COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1895-CR **Cir. Ct. No. 01-CF-000287**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK HARVEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Frederick Harvey appeals a judgment entered upon a jury verdict convicting him of one count of misdemeanor theft contrary to WIS.

[1] This case originally contained one misdemeanor count and one felony count. The felony was then severed, leaving only the misdemeanor. Therefore, this appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) even though it is captioned in the trial court as a felony case. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

STAT. § 943.20(1)(a) as well as an order denying his postconviction motion for a new trial. Harvey argues (1) that he did not knowingly, intelligently, or voluntarily waive his right to testify in his own behalf; (2) that his trial counsel was ineffective by failing to seek a ruling regarding the admissibility of certain evidence; and (3) that he was entitled to appear personally at his postconviction motion hearing, not by videoconferencing. We reject Harvey's arguments and affirm the judgment and order.

Background

¶2 Harvey was charged with misdemeanor theft, contrary to WIS. STAT. § 943.20(1)(a), and soliciting a child for prostitution, a felony contrary to WIS. STAT. § 948.08, both with repeat offender enhancers. The felony was ultimately severed for not bearing sufficient relation to the misdemeanor. Both charges are based on events of April 24, 2001.

¶3 While Harvey was at a bar alone on April 24, Lisa Timko and her friends came into the bar. Timko placed her purse on the bar near Harvey while she and her friends played darts nearby. Harvey left, and Timko noticed her purse was missing. She suspected Harvey had taken it because he was the one sitting near the purse and because, she claimed, he was the only one who had left the bar.

¶4 Harvey returned to his apartment to meet Travis Heath and Heath's girlfriend, Keanna J. Harvey had agreed to let the couple stay with him for the night. Heath and Keanna were waiting outside for Harvey when he arrived and he let them in. Shortly thereafter, Heath and Keanna both claimed that shortly thereafter, they observed Harvey going through a purse. When they asked about it, Harvey informed them it was his girlfriend's.

¶5 Later in the evening, Timko went to Harvey's apartment with a friend. Although she apparently did not directly accuse Harvey of stealing the purse, she asked to have pictures of her children returned if he had them—he could keep the money, checks, and other items in the purse. Harvey denied any knowledge of the purse.

¶6 After Timko left, Heath and Keanna claimed they saw the purse in the garbage. They retrieved it and looked inside, where there was photo identification that appeared to be Timko's. Later that evening or the next morning, Heath and Keanna claim Harvey kicked them out of the apartment. At some point between April 24 and May 23, Timko's purse was recovered in an alley outside Harvey's apartment building.

¶7 Harvey was charged and pled not guilty, stating he "[did] not know who took the purse or how it got outside of his apartment building." On the day of trial in a pretrial conference conducted in chambers between the State and Harvey's attorney, the State informed Harvey's attorney that if Harvey testified, the State would seek to introduce evidence Harvey had attempted to threaten a witness and the prosecutor. The court noted it did not believe the evidence would be admissible, but made no formal ruling. Ultimately, Harvey did not testify. The jury convicted him, and the court sentenced him to three years in prison.

¶8 Harvey filed a postconviction motion alleging he was denied his constitutional right to testify on his own behalf and ineffective assistance of counsel by failing to seek a ruling on the admissibility of the threat evidence. The court scheduled a ***Machner***[2] hearing. Harvey then filed a petition for a writ of

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

habeas corpus, seeking transportation from the correctional institution so that he could be present in the courtroom for the hearing. The trial court denied the motion, and this court denied the petition for an interlocutory appeal. Harvey therefore appeared via videoconferencing.

¶9 At the postconviction hearing, the court heard testimony from Harvey and his trial attorney Lester Liptak regarding whether Harvey had waived his right to testify on his own behalf.[3] Liptak also testified regarding his decision not to seek a ruling on the threat evidence. In addition, Harvey had objected on the record to the videoconferencing. The court, following testimony, asked the parties to submit closing arguments in writing and to include a discussion of whether Harvey should have been personally present at the postconviction hearing.

¶10 Ultimately, the trial court concluded that (1) Harvey had knowingly, intelligently, and voluntarily waived his right to testify at trial and the decision had been made the day before trial; thus (2) Liptak was not ineffective because if Harvey was not testifying, the threat evidence would not be offered and a ruling on its admissibility was unnecessary; and (3) Harvey had no right to be physically present at the postconviction hearing.

[3] Harvey also presented the testimony of another attorney regarding that attorney's procedures when clients waive their right to testify.

Discussion

Whether Harvey Waived His Right to Testify

¶11 "[T]he right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." ***Rock v. Arkansas***, 483 U.S. 44, 53 n.10 (1987). A trial court's findings of historical fact relevant to whether a violation of a constitutional right has occurred will not be overturned unless they are clearly erroneous. ***State v. Landrum***, 191 Wis. 2d 107, 113-14, 528 N.W.2d 36 (Ct. App. 1995). Application of constitutional principles to the facts of a case is subject to de novo review. ***Id.*** at 114.

¶12 At the time the trial court decided this case, there was no requirement for the court to engage in a colloquy with a defendant regarding waiving his or her right to testify. *See, e.g.,* ***State v. Wilson***, 179 Wis. 2d 660, 672 n.3, 508 N.W.2d 44 (Ct. App. 1993). The trial court specifically noted this as part of its conclusion that there had been no constitutional violation.

¶13 Recently, however, our supreme court concluded that such a colloquy is in fact required when a defendant waives his or her right to testify.[4] ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. The colloquy should be adequate to ascertain (1) that the defendant is aware of his or her right to testify and (2) has discussed this right with counsel. ***Id.***

[4] The case was released in July 2003. Harvey's brief to this court was not due until October 2003. Neither party cited this case, and therefore neither party has addressed the issue whether ***State v. Weed***, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485, should be applied retroactively. We decline to undertake a retroactivity analysis because even under ***Weed***'s requirements, Harvey does not prevail.

¶14 The colloquy requirement notwithstanding, the ***Weed*** court examined the entire record to determine whether Weed had knowingly, intelligently, and voluntarily waived her right to testify. ***Id.***, ¶44. This is consistent with another rule of law—that we apply the harmless error analysis to deprivation of a defendant's right to testify. *See* ***State v. Flynn***, 190 Wis. 2d 31, 56, 527 N.W.2d 343 (Ct. App. 1994) (citing ***Crane v. Kentucky***, 476 U.S. 683, 691 (1986)).

¶15 The harmless error analysis requires us to review the entire record. ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. From this review, we can therefore determine (1) whether ***Weed***'s two protections have been met and (2) whether the defendant's failure to testify resulted in harmless error. An error is harmless if there is no reasonable possibility that the error contributed to the conviction.[5] ***Moore***, 257 Wis. 2d 670, ¶16. A "reasonable possibility" is one sufficient to undermine our confidence in the outcome. ***Id.***

A. *Weed*'s Protections

¶16 We note first that the trial court concluded at the ***Machner*** hearing that Liptak had provided more credible testimony than Harvey. We must continue to use this finding; credibility determinations are for the fact finder and we do not disturb them unless they are clearly erroneous.[6] WIS. STAT. § 805.17(2).

[5] Harvey argues that because the jury is the sole arbiter of credibility, it is inappropriate for us to consider whether there is harmless error because it necessarily requires a determination whether the jury would have believed his testimony. This is incorrect.

[6] Harvey challenges the trial court's determinations as clearly erroneous by presenting another interpretation of the facts, not legal conclusions. It is not for this court to resolve competing factual inferences. *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

¶17 Liptak testified that initially, Harvey thought he might want to testify. However, Liptak informed the court that he and Harvey had discussed four or five times whether Harvey should testify and had considered the pros and cons of doing so, including the likelihood that the State would impeach Harvey with evidence of thirteen prior convictions. Liptak also noted that Harvey had a tendency to speak tangentially, thus running the danger that he would open the door to certain prejudicial issues already excluded from discussion at trial. Liptak stated that by the evening before trial, he and Harvey had mutually concluded Harvey should not testify.

¶18 This testimony sufficiently supports the trial court's finding that Harvey had been informed that he had a right to testify and that the right had been discussed. Indeed, Harvey makes no arguments that would hint at a position to the contrary, and even his own recollection is that he and Liptak discussed testifying at least twice. Harvey takes issue with the fact that Liptak did not re-consult him regarding testifying when the State rested. However, we know of no rule imposing an affirmative duty on an attorney to continually re-verify a client's wishes whether to testify. While Harvey contends this should have been done because he initially signaled a desire or willingness to testify, under the scenario described by Liptak we disagree.

B. Harmless Error

¶19 Even if there had been a violation of Harvey's right to testify, we conclude the error is harmless. Harvey claims the error was not harmless because he was unable to present his denial personally to the jury and he was unable to present his defense that Heath and Keanna were lying on the stand because he had

asked them to leave his apartment. However, Harvey's claims do not give us a reason to question the results of the trial.

¶20 Harvey's not guilty plea was akin to his denial. Thus, the jury was not without information that Harvey denied the theft. More significantly, in order for Harvey to present evidence that Heath and Keanna were lying, he would have to argue they were angry that he had kicked them out of the apartment. This, however, would open the door to Harvey's impeachment with questions about why he kicked them out—the answers relate to the severed felony solicitation charge.

¶21 Harvey was able to reveal some inconsistencies between Heath's and Keanna's testimony. Also, both witnesses testified that Harvey told them the purse was his girlfriend's, but that they had believed it was Timko's based on the photo on the identification card, not the name. Harvey presented evidence that his girlfriend looked strikingly similar to Timko.

¶22 In order for Harvey to present his defense that the witnesses against him were lying, he would have exposed himself to much more damaging testimony regarding alleged solicitation of a minor. Moreover, he had an opportunity to present evidence that called into question both the witnesses' recollection of events as well as their identification of the purse's owner. Even had Harvey testified, we are confident the jury would still have reached its guilty verdict. There was no violation of his right to testify, because he knowingly, intelligently, and voluntarily waived the right. Even if he had not waived the right, any error from his failure to testify was harmless.

Ineffective Assistance of Counsel

¶23 Every criminal defendant has a Sixth Amendment right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To establish a violation of this right, a defendant must prove (1) that the lawyer's performance was deficient and (2) that the deficient performance prejudiced the defense. ***Flynn***, 190 Wis. 2d at 46. The defendant is not entitled to reversal unless he or she can establish that counsel's errors deprived him or her of a fair trial and that there is a reasonable probability that but for counsel's error the result would have been different. ***Id.*** at 46-47. We need not examine counsel's performance if the defendant cannot demonstrate prejudice. ***Id.*** at 48.

¶24 We must start from the factual basis the trial court established. This is because when we examine whether there has been a constitutional violation, we must defer to the trial court's findings of historical or evidentiary fact. ***Landrum***, 191 Wis. 2d at 113-14. Liptak testified and the trial court found that because Harvey had decided not to testify, Liptak knew there was no need to seek a ruling on the admissibility of the State's evidence. We agree. Harvey's decision not to testify rendered any ruling the court would have made moot. Moreover, because the evidence was never offered at trial, there is no prejudice from Liptak's failure to seek an admissibility ruling.[7]

[7] Harvey claims that if the court had excluded the evidence, he could have testified. However, this is contrary to the factual finding that the decision not to testify had been made before the State informed Liptak of the additional evidence.

Whether Physical Presence was Required for the Postconviction Hearing

¶25 Harvey argues that WIS. STAT. § 967.08 lists certain court proceedings that may be conducted by telephone or live audiovisual means. He claims that it is an exhaustive list, and that because a postconviction motion hearing is not listed in § 967.08, it must be conducted with all parties present in the courtroom. Indeed, the supreme court has concluded that § 967.08 is an exhaustive list. ***State v. Vennemann***, 180 Wis. 2d 81, 96-97, 508 N.W.2d 404 (1993).

¶26 However, Harvey's argument appears to assume that there is a right of physical presence at any proceeding not enumerated in WIS. STAT. § 967.08. The only statute mandating the physical presence of a criminal defendant is WIS. STAT. § 971.04(1).[8] A postconviction evidentiary hearing is not one of those statutorily mandated occasions, and the supreme court has in fact determined that

[8] WISCONSIN STAT. § 971.04(1) states:

> (1) Except as provided in subs. (2) and (3), the defendant shall be present:
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> (a) At the arraignment;
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> (b) At trial;
>
> (c) During voir dire of the trial jury;
>
> (d) At any evidentiary hearing;
>
> (e) At any view by the jury;
>
> (f) When the jury returns its verdict;
>
> (g) At the pronouncement of judgment and the imposition of sentence;
>
> (h) At any other proceeding when ordered by the court.

§ 971.04(1) does not apply to postconviction evidentiary hearings.[9] ***Vennemann***, 180 Wis. 2d at 93.

¶27 When the statutes do not mandate the appearance, the test for whether a prisoner must be physically produced is:

> First, upon the filing of a motion to produce a prisoner for a postconviction hearing, the circuit court must review the motion papers to determine whether there are substantial issues of fact as to events in which the prisoner participated. Second, the circuit court must then ascertain that those issues are supported by more than mere allegations. If both prongs of the test are satisfied, the court must order the defendant physically produced for the hearing.

Id. at 94-96 (citation omitted).

¶28 Whether an issue of fact exists is a question we decide independently, although we do not resolve the issue if it does exist. *See, e.g.,* ***Smith v. Keller***, 151 Wis. 2d 264, 269, 444 N.W.2d 396 (Ct. App. 1989). The trial court concluded that Harvey had fulfilled the first prong, but that his allegations were not sufficiently supported to fulfill the second prong. We disagree with this conclusion.

¶29 Harvey's complaints were based on a single factual premise: that Liptak did not sufficiently consult with him regarding waiving his right to testify. Because such a decision takes place, at least in this case, between a single defendant and a single attorney in confidence, we are uncertain what evidence,

[9] Moreover, WIS. STAT. § 971.04(2) states: "A defendant charged with a misdemeanor may authorize his or her attorney in writing to act on his or her behalf in any manner, with leave of the court, and be excused from attendance at any or all proceedings." Therefore, in this case Harvey could even have opted out of mandatory appearances if the court had agreed.

other than his own testimony, Harvey should have been expected to produce to fulfill the second prong.

¶30 Thus, we will assume Harvey was entitled to be present for the ***Machner*** hearing. Under ***Vennemann***, telephonic procedures are insufficient to fulfill that right. ***Vennemann,*** 180 Wis. 2d at 96. However, the remedy is to remand for a new postconviction hearing to allow the defendant to be physically present for the hearing. ***United States v. Hayman***, 342 U.S. 205, 223-24 (1952); ***Vennemann***, 180 Wis. 2d at 99. Harvey himself declines this remedy and instead requests a new trial. First, he fails to cite any authority that a new trial should be his alternate remedy. Second, we have already concluded that Harvey's failure to testify—the underlying basis for all subsequent claims of error—was a harmless error. A new trial would serve no remedial purpose.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.