COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2488-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM AVERY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and JACQUELINE D. SCHELLINGER, Judges. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. William Avery appeals from a judgment entered after a jury found him guilty of keeping a drug house, party to a crime, *see* WIS. STAT. §§ 961.42 and 939.05 (1997–98), and conspiracy to deliver cocaine, *see*

WIS. STAT. §§ 961.16(2)(b)1, 961.41(1)(cm)1 and 961.41(1x), and from an order denying his postconviction motion.[1] Avery claims that: (1) he was denied due process when the trial court refused to order disclosure of police reports involving a related homicide investigation; and (2) his trial counsel was ineffective in failing to request a jury instruction. We affirm.[2]

I. BACKGROUND

¶2 Police questioned Avery pursuant to a homicide investigation and, although Avery confessed to the homicide, he was not charged. Instead, the State charged Avery with keeping a drug house, party to a crime, and conspiracy to deliver cocaine, crimes to which he also confessed. Prior to trial, Avery requested that the trial court order the discovery of police reports relating to the homicide investigation. Avery argued that these documents were relevant because "he confessed to something he didn't do, the homicide, and therefore when he confessed to drug trafficking, he didn't do that either." The trial court denied Avery's discovery motion after it reviewed the records *in camera* and found that they were not relevant. The court held that the only way Avery could establish relevance was by proving that he lied when he confessed to the homicide, which would involve trying "the entire homicide case." The court refused to allow a mini-trial on the uncharged homicide because it would "needlessly confuse the jury" and would create a substantial risk of prejudice to Avery.

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

[2] The Honorable Jeffrey A. Kremers presided over the jury trial. The Honorable Jacqueline D. Schellinger presided over the postconviction hearing.

¶3 Defense counsel did not request that the jury be instructed on the weight to be given to a confession made by a defendant. Avery was convicted. After a hearing, held pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (evidentiary hearing generally required to assess claims of ineffective-assistance-of-counsel), the trial court determined that this failure did not amount to ineffective-assistance-of-counsel because counsel's performance was not deficient and the instruction would have hurt Avery, not helped him.

II. DISCUSSION

A. Refusal to Order Disclosure of Documents

¶4 Avery claims that he was denied his right to due process and is entitled to a new trial because the trial court erroneously refused to order disclosure of documents relating to the homicide investigation, which he claims were material to the defense. Due process requires that the prosecution not suppress evidence that favors the accused or discredits its own case. *See* ***United States v. Bagley***, 473 U.S. 667, 675 (1985). Avery may prevail on this claim only if the documents sought by him contain information material to the defense that probably would have changed the outcome of his trial. *See* ***State v. Mainiero***, 189 Wis. 2d 80, 87, 525 N.W.2d 304, 307 (Ct. App. 1994). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Id.***, 189 Wis. 2d at 88, 525 N.W.2d at 307 (quoting ***Pennsylvania v. Ritchie***, 480 U.S. 39, 57 (1987); ***State v. Richard A.P.***, 223 Wis. 2d 777, 785, 589 N.W.2d 674, 678 (Ct. App. 1998).

¶5 We consider the trial court's determination on the materiality of undisclosed records "under the clearly erroneous standard." ***State v. Solberg***, 211 Wis. 2d 372, 385–386, 564 N.W.2d 775, 781 (1997). "The decision to exclude evidence lies within the sound discretion of the circuit court." ***Id.***, 211 Wis. 2d at 386, 564 N.W.2d at 781. A trial court properly exercises its discretion in this regard when it applies the relevant law to the applicable facts and reaches a reasonable conclusion. *See* ***id.***

¶6 As required, we have reviewed the sealed records, *see* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 655, 581 N.W.2d 567, 574 (Ct. App. 1998), and find nothing in the additional material that would cast light on Avery's convictions. Neither appellate counsel, however, has examined the sealed records: consequently, argument about the propriety of the trial court's decision not to disclose the documents is necessarily limited to the theory of relevance proffered by Avery at trial.

¶7 Avery argued that the sealed records would indicate that he confessed to the homicide but was, in fact, not guilty of the homicide, therefore leading to the inference that his confessions to the drug crimes were similarly unreliable. The State maintains that although Avery was not charged with the homicide, nothing in the record supports the inference that Avery could not have committed it. As noted, evidence is material only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. *See* ***Mainiero***, 189 Wis. 2d at 88, 525 N.W.2d at 307. Here, several details contained in Avery's confessions to the drug crimes were independently verified by police officers, thus substantially increasing the confession's reliability. In addition, Patricia McCoy, a State witness, testified that she purchased drugs at the house in question "eight or nine times" in February

1998, and that Avery "was [*sic*] one dealing drugs, he was [*sic*] one collecting the money." There is nothing in the sealed records that undermines our confidence in the guilty verdicts in this case. We conclude that the trial court correctly determined due-process considerations did not entitle Avery to the documents and, additionally, that a mini-trial on the uncharged homicide was excludable under WIS. STAT. § 904.03.

B. Ineffective Assistance of Counsel

¶8 Avery next argues that his trial lawyer was ineffective. A defendant claiming ineffective-assistance-of-counsel must prove both that his or her lawyer's representation was deficient and, as a result, that he or she suffered prejudice. *See* ***Strickland v. Washington***, 466 U.S. 687, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986). To prove counsel's deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. *See* ***id.***, 466 U.S. at 687. If a defendant fails on either aspect – deficient performance or prejudice – the ineffective-assistance-of-counsel claim fails. *See* ***id.***, 466 U.S. at 697.

¶9 Whether a lawyer gives a defendant ineffective assistance of counsel is a mixed question of law and fact. *See* ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). But whether proof satisfies either the deficiency or the prejudice

prong is a question of law that this court reviews *de novo*. *See* ***id.***, 124 Wis. 2d at 634, 369 N.W.2d at 715. We reject Avery's ineffective assistance claim.

¶10 Avery claims that his trial counsel provided ineffective assistance by failing to request that the jury be instructed on the weight to be given a confession made by a defendant. *See* WIS JI–CRIMINAL 180.[3] During the ***Machner*** hearing, trial counsel testified that he was "reasonably confident that I would have discussed 180" with Avery, but that Avery did not want the instruction requested. Counsel indicated the reason Avery did not want the instruction was because Avery "had long maintained that there never was a confession in the first place." The trial court considered how each component of jury instruction 180 applied to Avery's case and determined that counsel's decision not to request this instruction was not deficient conduct, stating: "I don't find here that trial counsel's

[3] WIS JI–CRIMINAL 180 provides:

> CONFESSIONS–ADMISSIONS
>
> The state has introduced evidence of a statement which it claims was made by the defendant. It is for you, the jury, to determine how much weight, if any, to give to this statement.
>
> In evaluating the statement, you should consider three things.
>
> First, you must determine whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
>
> Second, you must determine whether the statement was accurately restated here at trial.
>
> Finally, if you find that the statement was made by the defendant and accurately restated here at trial, you must determine whether the statement is trustworthy. "Trustworthy" simply means whether the statement ought to be believed.
>
> You should consider the facts and circumstances surrounding the making of the statement, along with all other evidence in the case, in determining how much weight, if any, the statement deserves.

representation fell below the objective standard of reasonableness." The trial court also noted: "Could jury instruction 180 have been given? Of course it could have been given. Would it have helped this defendant? I don't think at all. In fact I think it would have hurt him."

¶11 The circuit court properly concluded that trial counsel's assistance was not deficient. Each of the three admonitions contained in jury instruction 180 was self-evident. First, the evidence was overwhelming that it was Avery who made the statement, and Avery did not testify on his own behalf to deny making the statement. Second, the police recitation, reduced to writing, was accurate; again, Avery did not testify to contradict this. Finally, the admonition regarding trustworthiness contained in jury instruction 180 was essentially within the jury's common sense. In addition, the court instructed the jury on general credibility, *see* WIS JI–CRIMINAL 300, which served as an adequate substitute to jury instruction 180 on the issue of trustworthiness.[4] Avery has not established that he was denied effective assistance of counsel.

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[4] WIS JI–CRIMINAL 300 provides:

> CREDIBILITY OF WITNESSES
>
> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony.
>
> In determining the weight and credit you should give to the testimony of each witness, you should consider interest or lack of interest in the result of this trial, conduct, appearance, and demeanor on the witness stand, bias or prejudice, if any has been shown, the clearness or lack of clearness of recollections, the opportunity for observing and knowing the matters and things testified to by the witness, and the reasonableness of the testimony.

(continued)

By the Court.—Judgment and order affirmed.

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

You should also take into consideration the apparent intelligence of each witness, the possible motives for falsifying, and all other facts and circumstances appearing on the trial which tend either to support or to discredit the testimony, and then give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive.