COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0069-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERNEST E. BURTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and ROBERT CRAWFORD, Judges. *Affirmed.*

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

¶1 PER CURIAM. Ernest Burton appeals from a judgment entered after a jury convicted him of robbery – use of force, contrary to WIS. STAT. § 943.32(1)(a), and habitual criminality, contrary to WIS. STAT. § 939.62

(1999-2000).[1] Burton also appeals from the trial court's order denying his postconviction motion. Burton argues that he was denied effective assistance of trial counsel. Burton also argues that the trial court erred in denying his postconviction motion without holding a ***Machner*** evidentiary hearing. We disagree and affirm.

I. BACKGROUND.

¶2 On June 3, 1999, Craig Arrison was riding his bicycle home from work. It was payday, and Arrison had cashed his paycheck during his lunch break. He was riding home with the cash in an envelope in the front pocket of his shorts, when he was suddenly knocked off his bicycle. Arrison told police that a man had been hiding between two parked cars, jumped out, and knocked him to the ground. Arrison later identified Burton as his attacker.

¶3 After being tackled and knocked to the ground, Arrison's bicycle landed on top of him. According to Arrison, Burton began reaching into his pockets. The two men struggled and Burton eventually grabbed the envelope containing the money out of Arrison's pocket and began to flee. Arrison then chased Burton down, tackled him on somebody's front lawn, and the two men continued struggling.

¶4 The police arrived in the midst of the struggle and separated the two men. Arrison explained that he had been robbed by Burton. The police found

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

Arrison's money in the envelope on the front lawn and also discovered Arrison's bicycle down the block in the middle of the street.

¶5 After the police interviewed Arrison, Burton, and a number of witnesses, Burton was arrested and charged with robbery. At the police station, Burton stated that he had been walking down the street when Arrison almost ran him over. He said that he yelled at Arrison, and a fight ensued. Burton admitted that he grabbed the envelope containing the money, but he claimed he then threw it to the ground to distract Arrison, so that Arrison would stop to pick up his property. Burton also told the police that "he did not intend to rob this man during the fight, it was just a spur of the moment thing that he did."

¶6 A jury convicted Burton of robbery – use of force, with the penalty enhancer for habitual criminality. Burton filed a motion for postconviction relief, alleging that his trial counsel was ineffective. In his postconviction motion, for the first time, Burton alleged that he was "acquainted" with the victim prior to the attack, and that this was really just "a fight between friends/acquaintances and not a robbery." The trial court denied Burton's postconviction motion.

II. ANALYSIS.

¶7 First, Burton claims that his trial counsel was ineffective for failing to adequately investigate his defense and call the appropriate witnesses, and for failing to request that hearsay evidence that was the subject of a sustained objection be stricken from the record. Second, Burton claims that the trial court

erred by failing to hold a ***Machner*** evidentiary hearing.[2] Because Burton fails to establish that he was prejudiced by counsel's decisions, we conclude that he was not deprived of a fair trial and a reliable outcome. Further, because the record conclusively demonstrates that Burton was not prejudiced, it was within the trial court's discretion to deny his postconviction motion without a hearing.

¶8 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant's ineffective assistance of counsel claim will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id.*** Moreover, counsel "is strongly presumed to have rendered adequate assistance." ***Id.*** To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687.

¶9 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous.

[2] During a ***Machner*** hearing, trial counsel testifies and, from that testimony, the reviewing court determines whether trial counsel's actions were ineffective. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

State v. Harvey, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687.

¶10 Burton has failed to persuade this court that his trial counsel's alleged errors were so serious that he was deprived of a fair trial and a reliable outcome. Because Burton has failed to prove he was prejudiced by counsel's decisions, we need not determine whether counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 697 (stating that if a court concludes that the defendant has failed to prove one prong, it need not address the other prong).

¶11 Burton contends that trial counsel was ineffective for failing to adequately investigate his theory of defense – that he and the victim were friends who got into a fight, and although he grabbed Arrison's pay envelope, he later dropped it on the lawn to divert Arrison's attention and "stave off the attack." Burton alleges he provided his attorney with the names of potential witnesses who could verify that he and the victim had "spent time together socially" prior to the attack, but his counsel decided not to pursue the issue any further. Burton concludes that because he and the victim were somehow acquainted, "what took place was a fight, not a robbery."

¶12 "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Strickland***, 466 U.S. at 691. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional 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.***

¶13 Here, Burton has failed to show a reasonable probability that the result of the proceeding would have been different if his trial counsel had presented evidence that Burton and Arrison had "spent time together socially." First, Arrison acknowledged on cross-examination that it was possible that he could have seen Burton before "at a get-together," but that he "would never have remembered him." Arrison then testified that "there was no interaction or relationship involved here." Therefore, the very issue Burton claims was ignored by his attorney was raised at trial.

¶14 Second, Burton was not prejudiced by any failure to pursue the issue any further in view of the overwhelming evidence of his guilt. ***Sanchez***, 201 Wis. 2d at 237 (stating that defendant was not prejudiced by counsel's performance where the remaining evidence was "'overwhelmingly probative'" of his guilt). Burton was convicted of robbery pursuant to WIS. STAT. § 943.32(1)(a), which states in relevant part:

> **943.32 Robbery. (1)** Whoever, with intent to steal, takes property from the person or presence of the owner by … the following means is guilty of a Class C felony:
>
> (a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property ….

The evidence of Burton's intent to steal Arrison's property was overwhelming, despite any claim that Burton may have been acquainted with his victim. Arrison testified that:

> At that point I was just riding my bike, and all of a sudden, out of nowhere, [Burton] flies through the air and knocks me off my bike.
>
> ….
>
> I saw [Burton] flying between two cars. One was a minivan, and he was hiding behind it, I imagine, because that's where he came from.
>
> ….
>
> [Burton] was on top of me, so I was sandwiched between the bike and [Burton]. At that point he proceeded to put his hands in my pockets. I didn't know at that particular time what was going on, so I asked [Burton], what's going on?
>
> ….
>
> I was told to shut up, and [Burton] proceeded to carry on with what he was doing.
>
> ….
>
> [Burton] hit me in the face a few times, I hit him back. My main concern was [ ] the money at the time. I wasn't thinking too much about myself.
>
> ….
>
> Well, [Burton] eventually grabbed the envelope … and proceeded to run away.

¶15 Burton decided not to testify, informing the court that he fully understood that it was his decision alone, and not his attorney's. Additionally, Burton chose not to raise the issue of his alleged "fight with a friend" to the court's attention until his postconviction motion. Burton's attorney's statement in closing argument also indicates a valid rationale for not pursuing Burton's defense theory:

> Craig Arrison says he didn't know Ernest Burton so Ernest Burton could not possibly have any way of knowing that Craig Arrison would ever come riding down this street on this day or this time nor did he know on this particular

> day that he'd have some money in his pocket. He told you, "I don't know him."

Thus, contrary to Burton's newly-alleged defense, actually submitting evidence that Burton knew his victim may have been prejudicial to Burton's defense theory at trial.

¶16 Moreover, the evidence overwhelmingly established that Burton knocked the victim from his bicycle, struggled with the victim on the ground, removed the envelope from his pocket, and ran away. Considering the totality of the circumstances, *see* ***Sanchez***, 201 Wis. 2d at 237, regardless of whether Burton and the victim were friends, acquaintances or strangers, we are satisfied that Burton committed robbery by use of force, contrary WIS. STAT. § 943.32(1)(a). Because Burton has failed to show a reasonable probability that the result of the proceeding would have been different had counsel presented evidence of his alleged familiarity with the victim, we conclude that Burton was not prejudiced by trial counsel's failure to pursue the issue further.

¶17 Next, Burton contends that trial counsel was ineffective for failing to request that hearsay evidence that was the subject of a sustained objection be stricken from the record. The testimony in question came from police officer James Charles, who first responded to the scene:

> [STATE]: What did you do?
>
> [CHARLES]: One of the citizen witnesses … I believe his last name was Bridges, he stated that [Burton] did take some money and that the money was laying in the grass.
>
> [DEFENSE]: Your honor, I object to the rest of his testimony as hearsay.
>
> [COURT]: Sustained.

However, defense counsel did not request that this testimony be stricken from the record.

¶18 We conclude that, even if defense counsel was deficient for failing to have the hearsay testimony stricken from the record, there was sufficient evidence, other than the allegedly inadmissible evidence, to convict Burton beyond a reasonable doubt. *See* ***State v. Van Straten***, 140 Wis. 2d 306, 318-19, 409 N.W.2d 448 (Ct. App. 1987); *see also* ***State v. Dyess***, 124 Wis. 2d 525, 545, 370 N.W.2d 222 (1985) ("the test of prejudice as formulated in ***Strickland*** subsumes the various statements of the harmless error test").

> If the erroneously admitted evidence merely duplicates untainted evidence, it is likely that its admission had little if any independent impact on the jury, that the error played no role or an insignificant one in the conviction, and that the court can declare a belief that the error was harmless beyond a reasonable doubt.

State v. Billings, 110 Wis. 2d 661, 669, 329 N.W.2d 192 (1983).

¶19 Here, the witness's hearsay statement merely duplicated other admissible testimony that Burton took the envelope and later threw it on the lawn. Arrison testified that Burton took the envelope from his pocket and ran away. Arrison also testified that he and Burton were wrestling on the lawn where the money was eventually found. Officer Charles testified that he found the envelope on the grass where the men had been struggling. Additionally, in his statement to the police, Burton admitted that he took the envelope and later threw it on the lawn. Accordingly, the hearsay statement was duplicative, and its admission had little, if any, independent impact on the jury.

¶20 Finally, Burton argues that the trial court erred in denying his postconviction motion without holding a ***Machner*** evidentiary hearing. Burton

first claims that a hearing was necessary to take testimony from witnesses in order to determine whether or not the failure to present their testimony at trial constituted ineffective assistance of counsel. Burton also claims that had such a hearing been held, the trial court would have erred by not permitting him to be present.[3]

¶21 The question of whether a trial court must hold an evidentiary hearing involves a two-part test and necessitates a mixed standard of review:

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any of the three factors enumerated in ***Nelson***. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard.

Bentley, 201 Wis. 2d at 310-11 (citations omitted). In ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the supreme court enumerated three factors that a circuit court should consider in exercising its discretion:

> [I]f the defendant fails to allege sufficient facts in his [or her] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively

[3] Burton apparently puts forth this conditional argument to assure that he is present at a hearing, in the event we determine that the trial court erred in failing to hold a hearing. Because we conclude that the trial court properly exercised its discretion in denying the postconviction motion without a hearing, we will not address this argument. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that cases should be decided on the narrowest possible grounds); *see also* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that if a decision on one point disposes of the appeal, the appellate court will not decide the other issues raised).

> demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 497-98.

¶22 Burton requested a ***Machner*** hearing in order to present the testimony of four witnesses – both of his parents, an investigator, and his trial counsel. Burton contends that these witnesses would have established that he and the victim had some type of prior relationship.

¶23 As noted previously, the record conclusively demonstrates that Burton has shown no prejudice by his trial counsel's decision not to present evidence regarding the alleged friendship between Burton and his victim. Accordingly, based on the third ***Nelson*** factor, it was within the trial court's discretion to deny Burton's postconviction motion without a hearing. Further, the trial court did not erroneously exercise its discretion because "the record sufficiently refute[d] the allegations raised by the defendant in the motion." ***Id***. at 496.

¶24 Based on the above stated reasons, we affirm the trial court's decision to enter judgment against the defendant and deny the motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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