

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 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. 00-3373-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN R. BOOTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kevin Booth, pro se, appeals his judgment of conviction for attempted second-degree sexual assault with a person who the defendant knows is unconscious, contrary to WIS. STAT. §§ 940.225(2)(d) and

939.32¹ and an order denying postconviction relief. Booth argues that: (1) he was denied his Sixth Amendment right to counsel at the preliminary hearing; and (2) his trial counsel was ineffective.² Because Booth waived his right to object to the preliminary hearing and did not allege sufficient facts to warrant a *Machner* hearing, we affirm the conviction. *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

BACKGROUND

¶2 At the initial appearance, Booth appeared with a public defender. However, because Booth did not qualify for a public defender appointment, the trial court set a date for the preliminary hearing and told Booth to seek counsel.

¶3 Booth failed to appear at the preliminary hearing and a bench warrant was issued. At a hearing two days later, Booth indicated that he was still attempting to retain counsel. The court then rescheduled the preliminary hearing.

¶4 At the rescheduled preliminary hearing, Booth again did not appear with a lawyer and indicated that he had not attempted to look for one. The hearing proceeded and Booth was bound over for trial.

¶5 Between the preliminary hearing and trial, the trial court appointed counsel for Booth. The case proceeded to trial, and Booth was subsequently

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² Booth divides his arguments into six separate sections: constitutional rights, failure to read information, closing arguments, ineffective assistance of counsel, insufficiency of the complaint and jury bias. However, we characterize Booth's arguments as challenges based upon an alleged denial of his right to counsel and ineffective assistance of counsel

convicted. At the postconviction proceedings, Booth argued that he was denied his right to counsel at the preliminary hearing and that his trial counsel was ineffective. He requested that the court hold a *Machner* hearing. The trial court denied the motions. This appeal followed.

DISCUSSION

I. RIGHT TO COUNSEL

¶6 Booth argues that he was denied his Sixth Amendment right to counsel at the preliminary hearing. However, Booth's claim is not properly before us. Despite the preliminary hearing being a critical stage of the criminal proceedings entitling a defendant to counsel, a defendant who claims error occurred at the preliminary hearing may only obtain relief prior to trial. *State v. Wolverton*, 193 Wis. 2d 234, 253-54, 533 N.W.2d 167 (1995). This rule applies to a defendant who claims he or she was denied a right to counsel at a preliminary hearing. *Id.* at 254.

¶7 In order to obtain review, Booth was required to file an interlocutory appeal from the non-final order that allegedly denied the right. *See State v. Webb*, 160 Wis. 2d 622, 631, 467 N.W.2d 108 (1991). Booth's failure to do so constitutes a waiver of the right to postconviction appellate review of the issue. *See id.* at 636. Therefore, we conclude that Booth has waived his right to raise a challenge to the preliminary hearing on appeal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶8 Booth argues that he received ineffective assistance of counsel and that the trial court improperly denied his request for a *Machner* hearing.³ He contends that trial counsel: (1) failed to challenge the preliminary hearing being held without counsel; (2) failed to object to the trial court not formally reading the Information to Booth at the arraignment; (3) failed to challenge certain jurors; (4) failed to make necessary objections during trial; and (5) failed to object to the State's closing arguments.

¶9 “When trial counsel's representation is challenged, a hearing may be held on the effectiveness of counsel.” *Waukesha County v. Steven H.*, 2000 WI 28, ¶14 n.6, 233 Wis. 2d 344, 607 N.W.2d 607. However, a *Machner* hearing is necessary only if a defendant alleges enough facts to raise a question of fact that trial counsel's performance was both deficient and prejudicial. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Whether a defendant alleges facts which, if true, would entitle him or her to relief is a question of law that we review independently. *Id.* at 310.

¶10 In determining whether counsel's services were ineffective, a defendant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the *Strickland* test, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* The ultimate questions of whether counsel's performance was

³ During a *Machner* hearing, trial counsel testifies about the reasons for the conduct that is attacked as deficient performance and, from that testimony, the trial court determines whether trial counsel's actions were the result of incompetence or deliberate trial strategy. *Machner*, 92 Wis. 2d at 804.

deficient and whether the deficient performance prejudiced the defendant, thereby violating his federal constitutional right to effective counsel, are questions of law. *State v. Smith*, 207 Wis. 2d 258, ¶11, 558 N.W.2d 379 (1997). This court decides questions of law independently without deference to the trial court. *Id.*

¶11 To constitute deficient performance, counsel's representation must fall below the representation that a reasonably effective attorney would provide. *Strickland*, 466 U.S. at 688. Reviewing courts must be highly deferential and should start with a presumption that counsel's actions were reasonable. *Id.* at 689. Failure to pursue matters that lack merit is not deficient performance. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 133 (Ct. App. 1994). As to prejudice, a defendant must prove that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶12 After reviewing the record, we conclude that a *Machner* hearing was not necessary under the circumstances. Booth has failed to allege sufficient facts to raise a question of fact that his trial counsel's performance was deficient and prejudicial.

¶13 Booth claims that trial counsel's failure to object to the preliminary hearing would have likely resulted in a different outcome in the case. We reject Booth's argument. Any alleged errors occurring during the preliminary hearing, including proceeding without counsel, are cured by a fair and error free trial. *Webb*, 160 Wis. 2d at 628. Therefore, he is unable to show prejudice.

¶14 Booth claims that trial counsel was deficient by failing to object to the trial court not formally reading the Information. However, the record indicates

that after being appointed, counsel appeared with Booth and indicated to the court that Booth had waived the reading of the Information. Therefore, Booth has waived any arguments regarding counsel's deficient performance. In addition, Booth cannot show prejudice because by the time of trial, he was aware of the nature of the charges and allegations against him.

¶15 Regarding Booth's claims that trial counsel failed to challenge certain jurors, he does not offer anything other than conclusory allegations concerning lack of fairness and potential for bias.

¶16 Booth also fails to cite specific instances of error in the record by trial counsel. There is no evidence that counsel failed to make proper discovery and investigation, did not know the applicable law, or failed to adequately prepare and present Booth's case at trial.

¶17 Finally, we conclude that the State's closing arguments were appropriate. Booth argues that the State commented several times that Booth had the intention to go beyond mere touching and that these comments were not based on any direct evidence.⁴ However, attorneys enjoy wide latitude in closing arguments, subject to discretionary limitation by the trial court. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). Here, the State's closing arguments were based on conclusions and inferences from the facts presented at trial. Considering the latitude given to counsel, we conclude that the closing arguments were proper.

⁴ Booth does not argue that the State commented on facts outside the record.

By the Court.—Judgment and order affirmed.

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

