COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2394-CR **Cir. Ct. No. 2014CF5719**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTILLIS MITCHELL,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Artillis Mitchell appeals from a judgment of conviction for one count of first-degree sexual assault by use of a dangerous weapon, as an act of domestic abuse, contrary to WIS. STAT. §§ 940.225(1)(b) and 968.075(1)(a) (2013-14).[1] He also appeals from an order denying his postconviction motion. Mitchell challenges the sufficiency of the evidence used to convict him and asserts that his trial counsel provided ineffective assistance by failing to object to the admission of a utility knife recovered from Mitchell when he was arrested. We reject Mitchell's arguments and affirm.

BACKGROUND

¶2 Mitchell was charged with sexually assaulting the mother of his children, L.P., who did not live with him. The complaint alleged that Mitchell went to L.P.'s residence "unannounced and pushed his way into her residence and grabbed her by the neck and pushed her down onto a couch." The complaint further alleged that Mitchell "was waving around a gray box cutter and told [L.P.] to go into the bedroom" and that she "complied because she was afraid of the defendant and indicated that the defendant has been violent towards her in the past." The complaint said that Mitchell engaged L.P. in mouth-to-penis intercourse and penis-to-vagina intercourse, both without her consent.

¶3 The case proceeded to a jury trial. The State's theory was that Mitchell and L.P. had been in an abusive relationship for many years and that L.P. knew she had to comply with Mitchell's commands or risk injury. The State elicited testimony from L.P. about prior violent incidents with Mitchell. She said

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that one time, Mitchell forced her to engage in penis-to-mouth intercourse while he was holding a screwdriver in his hand. L.P. indicated that during another incident, Mitchell had a meat cleaver and hit her with a hammer, which led to his conviction for battery.

¶4 L.P. also testified about the assault for which Mitchell was on trial. She said: "He grabbed my throat and he was yelling at me, pushed me into the living room, sat me down on the couch holding my throat and he was yelling all the while." L.P. said that Mitchell "thumped" her on the chest, causing bruising. L.P. also testified that after pushing his way into her home and "holding [her] by the neck," Mitchell removed a box cutter from his pocket and "showed [her] that he had it." She testified that when Mitchell showed her the box cutter, "it was pretty much just intimidation," adding: "I don't believe I ever was cut with it."

¶5 L.P. described the box cutter as one where the blade slides "in and out." At first L.P. testified she could not remember the color of the box cutter. She later said it was orange. When asked whether she had seen the box cutter in Mitchell's possession in the past, L.P. said: "I'm not sure if it's that particular one but in the past I think I've seen him with a box cutter."

¶6 The State introduced testimony from a police officer about a utility knife that was seized from Mitchell when he was arrested a few blocks from L.P.'s home shortly after the incident. The officer agreed with the prosecutor's observation that the utility knife opens like a switchblade and, when open, reveals a blade that is "more along the lines of a box cutter apparatus." The black and silver utility knife was admitted into evidence, but no one asked L.P. whether it was the weapon she claimed Mitchell had displayed.

¶7 Mitchell took the stand in his own defense. He testified that he and L.P. had been seeing each other and were keeping their relationship secret from her family, who did not like Mitchell and had threatened to withhold support for L.P. if she spent time with him. Mitchell said that on the day of the incident, L.P. initially told him that she did not want to have sexual intercourse, but she eventually agreed and they had consensual sexual relations. Mitchell also denied striking L.P. in the chest. Mitchell acknowledged that he had the utility knife on his belt, but he denied removing it from his belt or threatening L.P. with it.

¶8 The jury was directed to determine if Mitchell was guilty of first-degree sexual assault "by use or threat of use of a dangerous weapon." The lesser-included offense of second-degree sexual assault was also submitted to the jury. The jury found Mitchell guilty of the first-degree charge and the trial court sentenced him to twenty-five years of initial confinement and fifteen years of extended supervision.

¶9 Represented by postconviction counsel, Mitchell filed a motion for postconviction relief. He sought a new trial on grounds that his trial counsel provided ineffective assistance by not objecting to the admission of the utility knife recovered from Mitchell when he was arrested. Mitchell asserted that the "black folding utility knife … was not the box cutter that the victim had identified during her testimony," which she had described as "an orange box cutter." Mitchell argued that admission of the utility knife was "overly prejudicial and irrelevant" and that his trial counsel should have objected to the utility knife's admission. The trial court denied Mitchell's motion without a hearing. This appeal follows.

DISCUSSION

¶10 Mitchell presents two issues on appeal. First, he challenges the sufficiency of the evidence to convict him of first-degree sexual assault by use of a dangerous weapon. Second, he asserts that his trial counsel provided ineffective assistance by not objecting to the admission of the utility knife recovered from Mitchell when he was arrested. We consider each issue in turn.

I. Sufficiency of the evidence.

¶11 In reviewing challenges to the sufficiency of the evidence, our standard of review is limited, as our supreme court explained in ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted):

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

¶12 The trial court instructed the jury that in order to convict Mitchell of first-degree sexual assault by use of a dangerous weapon, it had to find that: (1) Mitchell had sexual intercourse with L.P.; (2) L.P. did not consent to the sexual intercourse; and (3) Mitchell had sexual intercourse with L.P. "by the use or threat of use of a dangerous weapon." *See* WIS JI—CRIMINAL 1203 (2002). The trial court told the jury, consistent with WIS JI—CRIMINAL 1203 (2002), that the third element "requires that the defendant actually used or threatened to use the dangerous weapon to compel [L.P.] to submit to sexual intercourse" and that "[a]

dangerous weapon is any device designed as a weapon and capable of producing death or great bodily harm." *See* ***id.***

¶13 Mitchell argues that there was insufficient evidence to support the "use or threat of use of a dangerous weapon" element of the sexual assault charge. He explains:

> [T]he evidence was insufficient to prove that the defendant had actually used or threatened to use the dangerous weapon, the box cutter. The victim had testified that the defendant had never actually used or threatened to use it during the convicted sexual assault. He had merely shown it to her. There was no evidence that he had even unslid the blade out from its holder. When the victim saw the box cutter, she thought that this possession was fairly normal for him. He never waved it around. He never said "look at the box cutter that I've got." He never cut her with that box cutter. When asked why she had submitted to the sexual intercourse, the victim merely replied that she did so because he was "strong." She did not testify that the box cutter was the cause at any time as a reason for her submission to the convicted sexual assault. There was no testimony at any time during the trial that [the] defendant had actually used or threatened to use the box cutter in order to get the victim to submit to the sexual assault. On the contrary, the evidence was that the defendant had not used or threatened to use the box cutter in that manner. Hence, the evidence showed that [the] State had not proven this element beyond a reasonable doubt.

(Underlining omitted.)

¶14 Mitchell also points out that after L.P. testified, the State moved to either amend the charge to second-degree sexual assault—a crime that does not require proof that the defendant used or threatened to use a dangerous weapon—or instruct the jury on second-degree sexual assault as a lesser-included offense. Mitchell argues that by doing so, the State was "basically conceding that this does not rise to the level of proof that the defendant had actually used or threatened to use the box cutter, as required by the law." (Underlining omitted.)

¶15 We disagree with Mitchell's characterization of L.P.'s testimony and conclude that there was sufficient evidence to support the third element of first-degree sexual assault. L.P. testified that in the past, Mitchell had used a screwdriver, a meat cleaver, and a hammer to threaten or injure her during physical and sexual assaults. L.P. further testified that after Mitchell pushed open the door to her home and grabbed her by the neck, he removed the box cutter from his pocket and "showed it" to L.P. She explained what was happening when Mitchell showed her the box cutter:

> [H]e was already in my home and holding me by the neck. He would always make reference to—I would try to make enough noise so somebody would hear. More often than not, there wasn't anybody to hear. He'd tell me, you know, "Don't bother. Nobody's gonna come and help you."

L.P. said that she viewed the box cutter as an "intimidation technique."

¶16 L.P. said that as Mitchell continued to grab her neck, he pushed her into the bedroom, where he expressed anger about one of their children and said that he would hurt L.P.'s sister if she came to L.P.'s home. L.P. testified that Mitchell said he was going to have sex with L.P. and "jammed his penis down [her] throat." Later, on redirect examination, the State asked L.P.: "When he came in[to the home] in the state that you just talked about, being angry, had been drinking and I think you had also indicated he had this box cutter, were you at that time fearful for your safety?" L.P. responded: "Definitely, yes. He's very strong. And going by past incidents, I knew I had to comply with what he wanted."

¶17 Viewing this testimony in a light most favorable to the State and to the conviction, we conclude that the trier of fact "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *See* ***Poellinger***, 153 Wis. 2d at 507. Specifically, L.P.'s testimony that

Mitchell forced himself into the apartment, grabbed L.P.'s neck, and showed her a box cutter supported a finding that Mitchell threatened to use the box cutter. Mitchell did not have to explicitly say: "I'm going to cut you with this box cutter if you do not submit to sexual intercourse." Rather, the threat can be inferred from Mitchell's actions, especially in light of his history of violence with L.P., which included the use of a screwdriver, a hammer, and a meat cleaver. Further, the box cutter did not have to be the sole factor that led to L.P.'s acquiescence. It is sufficient that L.P. felt compelled to engage in sexual intercourse by Mitchell's anger, his drunkenness, the box cutter, and Mitchell's history of violence, as she testified in response to the State's question. For these reasons, we reject Mitchell's challenge to the sufficiency of the evidence.

¶18 Next, we briefly address Mitchell's argument that the State conceded the issue of sufficiency when it moved the trial court to either amend the information or submit the lesser-included offense of second-degree sexual assault to the jury. The State, which made its motion after L.P.'s testimony, said that "the evidence [that] has been presented so far … conforms more along the lines of a second[-]degree sexual assault." Accordingly, the State indicated it was willing to amend the charge to second-degree sexual assault or submit the second-degree sexual assault to the jury as a lesser-included offense. The parties subsequently discussed the matter at length, with trial counsel at first opposing the amendment of the charge and later supporting it. Ultimately, the trial court told the parties that it had "reached the decision to give the first[-]degree sexual assault instruction with the second[-]degree sexual assault as a lesser[-]included [offense]." The State withdrew its motion to amend the information.

¶19 We do not read the State's comments on the testimony as a concession that it could not prove the third element of first-degree sexual assault,

use or threat of use of a dangerous weapon. The fact that the State subsequently withdrew its motion to amend the information and explicitly agreed with the trial court's decision to submit both charges to the jury also mitigates against the suggestion that the State conceded it could not prove that element. Even if the prosecutor's comments could be read as a concession, the State points out on appeal that a prosecutor's "concession would not bind a court's determination of the issue." *See* ***Fletcher v. Eagle River Memorial Hospital, Inc.***, 156 Wis. 2d 165, 182, 456 N.W.2d 788 (1990) ("a matter of law … cannot be bargained away by counsel nor shielded from *ab initio* consideration by successive court reviews."). We reject any suggestion by Mitchell that we should either overturn his conviction based on the State's comments or view the State's comments as proof that the third element of the crime was not satisfied.

II. Ineffective assistance of trial counsel.

¶20 Next, we turn to Mitchell's ineffective assistance argument. To prove ineffective assistance, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Id.*** at 697. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the 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." ***Id.*** (citations and internal quotation marks omitted).

¶21 An evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A motion for a ***Machner*** hearing may, at the discretion of the trial court, be denied "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

¶22 Mitchell argues that his trial counsel provided ineffective assistance when he failed to object to the admission of the black and silver utility knife that was recovered from Mitchell when he was arrested. Mitchell's argument is based on ***Thompson v. State***, 83 Wis. 2d 134, 265 N.W.2d 467 (1978), a case that held "it is error to introduce possession of a gun which was not involved in the crime." *See* ***id.*** at 144. ***Thompson*** quoted with approval the reasoning of a California Supreme Court case:

> "When the specific type of weapon … is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon…. When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that the other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons."

See ***id.*** at 144 (quoting ***People v. Riser***, 305 P.2d 1, 8 (Cal. 1956) (first set of ellipses supplied by ***Thompson***). Applying ***Thompson***, Mitchell argues that the utility knife should not have been admitted because it was "materially different from the box cutter that the victim had described." It follows, Mitchell argues,

that trial counsel provided deficient representation when he did not object to the introduction of the utility knife.

¶23 We are not persuaded that Mitchell was prejudiced by his trial counsel's lack of objection because we conclude the utility knife was relevant evidence and was properly admitted. *See* WIS. STAT. §§ 904.01 and 904.02. It is undisputed that Mitchell had the utility knife with him at the time of his arrest. Mitchell also testified that he had the utility knife at L.P.'s home, although he denied removing it from his belt, where it was clipped. The utility knife is black and silver. When opened, it is six inches long and reveals a removable blade like those found in box cutters.[2] The officer who seized the utility knife agreed with the State that when the utility knife is open, its appearance is "more along the lines of a box cutter apparatus."

¶24 L.P.'s description of the box cutter she claims Mitchell showed her was generally consistent with the appearance of the utility knife when it is open, except for the color. L.P. indicated that the box cutter was about six inches long and had a blade that slid in and out. As noted, L.P. initially said she could not recall the color of the box cutter but later testified that it was orange. We are not persuaded that the color difference made the utility knife inadmissible. As the State explains:

> [I]t was for the jury to assess L.P.'s and Mitchell's credibility and reconcile any inconsistencies in the evidence. Here, this meant that the jury was responsible for deciding whether the utility knife received as Exhibit 7 was the box cutter that L.P. described, whether L.P. merely was

[2] Mitchell provided photographs of the utility knife in the appendix to his postconviction motion and the State provided photographs of the utility knife in its appellate brief.

> mistaken as to its color, and whether Mitchell used or threatened the use of a dangerous weapon.

(Citation omitted.) *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985) ("It is the jury's task … to sift and winnow the credibility of the witnesses.").

¶25 Finally, we reject Mitchell's argument that ***Thompson*** compels a different result. Unlike the facts in ***Thompson***, where it was clear that the gun being introduced into evidence was not the gun used in the crime, the utility knife found on Mitchell's belt was sufficiently similar to L.P.'s description of the box cutter that it "'could have been the weapon[] employed.'" *See* ***id.***, 83 Wis. 2d at 144 (citation omitted). Thus, the utility knife was admissible.

¶26 Because the utility knife was admissible, Mitchell was not prejudiced by trial counsel's failure to challenge the admission of the utility knife. Accordingly, Mitchell's ineffective assistance claim fails.

By the Court.—Judgment and order affirmed.

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