

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

No. 00-2650-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. NOVAK,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Timothy Novak appeals a set of judgments convicting him of one count of being party to the crime of arson, two counts of insurance fraud, and one count of false swearing, and also appeals an order denying his motion for postconviction relief. He claims that he was denied his

constitutional right to counsel at the preliminary hearing and arraignment, and that he was denied effective assistance of counsel and due process of law in several other respects. We affirm the judgments and order of the trial court for the reasons discussed below.

¶2 Novak and his wife were charged with arson and three counts of insurance fraud following the destruction of their home by fire. At their initial appearance, they informed the court that they had not qualified for representation by the Public Defender's Office and were unable to afford a private attorney. The Novaks subsequently managed to obtain an attorney who appeared with them at two scheduling conferences, but the trial court apparently allowed him to withdraw.¹ The trial court then cautioned the Novaks by letter that they should be prepared to proceed at the preliminary hearing whether or not they had obtained successor counsel.

¶3 The Novaks were unrepresented at the preliminary hearing because, they said, they lacked sufficient funds to retain another attorney. The trial court noted that the matter had been on the calendar for months and that the Novaks had been given every opportunity to hire an attorney, although it did not specifically examine their ability to do so. The hearing proceeded and the trial court found probable cause to bind the Novaks over for trial. The State filed an information adding charges of false swearing against each defendant based on evidence presented at the preliminary hearing. The trial court subsequently appointed an

¹ Although there is nothing in the record explaining counsel's withdrawal, the State does not contest the Appellant's assertion in his brief that the withdrawal was based on a disagreement over whether the Novaks should accept a plea bargain.

attorney to represent the Novaks at trial on the condition that the Novaks repay the county on a monthly basis.

¶4 During the trial, the State introduced evidence that there had been a prior fire at the Novak home for which they had collected insurance from the same insurer. Defense counsel withdrew his objection to this evidence after the State explained at a sidebar that the purpose of the evidence was to show the Novaks' familiarity with the insurance claims procedure, not that the prior fire had also been the result of arson.

¶5 A jury convicted Novak on all of the charges, but the State subsequently dismissed one of the counts of insurance fraud. The court sentenced Novak to seven years in prison for the arson, seven years of probation on each of the insurance fraud counts and eight years probation for the false swearing. Novak filed a postconviction motion raising the issues of lack of counsel at the preliminary hearing and arraignment, the filing of an additional charge following the hearing, and the admission of evidence relating to the prior fire. The trial court denied the motion and Novak appealed.

¶6 Novak first seeks relief on the grounds that he lacked counsel at the preliminary hearing and arraignment. He points out that the Sixth Amendment to the United States Constitution guarantees the right to counsel at all critical stages of a criminal proceeding, including the preliminary hearing. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *State v. Wolverton*, 193 Wis. 2d 234, 251-52, 533 N.W.2d 167 (1995). Once the right to counsel has attached, a defendant cannot proceed alone unless the record affirmatively demonstrates a knowing and intelligent waiver of the right to counsel, or the defendant forfeits the right by conduct which interferes with the orderly administration of justice. *Pickens v.*

State, 96 Wis. 2d 549, 555, 292 N.W.2d 601 (1980), *overruled on other grounds* by *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997); *State v. Cummings*, 199 Wis. 2d 721, 752, 546 N.W.2d 406 (1996). This means that the trial court is obligated, when the necessities of the case so require, to appoint counsel for a defendant who does not qualify for representation by the Public Defender's Office but is unable to afford private counsel at the market rate prevailing in the community. *State v. Dean*, 163 Wis. 2d 503, 513, 471 N.W.2d 310 (Ct. App. 1991). However, a defendant who claims error at the preliminary hearing must seek relief prior to trial in order to preserve the issue. *State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). This rule applies even when the alleged error is ineffective assistance of counsel. *State v. Wolverton*, 193 Wis. 2d 234, 254, 533 N.W.2d 167 (1995).

¶7 Novak argues that the *Webb* waiver rule should not apply to the facts of this case because it is unreasonable to expect an unrepresented defendant to raise the very issue of non-representation by means of an interlocutory appeal. He attempts to distinguish *Wolverton* on the grounds that the defendant in this case made repeated assertions that he could not afford counsel, and that counsel was not appointed until ten months after the preliminary hearing. He overlooks, however, the fact that counsel in *Wolverton* was appointed before trial but after the standard time for seeking interlocutory review of the bindover had passed, just as here. Furthermore, we note that one of the first actions counsel took in the present case was to move the trial court to extend the time to file motions whose filing deadline had expired prior to his appointment. There is no reason why counsel could not have made a similar motion to this court if he wanted to challenge the bindover determination on the grounds that Novak had been denied counsel. We see little incentive for counsel to have done so, however, given that

the overwhelming evidence presented at the initial preliminary hearing would undoubtedly have resulted in bindover regardless of counsel's presence. In sum, we conclude that any objection to the absence of counsel at the preliminary hearing was waived under *Wolverton* once the matter proceeded to trial, and that counsel's failure to raise the issue was not ineffective assistance of counsel because there was no reason to believe that a second preliminary hearing with counsel would have yielded any different result.

¶8 The same analysis applies to Novak's claim that counsel should have challenged the charge of false swearing added following the preliminary hearing on the grounds that Novak lacked counsel at the hearing. Because counsel could reasonably have concluded that the false swearing charge was transactionally related to the arson charge on which bindover was ordered, there was no reason for counsel to believe that a second preliminary hearing with counsel would have yielded any different result and his failure to raise the issue was not deficient performance. See *State v. Williams*, 198 Wis.2d 479, 483, 544 N.W.2d 400 (1996) (discussing what charges may be included in an information).

¶9 Novak also assigns error to testimony about a question asked by his wife during the preliminary hearing. See *Pointer v. Texas*, 380 U.S. 400 (1965) (barring the admission of testimony given at a pretrial proceeding where the accused did not have the benefit of cross-examination). He claims that the State should not have been able to use his wife's question of a witness from the preliminary hearing to impeach her trial testimony about when an alleged phone call had occurred because the integrity of the preliminary hearing was undermined by lack of counsel. Novak did not object during trial to his wife's testimony about her question at the preliminary hearing, however, and in fact his counsel asked her what information she had been trying to elicit from the witness by the question.

We therefore deem the issue waived. We further conclude that counsel's failure to object did not constitute ineffective assistance of counsel because counsel could reasonably have believed, as he testified, that the testimony would actually be favorable to the Novaks.

¶10 Novak next challenges the admission of his testimony on cross-examination regarding a prior fire at his house. He attempts to characterize this testimony as "other acts" evidence, and claims that it was inadmissible because the State failed to give notice that it planned to introduce it. However, there was no indication that the prior fire had been deliberately set. The State explained that it was introducing the evidence to show that the defendant was familiar with the insurance claims process. Therefore, we are persuaded that the testimony was offered not "to prove the character of a person in order to show that the person acted in conformity therewith," but rather to show that Novak had the requisite "knowledge" to plan insurance fraud. WIS. STAT. § 904.04(2) (1999-2000).² Because the testimony did not constitute impermissible other acts evidence, counsel did not perform deficiently by withdrawing his objection to it.

¶11 Novak argues that even if the testimony regarding the fire was not other acts evidence, its admission was plain error because its prejudicial effect substantially outweighed its probative value. *See* WIS. STAT. § 904.03. A plain error is one which is both obvious and substantial, and which has likely deprived a defendant of a basic constitutional right. *State v. Vinson*, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994). Here, Novak's theory of why the testimony was prejudicial parallels his argument that it was other acts evidence—that is, that the

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

jury could mistakenly infer that he had set the prior fire and had acted in conformity therewith by arranging the second fire. However, we have already noted that the evidence was probative on the issue of knowledge and plan. Because the weighing of potential prejudicial effect against probative value would fall within the trial court's discretion, we cannot conclude that the admission of the testimony was an obvious error. Nor can we conclude that the testimony deprived Novak of a fair trial or any other basic constitutional right. To the contrary, given the strength of the evidence against him, including the testimony of the man who said he set the fire and that Novak had paid him to do it, we are persuaded that the prior fire testimony did not affect Novak's substantial rights so as to constitute plain error.

By the Court.—Judgments and order affirmed.

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

