COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP191-CR **Cir. Ct. No. 2014CF4116**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICARDO RIVERA,

DEFENDANT-APPELLANT.

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

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Ricardo Rivera appeals a judgment of conviction and an order denying his motion for postconviction relief. Rivera argues his trial

attorney was constitutionally ineffective when he failed to ensure that the circuit court read to the jury WIS JI—CRIMINAL 315 (2001), relating to a defendant's right not to testify in a criminal proceeding. We conclude Rivera has failed to establish prejudice stemming from his attorney's alleged deficiency. Accordingly, we affirm.

¶2 An Information charged Rivera with three counts of delivering various quantities of cocaine. After a three-day trial, the jury acquitted Rivera on one of the counts and deadlocked on a second count that was later dismissed. Rivera was convicted and sentenced on the third count.

¶3 Prior to the trial, Rivera had requested the jury instruction relating to a defendant's right not to testify, WIS JI—CRIMINAL 315 (2001). That instruction states:

> A defendant in a criminal case has the absolute constitutional right not to testify.
>
> The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

Id. Rivera ultimately elected not to testify at trial. It is undisputed that, despite Rivera's pretrial request, the circuit court failed to give jury instruction 315.[1]

¶4 Rivera filed a postconviction motion alleging his trial attorney was constitutionally ineffective for failing to ensure that the circuit court gave jury

[1] At various points in his appellate briefing, Rivera suggests the circuit court gave erroneous jury instructions, misstated the applicable law, and "refused" to give WIS JI—CRIMINAL 315 (2001). The record does not support these characterizations of what occurred. By all accounts, the circuit court simply forgot to give jury instruction 315, which was inexplicably omitted from the compiled list of instructions to be given. Rivera's trial attorney did not object at any time to this omission.

instruction 315. The circuit court denied the motion without a hearing, a determination Rivera now appeals.

¶5 Rivera's arguments on appeal relate generally to the merits of whether the circuit court erred by not reading WIS JI—CRIMINAL 315 (2001) to the jury, as opposed to whether his counsel was constitutionally ineffective for failing to ensure that the instruction was read. This difference is not mere semantics. We use different standards to review preserved assertions of error in a direct appeal versus unpreserved assertions of error in an ineffective assistance of counsel context. Furthermore, different parties bear the burden of proof.

¶6 For example, had Rivera's trial counsel objected at some point to the omission of jury instruction 315, and had the circuit court overruled such an objection, Rivera would be entitled to review of that issue on direct appeal. As he points out, he would have no trouble showing in such a review that the circuit court erred in refusing to give the requested instruction. A circuit court must give a "no-adverse-inference" jury instruction when requested by a non-testifying defendant. ***Carter v. Kentucky***, 450 U.S. 288, 300 (1981). It is undisputed trial counsel in this case made such a request. The State would then bear the burden of showing the error was harmless, assuming such error is not per se prejudicial. *See* ***State v. Harvey***, 2002 WI 93, ¶35, 254 Wis. 2d 442, 647 N.W.2d 189; *see also infra* ¶¶17-18.

¶7 But here, there was no objection, and we must review Rivera's claim through the ineffective assistance of counsel lens.[2] To demonstrate ineffective

[2] Certain errors are so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. *See* ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. Rivera does not make any such "plain error" argument here.

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assistance of counsel, a defendant bears the burden of proving two things: (1) that counsel rendered constitutionally deficient performance; and (2) that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant makes an insufficient showing on one prong, we need not address the other. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583.

¶8 The State does not dispute that Rivera's trial counsel was deficient.[3] Rather, the State focuses, as did the circuit court, on the prejudice component. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. This inquiry requires that the court undertake a holistic review of the evidence before the jury. *See* ***id.*** at 695.

¶9 The State posits that Rivera cannot meet his burden because the substance of jury instruction 315 was conveyed to the jury by the parties' attorneys at various points in the trial proceedings. The State asserts the jury was

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However, he does argue for a rule of per-se prejudice arising from the circuit court's failure to give jury instruction 315, which we address below. *See infra* ¶¶17-18.

[3] Typically, any alleged deficiency would be ascertained through a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A ***Machner*** hearing is not necessary in this case because the State concedes trial counsel was deficient. Additionally, the circuit court denied Rivera's postconviction motion without a hearing based on the absence of discernable prejudice. A circuit court has discretion to grant or deny a hearing if the record conclusively demonstrates the defendant is not entitled to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We review a circuit court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.*** Questions of law that arise during our review of an exercise of discretion are decided de novo. *See* ***King v. King***, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

made aware at least four times that it was not to make any adverse inferences from the defendant's silence: twice during the voir dire of the jury pool, once during opening arguments, and once during closing arguments.

¶10 The first mention of the prohibition on adverse inferences arising from a defendant's refusal to testify came during the voir dire of potential jurors. The prosecutor acknowledged the State bore the burden of proof, and then asked the potential jurors the following:

> What that also means is that he [Rivera] has a constitutional right. That right is, he doesn't have to say a word. He never has to take the stand and you can't hold that against him. That's the law. Is everybody willing to follow the law, and you can't hold it against him if he doesn't say a word? That's the law. Any problem with that, anyone?

No potential juror responded to the State's inquiry.

¶11 Second, defense counsel also stated during voir dire that the jury could not speculate regarding a defendant's invocation of his right not to testify. Counsel stated: "And you can't speculate and say, well, he didn't come up here and tell his story because he would have said x, y, and z. Speculation is out; everybody willing to live with that?" Again, no potential juror responded to defense counsel's inquiry.

¶12 Third, defense counsel advised the jury of the substance of jury instruction 315 during his opening statement. Counsel stated:

> He [Rivera] doesn't have to testify, and that's again, that is a strategic decision that we don't make up today, tomorrow, nor until after the case is actually completed by the State. So just because again, and the judge will instruct you, this is the law, you cannot take it against him because he does not take the stand in this case.

¶13 Fourth, defense counsel repeated this admonition during his closing argument:

> And again, it's not my burden. The defendant doesn't have to testify, and there's a jury instruction in there that says that in fact you can't take that against him. Why? I[t']s because we just believe that they haven't met their burden.
>
> That's a decision, and it's on me, but the jury instruction says that you can't do it.

¶14 Under these circumstances, we agree with the circuit court that the record conclusively establishes that Rivera is not entitled to relief. The jury was told repeatedly—by both parties—that it could not draw a negative inference from the defendant's refusal to testify. Given that the jury was repeatedly told by the attorneys that it could not hold Rivera's silence against him, we cannot perceive a reasonable probability of a different outcome.

¶15 Moreover, Rivera's assertion that he was prejudiced by his attorney's failure is based solely on his speculation regarding the effect of the instruction not being given. Rivera must do more than show that the error had some conceivable effect on the outcome of the proceeding. *See* ***Strickland***, 466 U.S. at 693. Although he "need not establish that the final result of the proceeding would have been different," he bears the burden of demonstrating to this court's satisfaction that the outcome is suspect. *See* ***State v. Smith***, 207 Wis. 2d 258, 275, 558 NW.2d 379 (1997). Given the parties' repeated admonitions to the jury that it could not hold Rivera's silence against him, we conclude he has not satisfied that burden.[4]

[4] We also observe that the jury did ultimately resolve two of the charges in Rivera's favor. While there could be other explanations for these acquittals—e.g., the evidence was

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¶16 Rivera alternatively suggests his defense counsel's references to forthcoming jury instructions during his opening and closing statements prejudiced him because the jury might have viewed his attorney as a liar when it ultimately was not given jury instruction 315. We cannot countenance this interpretation of the record, as the State also informed the jury of the prohibition on adverse inferences. In addition, the jury was instructed that the attorneys' arguments are not evidence, so defense counsel's credibility was not at issue.[5]

¶17 Ultimately, Rivera appears to seek a per-se rule based on ***Carter*** that, when a defendant refuses to testify and defense counsel requests the "no-adverse-inferences" instruction, prejudice always follows a circuit court's later inadvertent failure to give that instruction regardless of whether defense counsel objects to that failure. In certain contexts we presume prejudice, but these instances are rare. ***State v. Erickson***, 227 Wis. 2d 758, 770, 596 N.W.2d 749 (1999). A defendant is only relieved of the obligation to show prejudice in circumstances where it is so likely that prejudice results that a "case-by-case inquiry into prejudice is not worth the cost." ***Strickland***, 466 U.S. at 692.

¶18 Rivera has directed us to no binding authority placing in this category an attorney's failure to ensure that a jury receives the "no-adverse-inference" instruction. Indeed, the United States Supreme Court has repeatedly

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simply weaker on those charges—they do provide support for the notion that Rivera was not prejudiced by the absence of jury instruction 315.

[5] For this reason, Rivera alternatively asserts the admonishments to the jury by both the State and defense counsel were insufficient. In part, this argument is based on the Supreme Court's observation in ***Carter v. Kentucky***, 450 U.S. 288 (1981), that arguments of counsel cannot substitute for instructions by a court. ***Id.*** at 304. However, ***Carter*** was not an ineffective assistance of counsel case, and it therefore does not establish that statements by counsel can be so easily dismissed for purposes of ascertaining prejudice under ***Strickland***.

declined to decide whether ***Carter*** error can be harmless, in one instance remarking that determination is best made first in state court proceedings. *See* ***James v. Kentucky***, 466 U.S. 341, 351-52 (1984); *see also* ***Carter***, 450 U.S. at 304.[6] If the per-se rule for which Rivera argues is to be adopted in this state, our supreme court should be the institution to do so. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶¶47, 50, 326 Wis. 2d 729, 786 N.W.2d 78 (observing the supreme court is the primary law-developing court).

By the Court.—Judgment and order affirmed.

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

[6] The United States Court of Appeals for the Seventh Circuit has concluded the harmless error doctrine—which is analogous to the ineffective assistance of counsel prejudice inquiry save for the party bearing the burden of proof—does apply to a trial court's failure to give a requested "no-adverse-inference" instruction. *See* ***Hunter v. Clark***, 934 F.2d 856, 859-60 (7th Cir. 1991) (en banc). This conclusion appears sensible, insomuch as a defendant and his or her counsel are not required to request a jury instruction relating to a defendant's right not to testify. *See* ***Carter***, 450 U.S. at 301, 303.