COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP952-CR **Cir. Ct. No. 2013CF2148**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN B. BLACKBURN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO and WILLIAM S. POCAN, Judges. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Kevin B. Blackburn appeals a judgment of conviction entered after a thirteen-member jury found him guilty of three felonies. He also appeals a postconviction order denying his motion for a new trial. He

claims that he agreed to a thirteen-member jury panel only because his trial counsel was ineffective by giving him incorrect legal advice about the ramifications of requesting a mistrial. He seeks a hearing on his ineffective assistance of counsel claim. We reject his contentions and affirm the judgment and postconviction order.

BACKGROUND

¶2 The State charged that, on May 7, 2013, Blackburn robbed a financial institution as a party to a crime, operated a motor vehicle without the owner's consent, and fled or attempted to elude a police officer. *See* WIS. STAT. §§ 943.87 (2013-14),[1] 939.05, 943.23(3), 346.04(3). The three charges proceeded to a jury trial. After the jury advised that it had reached verdicts, the trial court told the parties it had forgotten to select and discharge an alternate juror, and therefore thirteen jurors had deliberated on the case. The trial court instructed defense counsel to determine whether Blackburn wished to stipulate to a thirteen-member jury. After consulting with counsel, and against counsel's advice, Blackburn decided to stipulate to a thirteen-member jury. The trial court conducted a colloquy with Blackburn and concluded that his stipulation was knowing, intelligent, and voluntary. The trial court then received the jury's verdicts. The jury unanimously found Blackburn guilty as charged on all counts.

¶3 Before sentencing, trial counsel moved to withdraw from further representation of Blackburn based on Blackburn's contention that he had

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

misunderstood counsel's advice to move for a mistrial rather than agree to a thirteen-member jury. The trial court denied the motion.

¶4 After sentencing and the subsequent appointment of postconviction counsel, Blackburn moved for a new trial on the ground that his trial counsel was ineffective. In support of the motion, Blackburn alleged that his trial counsel erred when advising him about the potential ramifications of requesting a mistrial rather than accepting the verdicts of a thirteen-member jury. According to Blackburn, his trial counsel opined that a letter written by the co-defendant and presented to the jury at trial might be excluded at a second trial. Blackburn went on to argue that his trial counsel's advice was incorrect and that admission of the letter in a second trial was a virtual certainty. Blackburn said that, but for counsel's erroneous advice about the admissibility of the letter—a document he considered critical to his defense—he would have requested a mistrial.

¶5 A successor trial court considered Blackburn's postconviction motion and denied it without a hearing.[2] In a written opinion, the trial court determined that the advice Blackburn allegedly received from his trial counsel did not prejudice him because, assuming he would have been granted a mistrial upon his request, no reasonable probability existed that he would have been acquitted in a second trial. Blackburn appeals.

[2] The Honorable Glenn H. Yamahiro presided over Blackburn's trial and entered the judgment of conviction. The Honorable William S. Pocan presided over the postconviction proceedings and entered the order denying Blackburn's postconviction motion.

ANALYSIS

¶6 A defendant who claims that trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions were "professionally unreasonable." *See* ***Strickland***, 466 U.S. at 691. To demonstrate prejudice, "[t]he defendant 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 reviewing court may begin its analysis by examining either of the two ***Strickland*** prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. ***Id.*** at 697.

¶7 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Nonetheless, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A trial court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This determination also presents a question of law for our independent review. ***Id.*** If, however, the defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the trial court has

discretion to deny a postconviction motion without a hearing. ***Id.*** We review a trial court's discretionary decisions with deference. ***Id.***

¶8 Blackburn says that his trial counsel performed deficiently here because, when discussing with him whether to proceed with a thirteen-member jury or request a mistrial, trial counsel told him that a piece of evidence Blackburn considered critically important "may not be admitted in a second trial." That opinion is wrong, he says. The letter would have been admitted in any new trial, and his trial counsel therefore performed deficiently.

¶9 As to prejudice, Blackburn does not dispute that a thirteen-member jury is permitted under the Wisconsin Constitution pursuant to ***State v. Ledger***, 175 Wis. 2d 116, 126, 499 N.W.2d 198 (Ct. App. 1993).[3] He argues, however, that ***Ledger*** allows a thirteen-member jury only with the defendant's voluntary consent. *See* ***id.*** Blackburn contends that, if properly advised about the admissibility of evidence in a second trial, he would not have consented to a thirteen-member jury but would have requested a mistrial, and ***Ledger*** would have required the trial court to grant the request. Therefore, he says, he has demonstrated prejudice because, as ***Strickland*** requires, the result of the proceeding would have been different but for trial counsel's advice. *See* ***Strickland***, 466 U.S. at 694.

¶10 We choose to examine the prejudice prong of ***Strickland*** first. The trail court rejected Blackburn's assertion of prejudice because Blackburn failed to

[3] The United States Constitution does not confer a "right to a jury comprised precisely of twelve members." ***State v. Ledger***, 175 Wis. 2d 116, 122 n.3, 499 N.W.2d 198 (Ct. App. 1993). The Wisconsin Constitution contemplates a twelve-member jury, *see* ***id.*** at 125, but does not prohibit a jury with thirteen members, *see* ***id.*** at 126.

show a reasonable probability that a second jury would have reached a favorable verdict. Blackburn maintains that the trial court misconstrued ***Strickland*** by equating "different result" with "different verdict." He contends that, but for trial counsel's advice, he would have secured a mistrial, and "[a] mistrial and a new trial are clearly a different outcome than a guilty verdict." Therefore, he says, "[t]he second prong of ***Strickland***—prejudice—has been demonstrated." We conclude that the trial court's analysis is correct.

¶11 ***Strickland*** involved a claim of ineffectiveness in a capital sentencing proceeding. *See* ***id.*** at 675, 686-87. Thus, the ***Strickland*** court examined trial counsel's alleged ineffectiveness in relation to a sentence rather than a conviction. Nonetheless, the court observed that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors [of counsel], the factfinder would have had a reasonable doubt respecting guilt." *See* ***id.*** at 695. Applying ***Strickland*** in the context of a criminal trial, the Supreme Court held: "[t]he essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374-75 (1986). As this court has previously observed, ***Kimmelman*** reflects that when a defendant claims trial counsel incompetently litigated a suppression motion, the defendant must show '"a reasonable probability that the *verdict* would have been different absent the excludable evidence in order to demonstrate actual prejudice.'" *See* ***State v. Damaske***, 212 Wis. 2d 169, 200, 567 N.W.2d 905 (Ct. App. 1997) (emphasis added) (quoting ***Kimmelman***, 477 U.S. at 375).

¶12 Moreover, sister jurisdictions have concluded that, to demonstrate reasonable probability of a "different result" in the context of a trial, the defendant

must show reasonable probability of a different verdict. *See, e.g.*, ***State v. Chase***, 600 A.2d 931, 933-34 (N.H. 1991) (equating "result" with "verdict" in light of ***Strickland*** and ***Kimmelman*** and rejecting the contention that defendant can show prejudice by demonstrating reasonable probability of a mistrial); *see also* ***Ledezma v. State***, 626 N.W.2d 134, 144-45 (Iowa 2001) (collecting cases interpreting "different result" as "reasonable probability of a different verdict, or that the fact finder would have possessed reasonable doubt" and observing that "this is how 'result' ... has most often been interpreted"). We add that Blackburn offers no authority adopting a contrary interpretation of the ***Strickland*** prejudice prong. For this reason alone, we may reject his claim that "different result" includes a mistrial. *See* ***Young v. Young***, 124 Wis. 2d 306, 312, 369 N.W.2d 178 (Ct. App. 1985) (parties required to offer citations specifically supporting relevant legal propositions).

¶13 Accordingly, Blackburn must demonstrate prejudice here by showing a reasonable probability of favorable verdicts in a retrial with a twelve-person jury. The trial court concluded that Blackburn failed to make that showing. We agree.

¶14 The State presented compelling evidence against Blackburn. The May 7, 2013 robbery took place in the drive-through lanes of Educators Credit Union. Two black Buicks, both Centuries, were present at the scene. Video from a surveillance camera showed the drivers of both Buicks wearing white latex gloves. One Buick entered lane four, where customers can conduct transactions with a bank teller by using a pneumatic tube. The other Buick entered lane one, which leads to the bank's drawer window. Using the pneumatic tube, the occupant of the Buick in lane four passed a note to the teller. The note read, in part: "load the bag at the drawer window ... or the bomb outside will detonate."

The teller gave in to the demand, but delivered the money—nearly $6000—through the tube to the occupant of the Buick in lane four. The driver of the Buick in that lane drove away while the driver of the Buick in lane one pulled up to the drawer window and waited.

¶15 Police responding to a report of a robbery in progress approached the Buick waiting in lane one, and that Buick then sped away from the credit union. The police followed the Buick and, after several blocks, saw a person abandon it and flee on foot. The abandoned Buick caught fire, and police determined that the source of the fire was a Molotov cocktail in the vehicle.

¶16 An officer on foot chased the person who fled from the burning Buick and apprehended Blackburn in a nearby yard. He was panting and dripping with perspiration. White latex gloves were discovered in Blackburn's flight path. DNA on one of the gloves matched Blackburn's DNA profile. An expert from the Wisconsin crime laboratory testified that the probability of randomly selecting an individual with that profile is one in seventy-seven quadrillion.

¶17 Testimony established that the Buick in the drawer lane during the robbery was previously reported stolen. The owner of that Buick testified and identified it as his stolen vehicle.

¶18 Ricardo Perkins, a co-defendant and Blackburn's cousin, testified for the State. Perkins acknowledged that he had pled guilty to robbing a financial institution as a party to a crime and to driving a motor vehicle without owner's consent and he said that, in exchange for his testimony, the State promised to recommend a ten-year term of imprisonment for those crimes. Perkins then told the jury that he, Blackburn, and two others planned the May 7, 2013 robbery. Perkins said he drove a Buick into lane four, submitted the demand note, and

received money in response. Video surveillance of the robbery captured his image and corroborated his testimony. Perkins identified Blackburn as the driver of the Buick that entered the drawer lane, and Perkins testified that Blackburn's anticipated role included receiving the stolen money.

¶19 Perkins acknowledged writing a letter to Blackburn before trial even though a court order barred contact between the two men. Blackburn introduced the letter and cross-examined Perkins about its meaning. In response, Perkins explained: "I mean I'm not going to just lay down. I'm willing to man up for my wrongdoings.... Everybody else needs to do the same thing."

¶20 Not only did the State assemble an enormous amount of incriminating evidence against Blackburn, but, in addition, the thirteen-member jury that considered the evidence afforded him greater protection than the Wisconsin Constitution requires. *See* ***Ledger***, 175 Wis. 2d at 128. Indeed, ***Ledger*** reflects a consensus that the larger the jury, the better for a defendant. *See* ***id.*** at 126-27. Citing United States Supreme Court cases, the ***Ledger*** court observed: "'[s]tatistical studies suggest that the risk of convicting an innocent person ... rises as the size of the jury diminishes,'" and that "'a decline in jury size leads to less accurate factfinding and a greater risk of convicting an innocent person.'" ***Id.*** at 127 (citations omitted). The ***Ledger*** court concluded: "there is no likelihood that a thirteen-member jury would convict more readily than would a twelve-member jury." ***Id.*** at 126.

¶21 In light of the foregoing, the record conclusively shows that Blackburn did not suffer any prejudice from the allegedly erroneous advice he received from his trial counsel regarding the inadmissibility of Perkins's letter in a second trial. The State's evidence against Blackburn was strong and substantial,

and a thirteen-member jury panel unanimously concluded that the evidence proved him guilty beyond a reasonable doubt. Even if trial counsel incorrectly advised Blackburn that the letter would be inadmissible in a second trial, and even if that advice led him to forego a request for a mistrial, nevertheless, no reasonable probability exists that a second, twelve-member jury would have reached not-guilty verdicts upon consideration of the evidence marshaled against him.

¶22 Blackburn fails to satisfy the prejudice prong of the ***Strickland*** analysis. He therefore cannot prevail on his claim of ineffective assistance of counsel. *See* ***id.***, 466 U.S. at 697.

¶23 The parties also briefly discuss the possibility of applying a harmless error analysis to Blackburn's allegations. In this regard, Blackburn asserts that "his trial counsel performed deficiently in providing ... incorrect advice. This was not harmless error." We reject the suggestion that harmless error analysis is appropriate here. Under a harmless error analysis, the burden is on the beneficiary of the error—here, the State—to show harmlessness beyond a reasonable doubt. *See* ***State v. Martin***, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W.2d 270. The State, however, has no obligation to show harmlessness in response to the claim that Blackburn presents. "'[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.'" ***State v. Sanchez***, 201 Wis. 2d 219, 233, 548 N.W.2d 69 (1996), *citing* ***Strickland***, 466 U.S.at 693. Thus, to prevail in this case, Blackburn must carry the burden of showing prejudice.

¶24 Because Blackburn's postconviction motion did not allege facts that, if proved, would demonstrate prejudice from trial counsel's allegedly deficient performance, the trial court properly exercised its discretion by denying

postconviction relief without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Accordingly, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

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