COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1348-CR **Cir. Ct. No. 2015CF2827**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAPHAEL D. TURNER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, 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. Raphael Turner, Jr., appeals a judgment convicting him of three offenses and an order denying his motion for postconviction relief.

Turner argues he is entitled to a new trial because the circuit court improperly admitted impeachment evidence regarding the nature of his prior juvenile delinquency adjudications. He also seeks a new trial based on ineffective assistance of counsel, arguing his trial attorney was ineffective by: (1) failing to object to a question by the State that opened the door to admission of the impeachment evidence; (2) failing to advise Turner about the permissible scope of his testimony; and (3) failing to call a certain witness to testify at trial. In the alternative, Turner argues he is entitled to resentencing because his trial attorney rendered ineffective assistance by failing to advocate on his behalf during his sentencing hearing. Turner further contends the circuit court erred by denying his postconviction motion without a ***Machner***[1] hearing. We reject these arguments and affirm.

BACKGROUND

¶2 On June 3, 2015, Henry[2] was robbed at gunpoint and subsequently shot outside Judy's Red Hots, a restaurant located on West Lisbon Avenue in Milwaukee. Ten days later, Henry identified Turner from a photo array as the person who robbed and shot him. Turner was charged with three offenses in connection with these events: armed robbery; possession of a firearm by a felon; and attempted first-degree intentional homicide, with use of a dangerous weapon. A jury trial on these counts took place in April 2016.

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

[2] We refer to the victim using a pseudonym, pursuant to the policy of protecting the privacy and dignity interests of crime victims. *See* WIS. STAT. RULE 809.86 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 At trial, Henry testified he drove to Judy's Red Hots on June 3, 2015, and parked in the parking lot in front of the restaurant. As he entered the restaurant, he passed a man, whom he identified at trial as Turner, exiting the restaurant. Henry ordered his food and paid for it using a one-hundred dollar bill. He received eighty dollars in change, which he placed in his front pocket. Henry testified Turner, who had re-entered the restaurant, was standing about an arm's length away from him and saw him pay for his order. Turner asked Henry if he wanted to purchase "any weed or Xanax," but Henry declined.

¶4 Henry left the restaurant after receiving his order and walked to his car. As he approached the vehicle on the driver's side, a man came up behind him and told him not to move and to "give it up." Henry turned around to face the man, whom he again identified at trial as Turner. He saw that Turner had a large-caliber revolver in his right hand, which he was pointing toward Henry. Turner told Henry to "give me the money." Henry then raised his hands, and Turner reached into Henry's pocket and took the eighty dollars he had received in change from the restaurant, along with Henry's cell phone and identification card. Turner asked Henry where his drugs were, and Henry responded he did not have any drugs. Turner then asked to look inside Henry's vehicle, and Henry told him to go ahead. However, Turner did not do so and instead "just walked away." He told Henry "I should have shoot [sic] you because I'm already on camera."

¶5 Henry testified he got into his car after the robbery and attempted to exit the parking lot onto West Lisbon Avenue, but he had to stop for traffic. While he was waiting to exit the parking lot, he saw Turner walking toward his vehicle. When Turner reached the back of the vehicle, he fired three or four shots toward it, hitting Henry's back. Henry pulled out of the parking lot during the shooting and drove to a police station, which was "almost kitty-corner" from the restaurant.

¶6 Henry testified Turner was wearing a gray hooded sweatshirt during both the robbery and the shooting. He conceded Turner's sweatshirt was not gray when he saw Turner inside the restaurant. However, he theorized Turner had turned his sweatshirt inside out before committing the robbery.

¶7 The State introduced surveillance camera footage into evidence at trial from both inside and outside Judy's Red Hots. Footage from one of the cameras inside the restaurant shows Turner entering the building at 8:51 p.m. He is wearing a black hooded sweatshirt with white lettering on the back and red shorts. About thirteen minutes after he arrives, Turner can be seen leaving the restaurant as Henry is entering. However, Turner then re-enters the restaurant about one minute later, at 9:05 p.m., wearing the same black sweatshirt and red shorts as before.

¶8 The surveillance camera footage confirms that Turner was in a position to see Henry paying for his order, receiving his change, and placing the change in the front pocket of his pants. While Henry waits for his food, he and Turner appear to engage in conversation, standing about an arm's length away from one another. Turner leaves the restaurant just before 9:07 p.m. Security camera footage from outside the restaurant shows him walking past Henry's vehicle and proceeding right toward West Lisbon Avenue. Henry subsequently leaves the restaurant at 9:11 p.m.

¶9 The robbery that Henry described in his trial testimony was not captured by any of the surveillance cameras outside the restaurant. However, one of the cameras shows the interior light of Henry's vehicle coming on at 9:12 p.m.

Shortly thereafter, Henry can be seen getting into his car from the driver's side and placing his food on the passenger side seat.[3] Henry's vehicle then proceeds to the entrance of the parking lot, where it stops to wait for traffic. At that point, a man wearing a light colored sweatshirt and shorts can be seen walking from the right toward the rear of Henry's car.[4] The man stops behind the vehicle, raises his right arm, and appears to fire a shot toward the vehicle. The shooter begins to walk away but then stops and fires a second shot toward the vehicle. As the vehicle pulls out of the parking lot onto West Lisbon Avenue, the shooter fires a third shot in its direction. The shooter then runs from the scene. None of the security camera footage from outside the restaurant shows the shooter's face.

¶10 Turner was the only witness to testify for the defense at trial. He testified he went to Judy's Red Hots on June 3, 2015, wearing a black hooded sweatshirt and red shorts. After ordering and receiving his food, he left the restaurant and began walking home. However, after walking a short distance, Turner went back to the restaurant because he realized the cashier had forgotten to give him his change. When he returned to the restaurant, he saw Henry inside, and the two men engaged in "small talk." Turner denied that they spoke about drugs. After correcting the issue with his change, Turner testified he left the restaurant and went home. He denied robbing Henry or witnessing the robbery. He testified he was probably walking into his house, which was located about three and

[3] The camera that captured this footage—Camera 2—gives a clear view of the passenger side and most of the front of Henry's vehicle. However, it does not show the driver's side of the vehicle, where Henry testified the robbery occurred.

[4] While the surveillance video from inside the restaurant is in color, the footage from outside the restaurant is in black and white.

one-half blocks from the restaurant, at the time of the robbery and shooting. He denied changing his clothes that night or turning them inside out.

¶11 The jury found Turner guilty of all three charged offenses. The circuit court imposed concurrent sentences totaling thirty years of initial confinement, followed by ten years of extended supervision. Turner moved for postconviction relief, asserting he was entitled to a new trial based on: (1) the circuit court's improper admission of evidence regarding the nature of Turner's prior juvenile delinquency adjudications; and (2) ineffective assistance of trial counsel. In the alternative, Turner sought resentencing, arguing his trial attorney was ineffective by failing to advocate on his behalf at sentencing.

¶12 The circuit court denied Turner's postconviction motion, without holding a ***Machner*** hearing. Turner now appeals his judgment of conviction and the order denying postconviction relief. Additional facts are set forth below.

DISCUSSION

I. Admission of evidence regarding the nature of Turner's prior juvenile delinquency adjudications

¶13 Turner contends he is entitled to a new trial because the circuit court erred by allowing the State to introduce evidence regarding the nature of his prior juvenile delinquency adjudications. We review the circuit court's decision to admit that evidence for an erroneous exercise of discretion. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶19, 270 Wis. 2d 62, 676 N.W.2d 475. We will affirm if the court correctly applied accepted legal standards to the facts of record and used a rational process to reach a reasonable conclusion. ***Id.***

¶14 "Wisconsin law presumes that criminals as a class are less truthful than persons who have not been convicted of a crime." ***Id.***, ¶21. Accordingly, evidence that a witness has been convicted of a crime or adjudicated delinquent is admissible for the purpose of attacking the witness's character for truthfulness. *See* WIS. STAT. § 906.09(1). Inquiry into a witness's prior convictions is generally limited to two questions: "Has [the witness] ever been convicted of a crime; and, if so, how many times?" ***Nicholas v. State***, 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971). If the witness answers these questions truthfully, "then no further inquiry may be made." ***Id.*** However, if the witness's responses are inaccurate or incomplete, "then the correct and complete facts may be brought out on cross-examination." ***Id.*** In other words, a witness's responses may "open[] the door" to the admission of additional evidence regarding his or her prior convictions. *See* ***State v. Hungerford***, 54 Wis. 2d 744, 749, 196 N.W.2d 647 (1972).

¶15 Here, the record reflects that, at the time of trial, Turner had been adjudicated delinquent of two offenses: armed robbery, as a party to a crime, and possession of a firearm. Before Turner testified, the circuit court informed him that, if asked how many times he had been convicted of a crime, he should answer "two." Defense counsel asked Turner that question near the end of Turner's direct examination, and Turner appropriately responded that he had two prior convictions. Immediately thereafter, defense counsel asked, "So as far as [Henry's] saying you're definitely the guy, he's a hundred percent sure, he's making a mistake; is that right?" Turner responded, "Yes, sir. I would never do nothing like this across the street from a police station. I've been going there since I was 12. I know not to do nothing like this."

¶16 The following exchange then took place at the beginning of the State's cross-examination of Turner:

> [THE STATE] Mr. Turner, you said you never [sic] do something like this now. Are you saying you'd never do something like this, like an armed robbery or—
>
> [TURNER] I will never do nothing like the whole situation especially where it happened at by the police station. That's suicide. That's something I would never do.
>
> [THE STATE] So it's because it's in front of the station?
>
> [TURNER] It's—it's not because it's in front of the station, that's just the main reason that's something I would never do.

¶17 The State subsequently requested a side bar. Outside the jury's presence, the State argued that, by testifying he would "never do anything like this," Turner had opened the door to admission of the fact that he had previously been adjudicated delinquent of both an armed robbery involving a gun and possession of a firearm. The circuit court agreed Turner had opened the door to admission of that evidence by "saying he would never do something like this when in fact he has [done] so." The court reasoned Turner's testimony to that effect "made himself sound very favorable" and, without clarification, would allow him to mislead the jury into believing his prior convictions were for "minor" offenses such as "disorderly conduct or possession of THC." The court therefore permitted the State to ask Turner about his prior delinquency adjudications for armed robbery and possession of a firearm, and to clarify that the former offense involved a gun. However, on defense counsel's request, the court required the State to clarify that those adjudications occurred in juvenile court. The court denied the State's request to question Turner about two counts of armed robbery that had been dismissed and read in during one of his juvenile cases.

¶18 After the jury returned, the State questioned Turner as follows:

> [THE STATE] Mr. Turner, earlier you had mentioned that you would never do anything like this, but isn't it true that on July 23, 2010 that you were adjudicated delinquent in juvenile court of one count of armed robbery as party to a crime?
>
> [TURNER] Yes, yes. I was 16. I didn't know better.
>
> [THE STATE] And there was a gun used in this—that offense?
>
> [TURNER] A BB gun.
>
> [THE STATE] And isn't it also true that on February 26th of 2014 you were adjudicated delinquent possession of a firearm?
>
> [TURNER] Yes.
>
> [THE STATE] And that was also with a gun?
>
> [TURNER] Yes.

¶19 In his postconviction motion, Turner argued the circuit court erred by allowing the State to ask these questions because Turner had accurately testified on direct examination that he had two prior convictions. He asserted his later testimony did not open the door to evidence regarding the nature of those convictions because it "did not suggest that he never committed his two prior offenses—only that he would not commit a crime in front of a police station." In denying Turner's motion, the circuit court stated it "st[ood] by" its prior determination that Turner had "opened the door to impeachment with his prior record by asserting that he would never engage in this kind of conduct under any circumstances."

¶20 We conclude the circuit court properly exercised its discretion by allowing the State to question Turner regarding the nature of his prior juvenile

adjudications. The court reasonably determined Turner had opened the door to that line of questioning by virtue of his prior testimony. On direct examination, when asked whether Henry's identification of Turner as the robber was mistaken, Turner volunteered that he "would never do nothing like this across the street from a police station" and further stated, "I know not to do nothing like this." That testimony was ambiguous. It could have reasonably been interpreted to mean that Turner would not commit the types of acts alleged in the State's complaint only when located across the street from a police station, or to mean that Turner would not commit those types of acts at all. The second interpretation would have created a false impression, given Turner's prior juvenile adjudications for armed robbery and illegal possession of a firearm.

¶21 The State therefore reasonably sought to clarify Turner's testimony on cross-examination. As both the State and the circuit court noted at trial, the State's questions gave Turner a "way out"—that is, an opportunity to clarify that his prior testimony only meant he would not do something "like this" across the street from a police station. Had Turner so testified on cross-examination, his testimony to that effect would have removed any impression that he would not do something "like this" in general, and further inquiry into his juvenile adjudications would have been unnecessary. However, instead of clearly answering the State's question, Turner equivocated, stating he would "never do nothing like the whole situation *especially* where it happened at by the police station." (Emphasis added.) When the State then attempted to clarify whether Turner was saying he would not have committed the charged crimes "because it's in front of the station," Turner again responded ambiguously, stating, "It's … not because it's in front of the station, that's just the *main reason* that's something I would never do." (Emphasis added.) A jury could reasonably interpret these responses to mean that, while

Turner would be especially unlikely to commit the types of offenses alleged in the State's complaint in front of a police station, he also would not commit such offenses as a general matter.

¶22 Thus, without further clarification, the jury could have been left with the inaccurate impression that Turner would not commit crimes similar to those alleged by the State. Under these circumstances, the circuit court reasonably concluded Turner had opened the door to limited questioning regarding the nature of his prior juvenile adjudications for armed robbery and possession of a firearm. The court attempted to limit any undue prejudice to Turner by requiring the State to clarify that these adjudications occurred in juvenile court and by preventing the State from inquiring about additional charges that had been dismissed and read in during the juvenile proceedings. On the whole, the court applied the appropriate legal standard to the facts of record and used a rational process to reach a reasonable conclusion. The court therefore did not erroneously exercise its discretion by allowing the State to question Turner about the nature of his juvenile adjudications, and Turner is not entitled to a new trial on that basis.

¶23 Turner emphasizes the circuit court's statement that his testimony would have permitted an inaccurate inference that his prior convictions were for "minor" offenses such as disorderly conduct or possession of THC. Turner argues that analysis was "ill-considered" because the court had already read a stipulation to the jury stating that Turner was a convicted felon. Turner's argument in this regard misses the point. His testimony on direct examination, along with his responses to the State's clarifying questions on cross-examination, permitted a reasonable inference that he would not, under any circumstances, commit offenses like the ones charged in the instant case, which included armed robbery and possession of a firearm by a felon. Although the jury knew that Turner had been

convicted of two prior offenses, at least one of which was a felony, it could have inferred based on Turner's testimony that those prior offenses were nonviolent or were less serious than the current charges against him. That inference would have been inaccurate, given the undisputed fact that Turner had been adjudicated delinquent of both armed robbery and illegal firearm possession. Under these circumstances, it was not inappropriate for the circuit court to permit further inquiry into Turner's prior offenses in order to clarify his ambiguous testimony.

¶24 Turner also asserts that, even if the circuit court properly allowed the State to ask him about his juvenile adjudication for armed robbery, it should not have permitted the State to ask about his adjudication for possession of a firearm. We disagree. Turner testified on direct examination that he would not do something "like this." On cross-examination, he similarly stated he would not do something "like the whole situation." These statements could reasonably be interpreted as referring to all of the criminal conduct alleged by the State in this case, including the allegation that Turner illegally possessed a firearm. The circuit court therefore appropriately allowed the State to question Turner about his previous juvenile adjudication for firearm possession.[5]

II. Ineffective assistance

¶25 Turner next argues his trial attorney was constitutionally ineffective in four respects, and he is therefore entitled to either a new trial or, in the

[5] Turner additionally asserts the circuit court's error in admitting this evidence was not harmless. Because we conclude the court did not err by admitting the evidence, we need not address Turner's harmless error argument. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (stating the court of appeals "should decide cases on the narrowest possible grounds").

alternative, resentencing. To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show 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.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶26 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

¶27 Here, the circuit court denied Turner's postconviction motion without first holding a ***Machner*** hearing. A circuit court has discretion to deny a postconviction motion without a ***Machner*** hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We independently review whether a postconviction motion raised sufficient facts so as to require a ***Machner*** hearing. ***Allen***, 274 Wis. 2d 568, ¶9.

A. Failure to object to the State's questioning

¶28 As noted above, the State began its cross-examination of Turner with the following question: "Mr. Turner, you said you never [sic] do something like this now. Are you saying you'd never do something like this, like an armed robbery or—[?]" Turner argues his trial attorney was ineffective by failing to object to this question because Turner's response opened the door to the admission of evidence regarding the nature of his prior juvenile adjudications. We conclude trial counsel's failure to object was neither deficient nor prejudicial because any such objection would have been properly overruled. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (an attorney does not perform deficiently by failing to raise a legal challenge that would have been properly denied); ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (a defendant is not prejudiced by counsel's failure to make a motion that would have been denied).

¶29 When asked on direct examination whether Henry's identification of Turner as the robber was mistaken, Turner volunteered that he "would never do nothing like this across the street from a police station" and then further stated, "I know not to do nothing like this." As explained above, that testimony was ambiguous in that it could have been reasonably interpreted to mean either: (1) that Turner would not commit the types of acts alleged in the State's complaint; or (2) that Turner would not commit those acts specifically when located across the street from a police station. The former interpretation would have created a false impression, given Turner's prior offenses. It was therefore reasonable for the State to seek to clarify Turner's ambiguous testimony by asking whether he meant that he would "never do something like this, like an armed robbery." As the circuit court correctly noted at trial, that question gave Turner an

opportunity to "get out" of the situation created by his prior testimony by clarifying that he only meant he would not have done something "like this" in front of a police station. Had Turner taken that opportunity, additional questioning regarding his prior juvenile adjudications would have been unnecessary.

¶30 For these reasons, any objection to the State's clarifying question would have been properly overruled. Consequently, Turner's trial counsel did not perform deficiently by failing to object to the State's question, nor did that failure prejudice Turner. Because the record conclusively establishes that Turner is not entitled to relief based on his attorney's failure to object, the circuit court properly rejected his ineffective assistance claim on that ground without a ***Machner*** hearing.

B. Failure to advise Turner about the permissible scope of his testimony

¶31 Turner also argues his trial attorney was ineffective by failing to advise him about the permissible scope of his testimony. Specifically, Turner contends his attorney "never advised him not to discuss anything that could potentially be construed as suggesting that he had not previously committed an armed robbery or been illegally in possession of a firearm." He asserts, "Had counsel prepared Mr. Turner, he would have been aware of the dangers involved in testifying in any way that could be construed as discounting prior offenses."

¶32 We conclude Turner's trial attorney did not perform deficiently in this regard. In support of his argument to the contrary, Turner relies on ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W.2d 711 (1985). There, the defendant incorrectly testified to having only two prior convictions, and the State then impeached that testimony by demonstrating the defendant actually had nine prior convictions. ***Id.*** at 643-44. Our supreme court concluded the defendant's attorney

was ineffective by failing to "verify the [defendant's] convictions and have the circuit court rule on the admission of each conviction" prior to trial. ***Id.*** at 644. The court reasoned, in part, "Had defense counsel been appropriately informed of the defendant's prior convictions, both in terms of number and in terms of their nature, he could have more adequately counseled [the defendant]." ***Id.*** at 638.

¶33 ***Pitsch*** is distinguishable. Here, unlike in that case, there is no allegation that Turner's trial attorney failed to investigate his prior convictions or failed to advise him how to respond when asked whether he had been convicted of a crime and, if so, how many times. In fact, the record shows that Turner accurately responded to those questions. However, when defense counsel then asked a seemingly unrelated question, Turner spontaneously volunteered that he "would never do nothing like this across the street from a police station" and that he knows "not to do nothing like this." We agree with the circuit court that these responses were not foreseeable and, as such, it is not reasonable to expect that Turner's trial attorney would have advised him against responding in this manner. In other words, trial counsel's failure to so advise Turner did not fall below an objective standard of reasonableness. *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695.

¶34 The record therefore conclusively demonstrates that Turner is not entitled to relief on his claim that his trial attorney was ineffective by failing to advise him about the permissible scope of his testimony. Accordingly, the circuit court properly rejected that claim without a ***Machner*** hearing.

C. Failure to call an eyewitness to testify at trial

¶35 Turner also argues he is entitled to a new trial because his trial attorney was ineffective by failing to call Eveles Harris, an eyewitness to the

robbery and shooting, to testify at trial. According to a police report attached to Turner's postconviction motion, Harris told police he arrived at Judy's Red Hots at about 7:30 p.m. on the night of the shooting. He was seated in a booth inside the restaurant when he saw Henry arrive at approximately 9:05 p.m. He saw Henry order food, wait to receive his food, and then exit the restaurant.

¶36 Harris told police Henry walked to the passenger side of his vehicle, and another man then approached Henry from the front of the vehicle wearing a "dark in color hooded sweatshirt with the hood up, [and] dark colored pants." Harris saw the man point a revolver at Henry. Henry raised his hands, while still holding his food, and the man with the gun then walked up to Henry and began patting down his pockets, which Harris understood to mean that Henry was being robbed. After the robbery, Harris saw the robber walking away toward West Lisbon Avenue. He told police Henry then opened the front passenger door of his vehicle, placed his food on the passenger seat, walked around the front of the vehicle, and entered it through the driver's side door.

¶37 Harris then saw Henry's vehicle drive to the parking lot's exit and stop for traffic, at which point the robber approached the vehicle, pointed a gun at it, and fired one shot. Harris ducked down in his booth and heard two additional gunshots. When he raised his head again, he saw the shooter running away from the parking lot. Harris told police he did not "remember seeing the suspect inside of [Judy's Red Hots] prior to the incident." However, he also stated he "was not able to get a good view of the suspect[']s face" because the hood of the suspect's sweatshirt was "pulled up."

¶38 Turner's postconviction motion also relied on an affidavit signed by Harris. Consistent with his statement to police, the affidavit stated Harris did not

"remember seeing the person who [he] saw commit the robbery and shooting inside of Judy's Red Hots prior to the robbery and shooting." Harris further averred that the State "made [him] come to court for the trial in this matter, but [he] was not called to testify."

¶39 Without holding a ***Machner*** hearing, the circuit court rejected Turner's claim that his trial attorney was ineffective by failing to call Harris as a witness at trial. The court concluded counsel's failure to call Harris did not prejudice Turner because it was not reasonably probable the result of Turner's trial would have been different had Harris testified. The court reasoned that, because Harris "could not identify the suspect," his statement to police "did not conflict with [Henry's] identification testimony." The court also emphasized that Harris "did not get a good view of the suspect's face," unlike Henry, who was in close proximity to the suspect during the robbery and testified he was certain Turner was the person who robbed him.

¶40 Turner argues the circuit court erred by concluding he failed to demonstrate prejudice. He emphasizes that the State lacked any physical or forensic evidence tying him to the crimes, and that its entire case instead rested on: (1) Turner's undisputed presence in the restaurant before the robbery and shooting; and (2) Henry's identification of Turner as his assailant. Turner argues Harris's testimony that the assailant was not in the restaurant before the robbery and shooting would have given the jury a reason to doubt Henry's identification of Turner. He therefore contends the absence of Harris's testimony undermines confidence in the outcome of his trial.

¶41 We disagree. Contrary to Turner's suggestion, Harris did not definitively state, in either his affidavit or his statement to police, that the person

who robbed and shot Henry was not in the restaurant before the shooting. Instead, Harris merely stated he did not "remember" seeing that person in the restaurant before the crimes.[6] In addition, Harris's statement reveals that he viewed the robbery and shooting from a distance and did not "get a good view of the suspect[']s face." These deficiencies in Harris's evidence significantly undermine Turner's claim that Harris's testimony would have given the jury a reason to doubt Henry's identification of Turner as his assailant.

¶42 Moreover, Harris's statement to police conflicts with the surveillance video from the night of the robbery and shooting in at least two ways. First, Harris told police the robbery occurred on the passenger side of Henry's vehicle, and after the robbery Henry opened the vehicle's front passenger door and placed his food on the passenger seat before walking around the vehicle and entering it through the driver's side door. However, surveillance video from outside the restaurant clearly shows that the robbery did not occur on the passenger side of Henry's vehicle, and that after the robbery Henry entered his vehicle on the driver's side before placing his food on the passenger seat. Second, Harris told police that the man who robbed and shot Henry was wearing a dark-colored hooded sweatshirt. Conversely, in the surveillance video the assailant's sweatshirt appears light in color. These discrepancies would have damaged Harris's credibility as a witness and thus further weakened his testimony regarding whether Henry's assailant was inside the restaurant before the robbery and shooting.

[6] Turner asserts in his reply brief that Harris was "confident that he had not seen the attacker in the restaurant beforehand." To the contrary, in both his affidavit and his statement to police, Harris merely stated he did not "remember" seeing Henry's assailant in the restaurant before the robbery and shooting.

¶43 Turner relies heavily on ***State v. Jenkins***, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786, to support his argument that he was prejudiced by his trial attorney's failure to call Harris as a witness. In that case, Jenkins was arrested and tried in connection with a shooting that killed Anthony Weaver and injured Toy Kimber. ***Id.***, ¶¶11-16. Immediately after the shooting, Kimber told police he did not know the shooter. ***Id.***, ¶13. However, when shown a photo array including Jenkins the next morning, Kimber identified Jenkins, whom he had known for three years, as the shooter. ***Id.***, ¶14. At trial, Kimber's testimony identifying Jenkins as the shooter was the only evidence directly linking Jenkins to the shooting. ***Id.***, ¶18. Jenkins' trial attorney did not call Cera Jones, another witness to the shooting, to testify at trial. *See* ***id.***, ¶27. When shown a photo array including Jenkins' picture, Jones had not identified Jenkins as the shooter. ***Id.***, ¶15. In addition, Jones attested in a statement attached to Jenkins' postconviction motion that she told police Jenkins "was definitely not the shooter and that she had seen [Jenkins] across the street minutes after the shooting occurred." ***Id.*** On these facts, our supreme court concluded trial counsel's failure to call Jones as a witness was both deficient and prejudicial. ***Id.***, ¶¶48, 59.

¶44 ***Jenkins*** is distinguishable from the instant case in at least three important respects. First, Jones definitively stated Jenkins was not the person who shot Weaver and Kimber. ***Id.***, ¶15. In contrast, Harris was not able to give a definitive statement about the identity of Henry's assailant, and he conceded he did not have a good view of the assailant during the crimes. Second, Jones' statement that Jenkins was not the shooter was corroborated by evidence other than Jenkins' own testimony—namely, another witness's testimony that Jenkins was asleep at the time of the shooting and the witness woke Jenkins when the shots were fired. ***Id.***, ¶20. Here, there is no corroboration for Harris's statement

that he did not "remember" seeing Henry's assailant inside the restaurant before the robbery and shooting. Third, as discussed above, Harris's version of events conflicted with surveillance camera footage from the night of the robbery and shooting in at least two respects. No similar conflict was present in ***Jenkins***.

¶45 The State concedes that Henry's statements to police also included slight discrepancies, particularly concerning his assailant's clothes. However, despite these minor discrepancies, Henry identified Turner from a photo array and, thereafter, steadfastly maintained that Turner was the man who robbed and shot him. In contrast, Kimber—the victim in ***Jenkins***—gave conflicting statements to police about the shooter's identity, initially stating he did not know the shooter, but then telling police the shooter was Jenkins, whom he had known for three years. ***Id.***, ¶¶13-14. Henry's identification testimony was therefore stronger than Kimber's identification testimony in ***Jenkins***.

¶46 These distinctions between the instant case and ***Jenkins*** convince us that, even though trial counsel's failure to call Jones as a witness in ***Jenkins*** was prejudicial, the same is not true here. Instead, given the weaknesses in Harris's testimony, along with the strength of Henry's identification testimony, we conclude the record conclusively shows it is not reasonably probable the outcome of Turner's trial would have been different had his trial attorney called Harris to testify. The circuit court therefore properly rejected Turner's claim that his trial attorney was ineffective by failing to call Harris as a witness without a ***Machner*** hearing.

D. Failure to advocate on Turner's behalf at sentencing

¶47 Finally, Turner argues in the alternative that he is entitled to resentencing because his trial attorney was ineffective by failing to advocate on his

behalf at sentencing in two respects. First, Turner argues his attorney should have been better prepared to "address and expound upon the information contained in the PSI [presentence investigation report]." Second, Turner argues his attorney was ineffective by "repeatedly emphasizing [Turner's] difficult nature." The circuit court rejected Turner's claim that his trial attorney was ineffective at sentencing, concluding the record conclusively showed Turner was not prejudiced by his attorney's alleged deficiencies. We agree with that conclusion.

¶48 As to Turner's first argument that his attorney inadequately addressed and expounded upon information in the PSI, Turner's only specific complaint is that his attorney was unable to answer the circuit court's questions about his mental health diagnoses. The court asked counsel about the PSI's statement that Turner suffers from "mild oppositional defiant disorder conduct disorder," in addition to ADHD. Counsel responded that he is "not a doctor," but his "own personal observation" indicated "there is some defiant disorder present with [Turner]." When the court questioned counsel further about whether Turner's diagnosis of "mild oppositional defiant disorder conduct disorder" referred to a single disorder or two separate disorders, counsel responded, "[Y]ou'd have to consult a D.S.M. to find the definition of that disorder. But part being defiant [sic] in having that, I do see why they would have that diagnosis for Mr. Turner." The State then informed the court, based on a Google search, that Turner's diagnosis encompassed two separate disorders.

¶49 The record indicates the circuit court simply wanted to know whether one of Turner's diagnoses—"mild oppositional defiant disorder conduct disorder"—was in fact a single disorder or two separate disorders. Although Turner's attorney was unable to answer that question, the State promptly informed the court that diagnosis encompassed two separate disorders. Turner does not

argue that the information the State provided to the court was inaccurate. Accordingly, Turner was not prejudiced by his attorney's inability to answer the court's question. Turner does not cite any other specific instance in which his attorney failed to adequately address information in the PSI.

¶50 As for Turner's second argument that his attorney should not have emphasized his difficult nature, we conclude Turner was not prejudiced because the circuit court was already aware of that information. At the beginning of the sentencing hearing, the court asked the attorneys whether they were prepared to proceed. Turner's trial attorney responded:

> Your Honor, I do want to inform the Court of the situation between Mr. Turner and I since the trial.
>
> I guess I'm prepared to do the sentencing.
>
> But I would inform the Court that I did meet with Mr. Turner to go through the P.S.I., and he was not interested in reviewing it with me or discussing the issues for sentencing.
>
> Before the case was called, I went in back and talked to him, but he was not interested in communicating with me.
>
> I did send him in the mail a copy of the P.S.I.
>
> I don't know if he has any additions or corrections.

The court then gave Turner the opportunity to review the PSI with his attorney.

¶51 Shortly thereafter, Turner submitted a letter to the circuit court expressing dissatisfaction with his trial counsel's performance. After reviewing that letter, the court noted that Turner was on his second attorney and that the court had already denied his current attorney's request to withdraw. The court characterized Turner's letter as "a summary or re-cap of his gripes." When trial counsel subsequently indicated that Turner had been uncooperative in preparing

for sentencing, the court stated it was "not necessarily surprised" by that information because Turner had similar problems with his prior attorney. Later on, during his sentencing argument, Turner's trial attorney stated he had "limited information" about the "positive aspects" of Turner's character.

¶52 While Turner argues his trial attorney was ineffective at sentencing by emphasizing his uncooperative nature, the record conclusively shows that counsel did not tell the circuit court anything it did not already know. The court was aware of Turner's difficulties cooperating with his first attorney. The court was also aware that Turner's second attorney had previously moved to withdraw. Turner himself submitted a letter at sentencing renewing his complaints about his counsel's representation. In addition, the court was aware from reading the PSI that Turner had been diagnosed with "mild oppositional defiant disorder." Under these circumstances, it is clear Turner's trial attorney's statements about Turner's difficult personality did not prejudice Turner because the court was already aware of that information.

¶53 In addition, the record reveals an ample basis for the circuit court's decision to impose concurrent sentences totaling thirty years' initial confinement and ten years' extended supervision. The court emphasized Turner's "incredibly problematic" criminal record and stressed that he was twenty-two years old but had no employment history or high school diploma. The court acknowledged the substance abuse issues and mental health diagnoses set forth in the PSI. However, the court emphasized the "incredibly violent, aggravated" nature of the offenses for which Turner was being sentenced. The court also observed that Turner had failed to accept responsibility or show any remorse for his actions and had not demonstrated "any cooperation in this matter whatsoever." The court discussed the "chilling effect" of Turner's crimes, stating offenses of that nature make

members of the public "afraid to be on the streets of Milwaukee, afraid to come to our beautiful city." The court also stressed that Turner had been on supervision for less than two months when he robbed and shot Henry, which indicated a period of confinement was necessary "to protect the public from further criminal activity" by Turner. In addition, the court noted that Henry would continue to suffer the physical and psychological effects of Turner's crimes "for his entire life …. In effect, a life sentence for the victim."

¶54 On this record, there is no reason to believe Turner's sentences would have been any different absent his trial attorney's alleged deficiencies. The circuit court therefore properly rejected Turner's claim that he received ineffective assistance at sentencing without a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

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