COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP392-CR **Cir. Ct. No. 2012CF1270**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTRELL L. POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Dontrell L. Powell appeals from a judgment of conviction entered after a jury found him guilty of armed robbery and felony bail jumping, and from an order denying his motion for postconviction relief. Powell maintains that he is entitled to a new trial based on trial counsel's ineffective assistance. We disagree and affirm.

BACKGROUND

¶2 According to the criminal complaint, Powell contacted an acquaintance, T.B., and asked if he wanted to play cards or gamble. T.B. agreed, and Powell picked him up in a minivan. When they exited the minivan, a man immediately came out of the bushes and robbed T.B. at gunpoint. Powell was charged with armed robbery on the theory that he participated in the scheme to rob T.B. Because he was out on felony bail at the time of the offense, he was charged with felony bail jumping for committing the armed robbery.

¶3 At the outset of trial, the parties and the court discussed whether T.B. would testify that he knew Powell from their time in jail together. The prosecutor stated that the evidence "reflects equally bad on both [Powell and T.B.], so I don't think it's really a prejudicial issue because, obviously, the credibility of both of these gentlemen is in play here; and, frankly, I think it's a wash." Trial counsel agreed and asked for a cautionary instruction.

¶4 T.B. testified that he met Powell in jail and knew him as "DP." On October 12, 2012, T.B. received a phone call from Powell about getting together to play cards. Powell picked up T.B. in a green minivan, drove to an alleyway, and parked in a driveway. T.B. saw a man dressed in black standing about ten feet away. Powell made a phone call and said, "we're here." Powell told T.B. to get

out of the minivan and they walked toward the house where the card game was supposed to take place.

¶5 The man in black was wearing a mask. He approached T.B., pointed a pistol at him, and told T.B. to give him what he had. T.B. gave the man the money he had in his pocket. He testified that Powell was standing about five feet away from him and that the gunman did not point the gun at Powell and did not speak to, look at, or rob Powell.

¶6 T.B. testified that Powell and the robber ran from the scene in different directions but that Powell changed direction and ran toward the robber. T.B. called police to report the robbery and while waiting for police to arrive, saw Powell drive past in the green minivan. There was a man in the front passenger seat who was wearing the same clothes as the robber. T.B. made eye contact with Powell, and Powell raised his index and middle fingers in a "V" gesture, which T.B. understood to mean that "he just pulled one over [on] me."

¶7 T.B. provided police with the van's license plate number as well as the cell phone number from which Powell had called.[1] That information was turned over to Officer Leo Viola, who testified about the effort to locate and identify Powell. Viola testified that based on the description of "DP" and his "knowledge of prior contacts" with Powell, he compiled a photo lineup which included Powell's picture. Viola also determined that Powell had received traffic citations while driving a green minivan with a license plate number nearly

[1] Cell phone record evidence at trial confirmed relevant aspects of T.B.'s statement and also showed that Powell did not make an outgoing phone call at the time he purportedly called the card game host to say "we're here."

identical to the one T.B. provided. From the photo lineup, T.B. identified Powell as the man he knew as DP.

¶8 Viola testified that Powell's cell phone was tracked to the vicinity of a particular address. The green van was parked outside and contained evidence linking it to Powell. The van's owner testified that he was in the process of selling the van to Powell and had allowed Powell to take possession of it. He testified that Powell called him and said the gang unit had towed the van. Powell asked him to contact law enforcement and ask why the van was towed and if he could get it back.

¶9 Powell testified in his defense. He informed the jury that he had been convicted of a crime six times. He said he drove T.B. to the location of the robbery so they could gamble. He testified he did not know the robber and had nothing to do with the robbery. He said he did not call police to report the robbery because he was on probation.

¶10 On cross-examination, Powell testified that he did not know who lived in the apartment where they were going to gamble. The prosecutor asked Powell what he had done since the robbery to determine whose apartment it was and Powell answered, "Nothing." Powell testified that the person who called him to tell him there would be gambling that day was a friend he knows only as "Dee." The prosecutor asked Powell, "So what have you done since October of 2012 knowing this case exists?" Defense counsel objected that the prosecutor was "touching on some real touchy grounds." The prosecutor responded that because Powell had brought up Dee's name, it was appropriate to ask what he had done to determine Dee's identity. The circuit court overruled the objection. The

prosecutor then asked Powell what he had done to figure out Dee's actual name. Powell answered, "So far nothing. I haven't looked into it."

¶11 The court instructed the jury that the parties had stipulated to certain facts relevant to the felony bail jumping charge:

> Number one, the defendant, Dontrell Powell was on bond for a felony offense on October 12, 2012.
>
> And, number two, prior to October 12, 2012, defendant, Dontrell Powell, had been released on that felony bond and the parties agree that Dontrell Powell knew that he could not commit any criminal offenses during the pendency of that felony matter.

¶12 The court provided several limiting instructions, including the following:

> Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. Specifically, evidence has been presented that the defendant was charged in a previous felony matter and had been in jail prior to the alleged incident in this case. You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case. It's not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

The jury found Powell guilty as charged and the circuit court imposed a thirteen-year bifurcated sentence, with eight years' initial confinement followed by five years' extended supervision.

¶13 Powell filed a postconviction motion alleging that trial counsel was ineffective for failing to object to testimony that T.B. knew Powell from their time in jail, for not objecting to testimony about the investigating officers being in the gang unit, and for not sufficiently objecting to the prosecutor's question about

what he had done since the robbery to obtain the name of the person hosting the card game.

¶14 At an evidentiary ***Machner***[2] hearing, with respect to testimony that T.B. and Powell were in jail together, trial counsel testified that he agreed that the evidence was a wash because through its admission, both sides gained a benefit and incurred a deficit. He testified he did not remember whether he thought about objecting to the officers' testimony about the gang unit or their prior contacts with Powell. Counsel was not asked any questions and did not testify about the State's cross-examination of Powell regarding what he had done since the crime to determine the name of the card game host. The circuit court denied the postconviction motion, determining that trial counsel had not performed deficiently and that even if he had, there was no prejudice because the evidence of Powell's guilt "was quite overwhelming." Powell appeals.

DISCUSSION

¶15 Powell maintains that trial counsel was ineffective for failing to exclude irrelevant, prejudicial information about Powell and permitting the State to shift the burden of proof. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

counsel's conduct" fell "below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. A defendant must show specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove constitutional prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Id.*** at 694.

¶16 Powell first contends that trial counsel provided ineffective assistance for failing to object to T.B.'s testimony that the two men met in jail. According to Powell, this evidence was irrelevant and highly prejudicial because of "the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***State v. Sullivan***, 216 Wis. 2d 768, 782, 576 N.W.2d 30 (1998) (warning of the dangers of admitting other acts evidence).

¶17 We conclude that trial counsel's performance in this regard was neither deficient nor prejudicial. Trial counsel testified that he did not object to evidence about the two men meeting in jail because he agreed that the information was "a wash" in terms of credibility, "it was not inconsistent with [the] theory of defense," and he had no other way to inform the jury that T.B. was previously in jail. Counsel's performance was part of an objectively reasonable strategy which we will not by hindsight second guess. *See* ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583 (judicial review of an attorney's performance is highly deferential and the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight).

¶18 Further, the testimony about Powell and T.B. meeting in jail was not prejudicial. Powell testified that he had six prior convictions and was on probation at the time of the robbery. The jury was informed that Powell was subject to a

felony bond in a separate case at the time of the robbery. That he spent time in jail would not surprise the jury. Additionally, any minimal risk of prejudice was alleviated by the circuit court's limiting instruction. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (jurors are presumed to follow the instructions they received).

¶19 Next, Powell asserts that trial counsel was ineffective for failing to object to the investigating officers' testimony concerning their work with the gang unit. In addition to his testimony explaining why he thought "DP" might be Powell, Viola testified that he was "assigned to the Gang Crimes Unit." Viola testified that his partner, Officer Timothy Schaal, assisted in the investigation of the building and van. Viola and Schaal stated that Schaal also worked with the gang unit. Viola testified that he believed Powell knew that both officers worked in the gang unit.

¶20 Powell argues that Viola's testimony that he worked in the gang unit and had prior knowledge of Powell was irrelevant. We disagree. The evidence explained to the jury the chain of events which led the investigating officers to identify Powell as a suspect. That Powell did not dispute driving the van does not render the evidence irrelevant. "The state must prove all the elements of a crime beyond a reasonable doubt, even if the defendant does not dispute all of the elements." ***State v. Davidson***, 2000 WI 91, ¶65, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted).

¶21 Nor has Powell established that he was prejudiced by the officers' testimony that they were part of the gang unit. Neither officer testified that Powell had any gang affiliation. Even if officers had not mentioned that they were part of the gang unit, the jury would have heard this information through the van's owner,

who testified that Powell told him the gang unit had towed the van. Powell has not demonstrated a reasonable likelihood that the jury would have reached a different result had trial counsel objected. *See* ***Strickland***, 466 U.S. at 694.

¶22 Powell's final claim is that trial counsel was ineffective for failing to lodge a sufficient objection to the prosecutor's questions about what Powell did after the robbery to determine the name of the person known to him as "Dee" and who purportedly hosted the card party. Counsel unsuccessfully objected to that question, stating that it was "touching on some really touchy grounds." Powell contends that "[c]ounsel should have objected on the ground that the state's line of questioning improperly shifted the burden to Powell to prove his innocence."

¶23 We conclude that trial counsel was not ineffective.[3] We are not persuaded that the prosecutor's isolated question improperly shifted the burden of proof. *See* ***State v. Patino***, 177 Wis. 2d 348, 379, 502 N.W.2d 601 (Ct. App. 1993) ("A prosecutor's comment by questioning or argument about the shortcomings of the defense evidence does not, *per se*, constitute a shifting of the burden of proof."). Counsel's failure to lodge a meritless objection does not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

[3] The State's brief argues that Powell failed to preserve this claim because he did not question trial counsel about this issue at the ***Machner*** hearing. Indeed, the hearing transcript reflects that postconviction counsel affirmatively stated he would not be pursuing the issue as an ineffective assistance claim because trial counsel had lodged an objection. Postconviction counsel represented to the circuit court that he did not intend to ask trial counsel any questions on this subject and would instead directly challenge the circuit court's decision overruling trial counsel's objection. Having determined that the record allows us to sufficiently review Powell's ineffective assistance claim, we choose to address it.

¶24 Further, in both its initial and final instructions, the circuit court repeatedly told the jury that the State had to prove every element of the offense beyond a reasonable doubt. It advised the jury that "[d]efendants are not required to prove their innocence" and that "[t]he burden of establishing every fact necessary to constitute guilt is upon the state." Moreover, the prosecutor reinforced in his closing argument that "the burden is on the state … to prove each thing in this case beyond a reasonable doubt," while "[t]he defense has no burden" and was not required to "put on a single witness" or "do anything with the burden of proof in this case." Even if we consider this claim preserved and assume that trial counsel's conduct was deficient, Powell has not met his burden to show prejudice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).