COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP633-CR

Cir. Ct. No. 2001CF2994

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE MCFARLAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Jermaine McFarland appeals from a judgment of conviction for first-degree reckless injury with the use of a dangerous weapon, as a habitual criminal; endangering safety by use of a dangerous weapon (discharging firearm into a building devoted to human occupancy), as a habitual criminal; and

felon in possession of a firearm, as a habitual criminal, contrary to WIS. STAT. §§ 940.23(1)(a), 941.20(2)(a), 941.29(2), 939.62 and 939.63 (1999-2000).[1] He also appeals from an order denying his motion for postconviction relief. He seeks a new trial on grounds that he was provided ineffective assistance prior to trial, at trial and at sentencing. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 It is undisputed that at approximately 2:00 a.m. on October 10, 1999, someone stood on the porch of Illeana McNeal-Veasley's duplex, knocked on the front door and, when she appeared at the door, fired multiple gunshots through the door. McNeal-Veasley was struck multiple times. McNeal-Veasley suffered significant injuries and has permanent disabilities.

¶3 McFarland was ultimately charged with the crime. His defense was that he was not the individual who shot McNeal-Veasley, and that he had an alibi for the time of the shooting. The case was tried to a jury in March 2002.

¶4 McNeal-Veasley testified that she met McFarland four months prior to the shooting and knew him as "J. Money." McNeal-Veasley said that she was using drugs at the time, and that on at least four occasions, she had sexual relations with McFarland in exchange for drugs. McNeal-Veasley testified that on October 10, she was sleeping in her apartment when she was awakened by a knock on the door. She opened the door to her apartment and walked down an interior

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

flight of stairs to the door to an outside porch. As she approached the door, she said, "[w]ho is it" and heard in response, "it's J. Money." She pulled back a curtain covering a window on the door and saw the man she knew as J. Money standing on the porch.

¶5 McNeal-Veasley testified that she told McFarland, through the door, that nothing was going on, no one was there, and her children were asleep. She said that as she "was turning to go back up and move the curtain back [she] saw him with the gun and he began firing." She said she saw colors as the bullets flew and that she saw McFarland walk away from the porch. McNeal-Veasley was hit by multiple bullets. The police and paramedics were summoned and she was taken to the hospital.

¶6 McNeal-Veasley stated that at the hospital, she was asked who had shot her. She said she kept trying to say "J. Money" and ultimately tried to write that name on a piece of paper. At trial, she testified that there was "no doubt" in her mind that McFarland was the man who fired the gun at her.

¶7 Another eyewitness, neighbor Jerome Glosson, also testified. He stated that he lived across the street from McNeal-Veasley and that he was on his porch at the time of the shooting. He testified that he saw a man walk across the street and onto McNeal-Veasley's porch. The man knocked on the door and McNeal-Veasley looked out the front door. Glosson heard five or six gunshots and saw the man run from the porch and into an alley, after which time Glosson lost sight of him. Glosson said he recognized the man as someone from the neighborhood, but did not know his name. In court, Glosson identified McFarland as the man he had seen on the porch.

¶8 Glosson also testified that a woman named Rochelle Ray lived nearby and that Ray told him she was McFarland's cousin. Glosson said Ray told him that she knew who shot McNeal-Veasley, but that Ray never identified who that was. Glosson said that Ray "was bragging" and suggesting that McNeal-Veasley had been shot both because McNeal-Veasley had in the past broken into Ray's home and had allegedly given McFarland a venereal disease.

¶9 The defense presented two alibi witnesses, as well as the testimony of McFarland. McFarland's sister, Sheila Redding, testified that McFarland was watching her children on the night McNeal-Veasley was shot, and that she saw McFarland at 11:30 p.m. and again at 2:15 a.m., when she returned home. However, Redding could not account for McFarland's whereabouts between 11:30 p.m. and 2:15 a.m., except to assume that he had been at home watching her children. A second woman who said she was with Redding on that night offered similar testimony, except she estimated that she and Redding returned to Redding's home at midnight or 1 a.m.

¶10 McFarland testified that he knew McNeal-Veasley, but denied any involvement in her shooting. He said that on the day in question, he was at Redding's home the entire day and evening, babysitting for her three children. He also acknowledged that he sometimes went by the name "J. Money."

¶11 The jury found McFarland guilty of all charges. McFarland was convicted and sentenced to indeterminate periods of confinement of twenty-one years, eight years and eight years, to be served consecutively.[2] McFarland filed a

[2] The crimes were committed in October 1999, prior to the effective date of Truth-in-Sentencing. *See* 1997 Wis. Act 283.

motion for postconviction relief, alleging he was entitled to a new trial on grounds of ineffective assistance of trial counsel. After the issues were fully briefed, the trial court denied the motion without a hearing. This appeal followed.

DISCUSSION

¶12 McFarland argues that he is entitled to a new trial because his trial counsel provided ineffective assistance. In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Performance is deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See* ***id.***; ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637.

¶13 As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for the attorney's error, there is a reasonable probability that the result of the trial would have been different. ***Id.***

¶14 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

¶15 In this case, McFarland asserts that he was wrongfully denied a ***Machner***[3] hearing on his motion for postconviction relief. A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If, however: "'the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id.*** at 309-10 (citation omitted). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** at 310.

I. Alleged failure to raise multiplicity challenge

¶16 McFarland argues that he was provided ineffective assistance because trial counsel failed to challenge, on multiplicity grounds, the prosecution of first-degree reckless injury with the use of a dangerous weapon and endangering safety by use of a dangerous weapon. We conclude that this

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

argument would have been denied by the trial court because the charges are not multiplicitous and, therefore, McFarland is not entitled to a ***Machner*** hearing or relief on this ground.

¶17 Multiple punishments for a single criminal offense violate an individual's constitutional right to be free from double jeopardy. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). "Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that this court reviews *de novo*." ***State v. Davison***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1 (emphasis added).

¶18 There is a two-step analysis for reviewing multiplicity claims. First, it is necessary to determine whether the offenses are identical in law and fact under the test set forth in ***Blockburger v. United States***, 284 U.S. 299 (1932). ***Davison***, 263 Wis. 2d 145, ¶43. ***Blockburger*** stated: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304. Under the ***Blockburger*** test, if the offenses are identical in fact and law, there is a presumption that the legislature did not intend for the same offense to be punished under two different statutes. ***Davison***, 263 Wis. 2d 145, ¶43. If, however, the offenses are not identical in fact or law, there is a presumption that the legislature did intend to allow cumulative punishments. ***Id.***, ¶44. However, the presumption is rebuttable. ***Id.*** Thus, the second step, "even if the charged offenses are *not* identical in law and fact, [requires the determination of] whether the legislature intended multiple offenses to be brought as a single count." ***Id.***, ¶45. In this step, the defendant has the burden of showing "a clear legislative intent" that the "cumulative punishments" are not intended or authorized. ***Id.***

¶19 We begin with the first step: determining whether the offenses are identical in law and fact. If they are, the presumption that the legislature did not intend for the same offense to be punished under two different statutes would apply. *See* ***id.***, ¶43. For first-degree reckless injury, the State must prove: (1) the defendant caused great bodily harm to the victim; (2) the defendant caused great bodily harm by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. WIS JI—CRIMINAL 1250 (2002). For endangering safety by use of a dangerous weapon (discharging a firearm into a building), the State must prove: (1) the defendant discharged a firearm; (2) the defendant intentionally shot the gun into a building; and (3) under the circumstances the defendant should have realized that there might be a human being present in the building. WIS JI—CRIMINAL 1324 (1996).

¶20 We agree with the State's analysis:

> A comparison of the elements of the two crimes shows that each offense requires proof of an additional fact which the other does not. The offense of first-degree reckless injury requires that the defendant caused great bodily harm whereas the offense of endangering safety by use of a dangerous weapon does not require that anyone be harmed. The offense of endangering safety by use of a dangerous weapon (discharging a firearm into a building) requires that the defendant act intentionally, whereas the offense of first-degree reckless injury does not. The offense of endangering safety … [also] requires that a firearm be discharged whereas the offense of first-degree reckless injury does not, even where the charge involves use of a dangerous weapon.
>
> Since count one and two of the information are not identical in law, there is no potential double jeopardy problem and it is presumed that the legislature intended to permit multiple punishments for these crimes. This presumption can only be rebutted by clear legislative intent to the contrary. *Davison*, 263 Wis. 2d 145, ¶44.

¶21 McFarland offers no evidence or argument to rebut the presumption that the legislature intended to permit multiple punishments for these crimes. In the absence of evidence to rebut the presumption, McFarland cannot successfully challenge his prosecution on multiplicity grounds. Therefore, trial counsel was not deficient for failing to raise this issue at the trial court.

II. Alleged ineffective assistance at trial

A. Trial counsel's general comments to McFarland

¶22 In a single paragraph, McFarland argues that certain comments trial counsel made to him suggest that trial counsel "was not concerned with McFarland's case and, in fact, simply wanted it to be over." Assuming for purposes of discussion that trial counsel made such statements, McFarland fails to explain how trial counsel's general attitude can constitute prejudicial ineffective assistance. He provides no legal authority for this general proposition. In the absence of explanation and legal analysis, we decline to address this general assertion further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court need not address issues not fully briefed); ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (court need not consider arguments unsupported by reference to legal authority).

B. Trial counsel's comments during voir dire

¶23 McFarland contends his trial counsel provided ineffective assistance when he told the jury panel that he was appointed to represent McFarland. Trial counsel was given an opportunity to address the potential jurors during voir dire. He stated:

> [TRIAL COUNSEL]: I have been appointed by the State of Wisconsin to defend Mr. McFarland because he does not have the funds to defend himself.
>
> THE COURT: Well.
>
> [TRIAL COUNSEL]: I am basically a public defender, so you understand there is a difference.
>
> THE COURT: [Trial counsel], that is immaterial here.
>
> [TRIAL COUNSEL]: Yeah.
>
> THE COURT: A defendant is represented by counsel.
>
> [TRIAL COUNSEL]: Okay.
>
> THE COURT: Proceed.

Trial counsel then proceeded with voir dire.

¶24 Later, outside the presence of the potential jurors, the State raised the issue of trial counsel's comments. The State explained:

> [THE STATE]: I felt that counsel's question or statement with regard to the fact that he is appointed and that Mr. McFarland can't afford to hire an attorney was inappropriate.
>
> And I know your Honor cut that off and indicated it was immaterial, I would request that the jury panel simply be voir dired on that issue, either by yourself or myself by virtue of that fact that is going to impact on your ability to listen to the evidence.

The trial court asked trial counsel why he had raised the issue with the potential jurors. In response, trial counsel indicated that he had strong feelings about the topic, but said he did not want to argue about it. The trial court reiterated that it did not believe the statements were appropriate and said that it planned to ask the potential jurors about their responses to the statements. Both the State and McFarland's trial counsel agreed with the trial court's decision to poll the potential jurors. The trial court also asked McFarland if he understood what was going to

happen, stating, "I don't want the jury being affected by that statement one way or the other whether they hold it against you or they are sympathetic for you…." McFarland specifically indicated that he did not object to having the trial court ask the potential jurors about trial counsel's statement.

¶25 The trial court made the following statement to the potential jurors:

> I want to instruct the jurors that the statement made by [trial counsel] regarding his representation of the defendant is not material in any way whatsoever with regard to the issues in this trial, he is a competent lawyer licensed to practice and does practice frequently in this court and other courts.
>
> This statement that was made briefly, and I understand why [trial counsel] felt he should make that, but it is not material to this case, however, before we select the jury, is there anyone on the panel, having heard that information, that would be biased or prejudiced one way or the other either for or against the defendant because of that?

Only one potential juror indicated she had a concern, and that was addressed in chambers. She indicated that she had been surprised by the comment, but said that she was "going to listen to the evidence and … make a decision based on that." The woman ultimately was not selected to be on the jury.

¶26 Assuming, as the trial court concluded, that trial counsel's comments during voir dire were inappropriate, we nonetheless agree with the trial court that McFarland has failed to show he was prejudiced by trial counsel's statements. As the State explains:

> [The juror] did not serve on the jury. No other juror expressed the view that they would be biased in any way as a result of the statement. The court advised the jurors that [trial counsel's] comment was not material. Moreover, it is not clear that the comment would make jurors biased *against* McFarland. The comment might have been designed to arouse sympathy for McFarland and could have had such effect.

¶27 It is well-established that this court is to presume the jury follows the instructions given by the trial court. *See* ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶13, 254 Wis. 2d 830, 647 N.W.2d 362 (Ct. App. 2002). McFarland has not convinced us that there is reason to believe that the jurors ignored the trial court's instructions and, instead, convicted McFarland because he was represented by appointed counsel. McFarland has failed to explain how he was prejudiced by trial counsel's remarks. Therefore, he is not entitled to a ***Machner*** hearing or a new trial on this ground.

C. Alleged failure to object to improper statements by the State

¶28 McFarland argues that his trial counsel was ineffective for failing to object to statements the State made during opening and closing arguments. McFarland asserts that during opening statements, the State referred to McFarland "as being, essentially, a 'gun-toting felon.'" McFarland argues: "The effect of such name-calling before presentation of even one piece of evidence is highly prejudicial, inflammatory, and intended to persuade the jury that the defendant is of bad character."

¶29 Contrary to McFarland's assertion, the prosecutor did not use the term "gun-toting felon" in his opening statement. The prosecutor began his statement with the following:

> Honorable Judge Sosnay, Learned Counsel, Ladies and Gentlemen of the Jury, guns in our community, felons with guns in our community, felons with guns shooting into houses in our community, felons with guns shooting into houses in our community recklessly injuring citizens in our community, felon Jermaine McFarland possessing a firearm, discharging that firearm into a residence in our community, injuring a citizen of our community, Illeana McNeal-Veasley.

> Ladies and Gentlemen, this is a story that Illeana McNeal-Veasley will never, ever forget. Ladies and Gentlemen, today you will hear evidence presented….

In its decision denying McFarland's postconviction motion, the trial court found that the prosecutor "fairly laid out for the jury the evidence he intended to introduce at trial." We agree. The prosecutor's statement was not improper, and trial counsel did not erroneously fail to object.

¶30 In closing argument, the State did refer to McFarland as a "gun-toting drug dealer" on two occasions. The trial court found that the prosecutor's characterizations did not exceed the scope of permissible argument. Once again, we agree. McFarland himself testified that he was a felon and a drug dealer, and there was evidence that McFarland was the shooter. Although the prosecutor could have chosen different words to summarize the same evidence—that McFarland was a felon and a drug dealer who had a gun on this occasion—the facts are supported by the evidence, and it was not inappropriate for the prosecutor to highlight them for the jury.

D. Alleged failure to object to "courtroom antics"

¶31 McFarland contends that his trial counsel should have objected to the State's in-court demonstration, where McNeal-Veasley stood behind the actual door that had been damaged in the shooting and explained what she had done on that night. He argues, "The purpose of the [State's] request appears to have been to inflame the jury and create an emotional moment, the nature of which was highly prejudicial against McFarland without having any probative value." The trial court adopted as its decision the State's argument that its demonstration using the door was relevant to elements of the offenses. We agree with the State and the

trial court that this evidence was relevant and that trial counsel was not ineffective for failing to object to it.

E. Alleged failure to subpoena witnesses

¶32 McFarland argues that trial counsel failed to subpoena three necessary witnesses, even after McFarland told trial counsel they had relevant testimony to provide. McFarland fails to fully develop his argument with respect to two of the necessary witnesses: his mother and McNeal-Veasley's boyfriend. He only mentions his mother and offers a single sentence of argument with respect to McNeal-Veasley's boyfriend. He provides no evidence of what those witnesses would have testified to if they had been called, except to assert in his affidavit that he believes "their testimony would have been useful to my defense and would have helped establish that I did not shoot Ms. McNeal-Veasley and that there were other people who could have committed this crime." Because the issue is not fully briefed with respect to those two witnesses, we decline to consider it further. *See* ***Pettit***, 171 Wis. 2d at 646.

¶33 McFarland does offer a developed argument with respect to Rochelle Ray. He contends that if called to testify, Ray "would have testified in favor of McFarland and that she did not know who shot the victim, thus recanting her earlier statements to the police." In support of his assertion, McFarland included with his postconviction motion an affidavit from Ray in which she states that she did not see the shooting and had no idea who shot McNeal-Veasley. In an earlier statement to police, Ray apparently told police that McFarland was the shooter. In her affidavit, she states, "I only told the detectives … that Jermaine McFarland was involved because the detectives told me that they [were] going to charge me with the shooting and take my children away from me."

¶34 Ray never testified at trial. There was discussion, outside the jury's presence, about the State's efforts to call her as a witness. The State explained that Ray was in custody and had absolutely refused to testify in the case, even when she was offered immunity for any involvement in McNeal-Veasley's shooting. The prosecutor who interviewed Ray told the trial court, "She indicated … she was close to the defendant and she had great animosity towards the victim in the case. She would not testify under any circumstances." Initially, the State indicated that it hoped the trial court would declare Ray an unavailable witness and allow her ***Mirandized*** statement to be admitted at trial. Trial counsel strenuously objected, asserting that he believed Ray's testimony was "crucial." The trial court reminded trial counsel that he too had subpoena powers and deferred discussion of the matter.

¶35 The next day, the State said because Ray had refused to testify even with immunity, it had decided not to try to transport her to the courtroom so that she could personally tell the trial court that she refused to testify. Rather, the State would withdraw its request to have her declared an unavailable witness and would instead proceed without seeking to introduce her ***Mirandized*** statement, in which she stated that McFarland was the shooter. Trial counsel was given the opportunity to respond and did not object to not bringing Ray to court to say that she refused to testify.

¶36 At issue is whether trial counsel was ineffective for failing to subpoena Ray to testify for the defense. We conclude that counsel was not ineffective, because there is no evidence that Ray would have agreed to appear if subpoenaed by the defense. To the contrary, there was undisputed evidence that Ray had absolutely refused to testify, even if offered immunity for any role she may have played in the crime. Even Ray's affidavit does not indicate that if

subpoenaed by the defense, rather than by the State, she would have agreed to testify (and be subject to cross-examination by the State). Although it is generally prudent for defense counsel to subpoena anyone the defense may want to call at trial, rather than relying on the State to produce every witness, we are unconvinced that a subpoena would have made a difference in this case, given Ray's absolute refusal to testify.

¶37 McFarland's brief discusses in detail how he was prejudiced by trial counsel's failure to subpoena Ray. He asserts that he was especially harmed because the trial court permitted the admission of out-of-court statements Ray made to fact witnesses. Because we have concluded that the record demonstrates that Ray would not have testified even if trial counsel had subpoenaed her, we decline to address McFarland's argument on the prejudice prong of the ineffective assistance of counsel analysis. *See* ***Strickland***, 466 U.S. at 687 (a reviewing court need not address the performance prong if the defendant has failed to show prejudice and vice versa).

F. Trial counsel's failure to discuss McFarland's alibi witnesses at closing

¶38 McFarland argues that his trial counsel was ineffective at closing argument for failing to reference the alibi testimony from two witnesses and to argue that McFarland was somewhere else at the time of the crime. Instead, trial counsel focused on addressing inconsistencies in the testimony of the State's witnesses. In its written decision rejecting this postconviction argument, the trial court found that because the defense's witness testimony had been weak, "it was entirely reasonable for counsel to raise inconsistencies in the testimony elicited from the State's witnesses during his closing argument rather than to focus on the alibi defense."

¶39 We decline to weigh in on the debate whether the defense's strongest argument was to highlight inconsistencies in the State's witnesses' testimony or promote the reasonableness of the defense witnesses' testimony. We are convinced that defense counsel's closing argument was sufficient, and that McFarland was not deprived of the effective assistance of counsel. McFarland can only speculate that a different argument may have swayed the jury. Ultimately, the jury was instructed to decide the case based on the evidence, not the closing arguments. The jury could have acquitted McFarland; it chose not to. McFarland is not entitled to relief on this ground.

III. Alleged ineffective assistance at sentencing

A. Argument at sentencing

¶40 McFarland argued in his postconviction motion that his trial counsel provided ineffective assistance when he made negative comments about McNeal-Veasley and failed to say positive things about McFarland. The trial court rejected this argument, concluding:

> The extremely grave nature of the defendant's acts was sufficient to warrant the maximum sentences in this case. For the reasons set forth in the State's brief, and based upon the factors the sentencing court considered in its rendition of sentence, the defendant was not prejudiced by counsel's performance at the sentencing hearing.

¶41 We have reviewed the sentencing transcript. Although we agree with McFarland that trial counsel's comments in response to McNeal-Veasley's rhetorical question about why this happened to her did not advance his case, we are unconvinced that he was prejudiced such that he is entitled to resentencing. Trial counsel was, as he observed, in a difficult position because McFarland maintained his innocence. In an effort to mitigate the crime, trial counsel did

advise the trial court that McFarland was not on probation or parole at the time of the crime. Also, although trial counsel did not suggest a specific sentence to the trial court, he noted that the State had asked for the maximum and suggested that the trial court use its own judgment, thereby implying that the trial court should not rely simply on the State's recommendation.

¶42 McFarland fails to suggest facts that trial counsel should have emphasized that would have mitigated his crime. Furthermore, he does not contend that the trial court erroneously exercised its discretion when it sentenced him. We conclude that McFarland is not entitled to resentencing.

B. Failure to object to the setting of restitution

¶43 McFarland provides two sentences of argument in support of his contention that he was prejudiced because trial counsel did not object to the setting of restitution or request a hearing to determine the proper amount of restitution. McFarland offers no evidence that the restitution ordered, $2,666, was unjustified. The trial court rejected McFarland's argument, noting that the restitution request was provided by McNeal-Veasley and accompanied by materials in support of the request. We agree with the trial court that McFarland has failed to demonstrate that the award was unjustified, and that he has therefore failed to demonstrate that he was prejudiced by trial counsel's failure to challenge the restitution request.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.