fight and that he had tried to stop it. At the jury instruction conference, Hamilton requested the court to give a defense of others instruction to the jury. The court denied the request.

¶4 After Hamilton was convicted and sentenced, he filed a motion for postconviction relief. First, Hamilton requested a new trial on the grounds that he was denied his constitutional right to testify at trial. At the postconviction motion hearing, trial counsel, an attorney with twenty-four years experience in criminal defense work, testified that it was his normal practice to discuss with every defendant whether to testify at trial. Additionally, counsel testified that although he had no specific recollection of whether he told Hamilton that the decision to testify was his, he was sure he did so based upon his customary practice. Hamilton testified that he thought the decision to testify was to be made by his trial counsel and that had he known he had the right to testify, he would have done so. The circuit court concluded that Hamilton waived his right to testify; and therefore, denied his motion for a new trial.

¶5 Second, Hamilton requested a new trial on the grounds that the court improperly denied his request for a defense of others jury instruction. Finally, Hamilton sought a new trial on the grounds that he was denied effective assistance of counsel. He claims his trial counsel did not give him sufficient information from which he could make a rational decision about whether to accept various plea offers made by the State before trial. Trial counsel testified that he communicated all plea offers to Hamilton and explained the pros and cons of each offer. When he was asked whether he gave Hamilton an opinion about the likelihood of success

at trial, counsel responded he "probably" did because most defendants ask for this information; however, he did not have a specific recollection about whether Hamilton asked this question. The circuit court denied Hamilton's motion for a new trial based on ineffective assistance of counsel. Hamilton appeals.

DISCUSSION

Standard of Review.

¶6 Issues concerning waiver of a defendant's right to testify involve questions of historic fact applied to a constitutional standard. *See* ***State v. Lenzy Wilson***, 179 Wis. 2d 660, 668-72, 508 N.W.2d 44, 47-48 (Ct. App. 1993). We will uphold a circuit court's findings of historic fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). However, whether the circuit court's findings of fact satisfy a constitutional standard is a question of law that we review *de novo*. *See* ***Lenzy Wilson***, 179 Wis. 2d at 675, 508 N.W.2d at 50.

¶7 Our review of a request for a jury instruction is limited to whether the trial court acted within its discretion when it refused to give the requested instruction. *See* ***State v. Earlann Wilson***, 180 Wis. 2d 414, 420, 509 N.W.2d 128, 130 (Ct. App. 1993). We will reverse and order a new trial only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. *See* ***Miller v. Kim***, 191 Wis. 2d 187, 194, 528 N.W.2d 72, 75 (Ct. App. 1995).

¶8 Additionally, ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-634, 369 N.W.2d 711, 714 (1985). A circuit court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407

N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

Right to Testify.

¶9 The law regarding the right of a criminal defendant to testify at trial has evolved since ***State v. Albright***, 96 Wis. 2d 122, 291 N.W.2d 487 (1980). There, the Wisconsin supreme court acknowledged that while a defendant has a due process right to testify at trial, that right does not fall within the category of fundamental rights "which can only be waived in open court on the record by the defendant." *See* ***id.*** at 130, 291 N.W.2d at 490-91. The court concluded that although the decision to testify should be made by the defendant after consulting with counsel, nonetheless, "counsel, in the absence of the express disapproval of the defendant on the record during the pretrial or trial proceedings, may waive the defendant's right to testify." ***Id.*** at 133, 291 N.W.2d at 492.

¶10 In 1987, the United States Supreme Court decided ***Rock v. Arkansas***, 483 U.S. 44 (1987). ***Rock*** addressed whether a state's evidentiary rule which prohibited the admission of hypnotically refreshed testimony violated a defendant's constitutional right to testify on her own behalf. *See* ***id.*** at 45. The Court determined that a criminal defendant has the right to take the stand and testify on his or her behalf. *See* ***id.*** at 49. It also noted: "On numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." ***Id.*** at 53 n.10 (citations omitted). Thus, in direct contrast with ***Albright***, the United States Supreme Court clearly stated that the constitutional right to testify should be treated as fundamental in nature.

¶11 After ***Rock***, we addressed a defendant's right to testify in ***Lenzy Wilson***. We acknowledged that ***Rock*** concluded that a defendant's right to testify is a fundamental right. *See* ***Lenzy Wilson***, 179 Wis. 2d at 670, 508 N.W.2d at 48. However, we did not require circuit courts "to undertake an on-the-record colloquy with the defendant at the close of the defense's case-in-chief concerning his or her right to testify." *See* ***id.*** at 672 n.3, 508 N.W.2d at 48 n.3. We explained that "the principles of waiver as set forth in ***Albright*** were not affected by the Supreme Court's ruling in ***Rock***" and therefore, an on-the-record colloquy was not required. *See* ***id.*** Instead, we concluded that the standard to be applied in determining whether a defendant had waived his right to testify was whether the record supported a knowing and voluntary waiver. *See* ***id.*** at 671-72, 508 N.W.2d at 48.

¶12 Hamilton claims the record in this case does not reflect a knowing and voluntary waiver because trial counsel's testimony of his normal practice is insufficient to prove what counsel did in this case; and therefore, no direct evidence exists that Hamilton waived his right to testify. Hamilton relies on ***French v. Sorano***, 74 Wis. 2d 460, 247 N.W.2d 182 (1976), and ***Paulsen Lumber, Inc. v. Anderson***, 91 Wis. 2d 692, 283 N.W.2d 580 (1979), for the proposition that where there is a lack of corroborating evidence of a business practice on a particular occasion, evidence of routine practice is not sufficient to show that the practice was followed in a particular case.

¶13 However, in ***French***, the supreme court stated,

> '[e]vidence of the habit of a person or of the routine practice of an organization, *whether corroborated or not and regardless of the presence of eyewitnesses*, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.'

French, 74 Wis. 2d at 465, 247 N.W.2d at 185 (citation omitted) (emphasis in the original); *see also* WIS. STAT. § 904.06. Furthermore, even without corroboration, evidence of habit or custom is nevertheless relevant because "it makes more probable the fact that the person acted in the particular manner." ***French***, 74 Wis. 2d at 466, 247 N.W.2d at 185. Lack of corroboration goes to the sufficiency of this evidence, not its admissibility.

¶14 Therefore, under the reasoning of ***French***, trial counsel's testimony that it was his normal practice to discuss with every defendant whether to testify at trial is relevant evidence to show that counsel did so with Hamilton. We do not need to decide whether this testimony alone would be sufficient to demonstrate that Hamilton waived his right to testify because, contrary to Hamilton's claim, other evidence in the record corroborates that he waived this right.

¶15 First, Hamilton wrote, in a letter to his trial counsel prior to trial, that he was served with a subpoena for Forrett's trial and asked whether he should "[p]lead the 5th." This demonstrates, at minimum, that Hamilton was aware that he had a right against self-incrimination which could be exercised by not testifying. Additionally, that letter demonstrates that Hamilton had a sophisticated awareness of the legal system. For example, he also wrote "when I spoke to Det. Flood the first time I waived my miranda rights. I understand what happen [sic] there but I spoke to him a second time and I don't remember saying anything that time. … Maybe Floods [sic] testimony can be thrown out?" Hamilton also asked his counsel whether he was going to file "a motion to suppress evidence." Finally, trial counsel testified that he believed he answered all of Hamilton's questions that were posed in that letter, including Hamilton's question regarding the Fifth Amendment, although he had no specific recollection that he did so.

¶16 Second, Hamilton also conceded that he did have a "small discussion" with trial counsel about whether he should testify. He claims that after refusing the State's plea agreement, counsel stated "we'll play it by ear about you testifying" at trial. These statements show that Hamilton knew that a decision would be made at a later time and given his active interest in his case and his knowledge of the legal system, Hamilton could have asked his counsel about testifying while the trial proceedings were underway.

¶17 Third, the circuit court noted Hamilton's extensive criminal record. Hamilton was found delinquent as a juvenile on six separate occasions for burglaries and thefts. As an adult, he was found guilty of three felonies and more than fifteen misdemeanors. In many of these cases, Hamilton pled guilty or admitted the delinquency. The circuit court asked Hamilton if he remembered in each of these instances being told that he was giving up certain rights, one of which was the right to testify. Hamilton admitted that he was told he had a right to testify on his own behalf in each of these instances.

¶18 Fourth, Hamilton sent a letter to the circuit court after he was convicted but before he was sentenced. He complained of various errors that he believed occurred at trial. The circuit court determined that several of the statements in this letter were simply untrue. For example, he claimed that his trial counsel met with him for less than an hour on only two occasions. However, the court stated that trial counsel's billing records showed that he met with Hamilton at least six times prior to trial, and had at least one telephone conference with him. The court also found that Hamilton's own comments further supported the conclusion that Hamilton knew he had a right to testify at trial, and that his testimony to the contrary was not credible. Additionally, the record reflects that although Hamilton identified nine claims of error in his letter to the circuit court,

he never once mentioned that he wanted to testify at trial but was denied that right by his attorney. Therefore, the letter also supports the finding of the trial court that Hamilton knew he had the right to testify.

¶19 Fifth, after the defense presented all of its witnesses, the circuit court asked defense counsel, in the presence of Hamilton, whether he had any other witness to present. He replied that he did not. Hamilton did not indicate any objection or disagreement with counsel's statement. Hamilton's silence "is presumptive evidence of a valid waiver, by his counsel, of his right to testify." ***Lenzy Wilson***, 179 Wis. 2d at 673, 508 N.W.2d at 49.

¶20 Finally, the circuit court noted that throughout the trial, Hamilton continuously spoke to his counsel and passed notes back and forth. The court noted that it was clear that Hamilton was very active in directing his defense. Therefore, we conclude that the record in this case, taken as a whole, demonstrates that Hamilton waived his right to testify at trial.

Jury Instruction.

¶21 Hamilton contends that the circuit court erred in refusing to give a defense of others jury instruction. *See* WIS JI—CRIMINAL 825.[2] The circuit court

[2] Wisconsin Jury Instruction—Criminal 825 provides, in part:

> Defense of others is an issue in this case. The law of defense of others allows a person to threaten or intentionally use force to defend another under certain circumstances.
>
> The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in defense of others.
>
> The law allows the defendant to act in defense of others only if the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third

(continued)

permitted a note, allegedly written by Forrett, to be read into the record in the presence of the jury. The note stated that Hamilton got out of the truck to break up a fight that was occurring between Forrett and Denson and that Hamilton did not have anything "to do with the fight."

¶22 "A defendant is not automatically entitled to a jury instruction on an offered defense." ***State v. Stoehr***, 134 Wis. 2d 66, 87, 396 N.W.2d 177, 185 (1986). Additionally, it is the defendant who has the initial burden of producing evidence to establish a defense to criminal liability. *See* ***id.*** (citations omitted). The rule generally applied to instructions is,

> that a trial court is not required to give requested instructions unless the evidence reasonably requires it. However, a defendant in a criminal case, when he properly requests, is entitled to have the jury consider any defense which is supported by the evidence.
>
> Ultimate resolution of the issue of the appropriateness of giving [a] particular instruction turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual ground. …
>
> [W]here the defendant appeals from the denial of a request [sic] instruction, 'the evidence is to be viewed in the most favorable light it will reasonably admit from the standpoint of the accused.'

> person), believed that (name of third person) was entitled to use or to threaten to use force in self-defense, and believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person).
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

Johnson v. State, 85 Wis. 2d 22, 28, 270 N.W.2d 153, 156 (1978) (citations omitted).

¶23 The circuit court refused to give the defense of others instruction because that instruction allows a defendant to act in defense of others "only if the defendant believed that there was an actual or imminent unlawful interference" with another person. The circuit court noted that there was no basis for the court to conclude what Hamilton believed because: (1) Hamilton did not testify; and (2) there was nothing in the record as to what Hamilton believed. Hamilton contends that the notarized note found in his possession when he was arrested established that he believed that Forrett was in trouble; and therefore, he came to Forrett's aid, by breaking up the fight. We disagree. The note, even if taken as true, established only that Hamilton did not instigate the fight. It does not show what Hamilton believed to be occurring or whom he was defending, if anyone. Hamilton did not meet his burden of introducing sufficient evidence to entitle him to an instruction on the defense of others. Accordingly, we see no erroneous exercise of discretion by the circuit court in refusing to give it.

Ineffective Assistance of Counsel.

¶24 To establish a claim for ineffective assistance of counsel, a defendant must satisfy a two-part test. First, he must show that his counsel's performance was deficient. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, he must show that he was prejudiced by the deficient performance. *See* ***id.***

¶25 To prove deficient performance, Hamilton must show that specific acts or omissions of counsel were "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To prove prejudice, Hamilton must show

that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶26 Hamilton argues that his trial counsel's performance was deficient because counsel failed to give Hamilton sufficient information from which he could make a rational decision about whether to accept the plea bargains offered by the State. He claims that counsel did not tell him that the State could amend the information at the close of trial to allege that Hamilton had committed the crimes as a party to the crime. Hamilton contends that ***State v. Lentowski***, 212 Wis. 2d 849, 569 N.W.2d 758 (Ct. App. 1997), supports his contention. We disagree.

¶27 In ***Lentowski***, the defendant was charged with several counts relating to his sexual contact with a child under the age of eighteen. Lentowski was offered a plea by the State. His attorney told him to reject the plea because he had two defenses to the charges. However, one of the defenses was not legally valid; and Lentowski was unable to satisfy the evidentiary requirements for the other. Therefore, we concluded that Lentowski had satisfied the deficient performance element of an ineffective assistance of counsel claim. *See* ***id.*** at 854, 569 N.W.2d at 761.

¶28 Hamilton's contention that ***Lentowski*** controls this case is without merit. ***Lentowski*** involved counsel's giving erroneous advice about the legal defenses that were available. However, Hamilton does not allege that his trial counsel gave erroneous advice. Instead, he contends that although his attorney communicated all plea offers made by the State, and discussed "the pros and cons"

of each offer, his attorney was obligated to advise him to take a particular plea offer because the State could amend the charges at the close of trial to allege that Hamilton committed the offenses as a party to a crime.

¶29 We have previously concluded that the right to effective assistance of counsel "applies to advice as to whether a defendant should accept or reject a plea bargain." ***State v. Fritz***, 212 Wis. 2d 284, 293, 569 N.W.2d 48, 52 (Ct. App. 1997). Further, in ***State v. Ludwig***, 124 Wis. 2d 600, 601, 369 N.W.2d 722, 722 (1985), the supreme court concluded that the failure of defense counsel to inform a client of a plea offer in a way that made it clear that she, and not the attorney, had the right to accept or reject it constituted ineffective assistance of counsel. The court reasoned that the decision regarding what plea to enter belonged to the client, not counsel. *See* ***id.*** at 610-11, 369 N.W.2d at 727.

¶30 However, Hamilton does not contest that counsel did tell him of the offers and did communicate the pros and cons of those offers. Further, Hamilton does not argue that counsel made the decision to reject the plea offers. There is nothing in the record to substantiate Hamilton's contention that a critical factor in his decision to reject the plea offers was a belief imposed by counsel that he could not be convicted as a party to the crime. Hamilton does not contend that he even asked trial counsel to explore whether any of the plea offers were still available once he learned that the State amended the charges. Hamilton chose to test the veracity of the evidence and to see if he could obtain a sentence less than that recommended in the plea offers. Being unhappy with the final result does not permit him to return to the path not taken. *See* ***Farrar v. State***, 52 Wis. 2d 651, 662, 191 N.W.2d 214, 220 (1971).

CONCLUSION

¶31 Because we conclude that Hamilton waived his right to testify, the circuit court did not err in refusing the requested jury instruction, and Hamilton has not demonstrated that his trial counsel's performance was deficient, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.