

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 00-2897-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERJUAN SPILLER,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jerjuan D. Spiller appeals from a judgment of conviction and an order denying postconviction relief after a jury found him guilty of: two counts of kidnapping, contrary to WIS. STAT. § 940.31(1)(b) (1997-98);¹

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

two counts of first-degree sexual assault, contrary to WIS. STAT. § 940.225(1)(b); two counts of armed robbery, contrary to WIS. STAT. § 943.32(2); and exposing a sex organ, contrary to WIS. STAT. § 948.07(3), all as party to a crime. Spiller claims that: (1) the trial court erred when it summarily denied his postconviction motion alleging ineffective assistance of counsel; (2) the trial court erroneously exercised its discretion when it denied his motion for a mistrial; and (3) he is entitled to a discretionary reversal under WIS. STAT. § 752.35 because the real controversy was not fully and fairly tried. Because Spiller's postconviction motion failed to allege sufficient facts to warrant a *Machner*² hearing on his ineffective assistance claim, because the trial court did not erroneously exercise its discretion when it denied his motion for a mistrial, and because he is not entitled to a discretionary reversal, we affirm.

I. BACKGROUND

¶2 On October 6, 1998, Kelly S. was waiting for a bus when two men approached her, one of whom was later identified as Spiller. One of the men brandished a gun, and Kelly S. was ordered to enter a nearby alley where they were joined by a third man. The men robbed various personal items from Kelly S. and forced her to engage in penis-to-vagina intercourse. After Kelly S. was sexually assaulted, the three men fled the scene.

¶3 On October 26, 1998, two men, one of whom was later identified as Spiller, approached Chenille E. while she was waiting for a bus. One of the men brandished a gun, and Chenille E. was directed into an alleyway between two

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

houses. The two men robbed Chenille E. of various personal items including her coat, jewelry, a debit card and her cellular phone; they then forced her to engage in penis-to-vagina intercourse. A third man joined them in the alleyway and forced Chenille E. to perform penis-to-mouth intercourse. After Chenille E. was sexually assaulted, the three men fled.

¶4 The two cases were consolidated and tried to a jury, which found Spiller guilty of seven felonies relating to the two incidents. During the deliberations, the jury asked the bailiff for two bus schedules. The bailiff provided one to the jurors, but it was immediately removed when the trial court was notified. Spiller moved for a mistrial because the jury was provided with information which was not evidence received at trial. The trial court denied the motion, but did read a cautionary instruction to the jury advising it that the bus schedule was not evidence and should not be considered during the deliberations. The trial court reasoned that the cautionary instruction, together with the fact that the jury only had the bus schedule for a few seconds, obviated the need for a mistrial.

¶5 After he was convicted, Spiller filed a postconviction motion asserting ineffective assistance of counsel, alleging six specific instances of deficient performance. The trial court summarily denied the motion. Spiller now appeals.

II. DISCUSSION

A. *Ineffective Assistance of Counsel.*

¶6 Spiller claims that the trial court erred when it summarily denied his postconviction motion alleging six individual instances of ineffective assistance.

Specifically, Spiller alleged that he received ineffective assistance of counsel because: (1) his counsel engaged in prejudicially deficient conduct when he failed to address a promise that he made in his opening statement to the jury; (2) his counsel failed to object to the trial court's modification of the pattern jury instruction on accomplice testimony; (3) his counsel failed to object to the trial court's response to the jury's question about "intent"; (4) his counsel failed to cross-examine the accomplice, Toronto Conley, about DNA found at the crime scenes; (5) his counsel failed to request an instruction that Conley's guilty plea to the offenses that Spiller was being tried for could not be considered evidence that Spiller was guilty of the same offense; and (6) his counsel failed to request WIS JI—CRIMINAL 247 be read to the jury.

¶7 In order for a defendant to prevail on a claim for ineffective assistance of counsel, he or she is required to show that trial counsel's performance was deficient, and that the deficient performance prejudiced the defendant or undermined confidence in the outcome of the trial. *State v. Ludwig*, 124 Wis. 2d 600, 608-09, 369 N.W.2d 722 (1985). A trial court has the discretion to deny a postconviction evidentiary hearing if the motion on its face is deficient because it fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is entitled to no relief. *State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). A trial court's decision to deny an evidentiary hearing will be subject to deferential appellate review. *Id.* at 310-11. To obtain an evidentiary hearing on a claim of ineffective assistance of counsel, the defendant must allege with specificity both deficient performance and prejudice. *Id.* at 313-18.

¶8 Spiller's postconviction motion contains allegations of deficient performance and prejudice, which are conclusory in nature. Moreover, the record

conclusively shows that he is unable to meet his burden of proving both deficient performance and prejudice. Each of the six instances of deficient performance are addressed in turn.

Counsel's Opening Statement.

¶9 Spiller contends that during his trial, his attorney engaged in prejudicially deficient conduct when he failed to address a promise that he made in his opening statement to the jury. Counsel told the jury that Spiller would testify that he was present at the scene of an assault, but that it was not one of the two assaults at issue in this case. Ultimately, Spiller did not testify at trial. The prosecutor agreed not to mention defense counsel's opening statement in his closing arguments.

¶10 It is not deficient performance *per se* for counsel to promise something in opening statements, but fail to deliver on that promise during the defense case. *Turner v. Williams*, 35 F.3d 872, 903-04 (4th Cir. 1994). “[A]ssuming that counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is ‘virtually unchallengeable.’” *Id.* at 904.

¶11 The jury was instructed that the arguments of counsel are not evidence. Moreover, the jury was instructed that the appellant has an absolute right not to testify and that they are not to draw any inferences from that decision. Spiller decided not to testify for reasons unknown to this court. However, his statements to the police were presented to the jury. These statements disclosed Spiller's involvement in a sexual assault in October 1998. In his opening statement, defense counsel told the jury that Spiller would admit his presence at the scene of an assault, but that it was not one of the two assaults involved in this

case. Because Spiller's statements to the police were admitted, counsel was able to fully argue this point without Spiller's live testimony. Consequently, the trial court properly concluded that Spiller suffered no prejudice from counsel's opening remarks.

¶12 Further, Spiller suffered no prejudice because there was overwhelming evidence of his guilt. In all reasonable probability, Spiller would have been convicted even if the comments in the opening statements were not made. Spiller's accomplice, Conley, as well as the victim, testified in great detail about Conley's and Spiller's involvement in the two assaults. Thus, the record conclusively demonstrates that even if counsel did not make the challenged statement during his opening, the result of the proceedings would not be different. No evidentiary hearing on this instance of alleged ineffective assistance was required.

Modification of the Pattern Jury Instruction.

¶13 Defense counsel requested that the trial court give the pattern jury instruction on accomplice testimony. The essence of this instruction is that the jury should not base its verdict on the uncorroborated testimony of an accomplice unless it is sufficient to satisfy the jury of the defendant's guilt beyond a reasonable doubt. WIS JI—CRIMINAL 245 (1992). The trial court gave a modified pattern jury instruction that omitted all references to the uncorroborated testimony of an accomplice. The court explained that the pattern jury instruction would be erroneous because other evidence substantially corroborated the accomplice's testimony. Spiller contends that counsel's performance was prejudicially deficient because his attorney did not object to this modification. We disagree.

¶14 The modified WIS JI—CRIMINAL 245 instruction correctly stated the law regarding accomplice testimony as applicable to the facts of this case. Wisconsin law has long held that even uncorroborated testimony of an accomplice may be deemed sufficient to convict if the jury finds that testimony credible. *Kutcher v. State*, 69 Wis. 2d 534, 549, 230 N.W.2d 750 (1975). Moreover, Wisconsin law is clear that when accomplice testimony is corroborated by other independent evidence, as it was here, the instruction on accomplice liability is not necessary. *Linse v. State*, 93 Wis. 2d 163, 171, 286 N.W.2d 554 (1980).

¶15 In this case, the victims testified in great detail about Spiller's involvement in the two assaults. Further, this testimony was corroborated with pretrial statements made to police which were introduced into evidence. It is an error to deny a request for an accomplice instruction only in a case where the accomplice's testimony is totally uncorroborated. *Id.* at 172. The trial court did not err in modifying the pattern jury instruction on accomplice testimony. Consequently, as to this specific instance, Spiller has failed to meet his burden of proving both deficient performance and prejudice which are necessary for an ineffective assistance of counsel claim.

Note From the Jury Regarding the Element of Intent.

¶16 The trial court instructed the jury that the State had to prove beyond a reasonable doubt the element of intent relative to each offense. During deliberations, the jury sent out a note asking if intent to commit a crime can be found at any point in time during the execution of a crime. Counsel and the court discussed how to respond to this note. Spiller's attorney expressly agreed with the trial court's decision to instruct the jury that intent must be present at the time of the commission of the offenses. The prosecutor argued that intent must be present

prior to completion of the offense. The trial court disagreed with the prosecutor and instructed the jury in compliance with Spiller's request.

¶17 Spiller contends that counsel's performance was prejudicially deficient because he failed to object to the trial court's response to the jury note. There is no merit to this assertion because counsel requested the very instruction that was given by the trial court. Counsel's performance was not deficient, nor does Spiller make any attempt to prove prejudice. Intent was not in dispute in this case; the only issue in dispute was whether Spiller participated in these acts as a party to a crime. Accordingly, Spiller has failed to meet his burden of proving both deficient performance and prejudice on the basis of the jury note.

Presence of DNA.

¶18 Spiller claims that counsel's performance was prejudicially deficient because he failed to question Conley about the presence of his DNA at both crime scenes and the absence of Spiller's DNA. There was proof introduced at trial that Conley's DNA was found at the scene of both crimes and that Spiller's DNA was not found at either scene. Spiller does not explain how Conley would have been able to determine whether Spiller left his DNA at the crime scene. Conley testified that Spiller sexually assaulted the victims, but there is no evidence to indicate whether or not Spiller ejaculated on either occasion. The presence of Conley's DNA and the absence of Spiller's DNA was presented to the jury. Consequently, Spiller's assertion that counsel's failure to question Conley on this matter was prejudicially deficient is meritless.

Jury Instruction Regarding Impact of Conley's Plea.

¶19 Before Conley testified, the prosecutor advised the jury of all of the charges pending against Conley, as well as the terms of the plea agreement entered into between Conley and the State. After this was done, the trial court specifically instructed the jury that the information was introduced only with respect to Conley's credibility and was not to be used by the jury to determine whether Spiller was involved in any of those offenses. Spiller claims that counsel's performance was prejudicially deficient because he failed to request a jury instruction on this point.

¶20 The trial court gave the very jury instruction that Spiller says should have been given, as well as a detailed instruction on accomplice testimony. Spiller makes no effort to explain why the instructions given were inadequate. As a result, Spiller's allegations of deficient performance and prejudice are conclusory in nature regarding this claim.

Jury Instruction Assessing Spiller's Guilt.

¶21 Spiller claims that counsel was incompetent for failing to request the pattern jury instruction, WIS JI—CRIMINAL 247. This instruction tells the jury that they are only to consider whether the defendant is guilty or not guilty, and the fact that the other persons who were involved in the offenses are not on trial is immaterial. WIS JI—CRIMINAL 247. The trial court properly rejected this challenge noting that the instruction would have been cumulative. The jury was aware that Conley was an accomplice and that he admitted his own guilt. The court specifically instructed the jury to consider Conley's credibility and involvement in these offenses separately from that of Spiller's. Requesting WIS JI—CRIMINAL 247 would not have told the jury anything new. Thus, Spiller has

failed to meet his burden of proving both deficient performance and prejudice. None of his claims warranted a hearing, and the trial court did not err in summarily denying his ineffective assistance claim.

B. Mistrial: Bus Schedule Provided to the Jury.

¶22 Believing that they were concerned about finding rides home after deliberations, the bailiff gave the jury a bus schedule. The trial court ordered the bailiff to immediately retrieve this bus schedule upon learning that he had given it to the jury. The trial court advised counsel of this fact and a hearing was held on the matter.

¶23 The court found that the jurors had the schedule for only a matter of seconds before the bailiff returned and retrieved it. Moreover, the court found that the schedule post-dated the crimes at issue, and that it would take some time to figure out the complicated schedule. The trial court called the jury into the courtroom and instructed that it was inappropriate for the jury to look at the bus schedule and that the schedule should be disregarded because it was not in evidence. The trial court also ordered the jury to disregard the schedule and not comment on its contents. Defense counsel moved for a mistrial, which was denied by the trial court.

¶24 The trial court's decision to deny a motion for a mistrial is discretionary and is entitled to highly deferential review. *State v. Barthels*, 166 Wis. 2d 876, 885, 480 N.W.2d 814 (Ct. App. 1992), *aff'd*, 174 Wis. 2d 173, 495 N.W.2d 341 (1993). An appellant seeking to impeach a jury's verdict must present clear and satisfactory evidence that one or more of the jurors engaged in misconduct. *State v. Eison*, 194 Wis. 2d 160, 177, 533 N.W.2d 738 (1995). Spiller fails to explain why the trial court's curative instruction was not sufficient

and how he was prejudiced. Spiller does not dispute that the jury only had the bus schedule for approximately fifteen seconds. It is unlikely that the jury was able to draw any information from this schedule before the bailiff retrieved it.

¶25 A defendant is not entitled to a new trial every time a jury is exposed to material not admitted into evidence; he or she is entitled to a new trial only if there is a reasonable possibility that the evidence had a prejudicial impact upon the jury's verdict. *United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996). It is undisputed that the bus schedule should not have gone into the jury room. Nonetheless, Spiller has failed to meet his burden of proving by clear and satisfactory evidence that one or more jurors actually engaged in misconduct with respect to the schedule, or how he was prejudiced by the limited exposure to the non-evidentiary material. *See Eison*, 194 Wis. 2d at 177. Spiller suffered no prejudice because there was no reasonable possibility that the bus schedule had a prejudicial effect on the jury. There is nothing in the record demonstrating how the bus schedule adversely affected Spiller. Accordingly, the trial court properly rejected Spiller's motion for a mistrial.

C. Discretionary Reversal.

¶26 Spiller finally contends that he is entitled to a discretionary reversal under WIS. STAT. § 752.35 because the real controversy was not fully and fairly tried. "In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried ... the court may reverse the judgment or order appealed from" *Id.* This claim is frivolous. The real controversy was fully and fairly tried here with the able assistance of competent defense counsel. This is not an exceptional case that merits a new trial in the interest of justice. *See Vollmer v. Luty*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). The jury was not

prevented from hearing any important testimony and Spiller has not shown that justice has been miscarried in any respect. *See State v. Williams*, 2000 WI App 123, ¶17, 237 Wis. 2d 591, 614 N.W.2d 11. The evidence of Spiller's guilt was overwhelming. As a result, Spiller is not entitled to a discretionary reversal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

