COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2059-CR **Cir. Ct. No. 2008CF5873**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMON JOHN SEYMOUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Damon John Seymour, *pro se*, appeals the judgment entered on a jury verdict convicting him of attempted armed robbery with use of force as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 939.32,

939.05 (2007-08).[1] He also appeals the order denying his *pro se* motion for postconviction relief.[2] Seymour claims that his trial counsel was ineffective and that the prosecutor made impermissible comments during her closing argument. The circuit court denied Seymour's motion without holding an evidentiary hearing. We affirm.

BACKGROUND

¶2 During Seymour's jury trial, the State called Robert Braovac to testify. Braovac said he went to Mayfair Mall to have lunch on November 20, 2008. While in the men's restroom there, he was approached by Seymour, who pointed a silver or grey semiautomatic gun at Braovac's head and told Braovac to give him his money. Braovac grabbed for the gun and struggled with Seymour while trying to get out through the restroom door. Eventually Braovac made it out of the restroom and fled to a nearby kiosk where he told the employee to call 911 because there was a person with a gun in the restroom.

¶3 During Braovac's testimony, the State introduced a surveillance video showing Braovac fleeing from the restroom and Seymour leaving shortly thereafter.

¶4 The State also called Seymour's co-defendant, Damian Allikas, to testify. Jurors heard that Allikas had entered into a cooperation agreement with

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Honorable Daniel L. Konkol presided over the jury trial and entered the judgment of conviction. The Honorable Jean A. DiMotto entered the order denying Seymour's postconviction motion.

the State under which he pled guilty to reduced charges in exchange for agreeing to appear and testify truthfully in Seymour's case. The night before the attempted robbery, Allikas said he was at a party at his sister's house with Seymour and other friends. Allikas' sister was Seymour's girlfriend. During the party, Allikas claimed Seymour pulled out a semiautomatic gun and passed it around for others to touch. Allikas said he and Seymour spent the night at Allikas' sister's house.

¶5 The next morning, Allikas and Seymour went to Mayfair Mall. On their way there, Seymour displayed the same gun he had with him the night before at the party and said he had a plan for robbing someone. According to Allikas, Seymour planned for Allikas to be the driver and said that the two men would split any money from the robbery. When they got to the mall, both Seymour and Allikas went into a restroom. Allikas left the restroom before Seymour and waited for him. As he waited, Allikas claimed he heard Braovac approach a kiosk located near the restroom and claim that there was a man with a gun in the restroom. Upon hearing this, Allikas said he "figured it was my guy Seymour." Allikas left the mall and went to his car. Seymour arrived three to five minutes later and both men were arrested.

¶6 On cross-examination, Allikas admitted that he initially made untrue statements to police when he denied any wrongdoing and claimed he had no idea Seymour had a gun and was planning to rob someone. Allikas admitted that it was not until he saw the mall surveillance video that he gave police a statement implicating Seymour.

¶7 Seymour testified on his own behalf. He said he went to Mayfair Mall with Allikas to shop. According to Seymour, Allikas' testimony that the two discussed committing an armed robbery was untrue. Seymour further denied

having a weapon with him at the party the night before or in the car on the way to the mall. Seymour admitted to being in the restroom with Braovac but claimed he did not have a gun and did not attempt to rob Braovac. According to Seymour, he and Braovac got into a fight after Braovac splashed Seymour with his wet hands. By testifying, the jury was allowed to hear that Seymour had seven prior convictions.

¶8 The jury heard that police searched for but did not recover a gun in connection with the incident. It found Seymour guilty of attempted armed robbery with use of force as a party to a crime. The circuit court sentenced Seymour to ten years of initial confinement and six years of extended supervision.

¶9 Seymour, *pro se*, filed a motion for postconviction relief seeking a new trial. The circuit court rejected his claims without holding a hearing. Additional facts are set forth below as necessary.

DISCUSSION

¶10 A defendant seeking postconviction relief may not rely on conclusory allegations to support his or her claims. ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. A postconviction motion must include sufficient facts to "allow the reviewing court to meaningfully assess" a defendant's claims. ***State v. Bentley***, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996). If a motion does not raise sufficient facts to warrant relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court may deny relief without conducting a hearing. ***Id.*** at 309-10.

I. *Ineffective Assistance of Trial Counsel.*

¶11 A defendant alleging counsel's ineffectiveness must prove both that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, Seymour "must show that 'counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" *See* ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82 (one set of internal quotation marks and citation omitted). To prove prejudice, Seymour "must show that trial counsel's errors had an actual, adverse effect on the defense." *See* ***id.***, ¶16. If Seymour fails to make an adequate showing as to one component of the analysis, we need not address the other. *See* ***id.***, ¶14.

¶12 Here, Seymour claims that he received ineffective assistance from his trial counsel on the following bases: for failing to file a discovery demand; for failing to impeach Allikas; and for failing to adequately prepare him to testify at trial.[3] We will address each claim in turn.

a. Failure to file a discovery demand.

¶13 We first address Seymour's complaint that his trial counsel was ineffective for failing to file a discovery demand. Seymour's argument hinges on what he contends was an incomplete inventory list of the items in his possession at the time of his arrest. According to Seymour, if his trial counsel had investigated

[3] On appeal, Seymour does not renew his claim that trial counsel was ineffective for not filing a severance motion as to he and Allikas; consequently, we deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned).

this evidence, she would have discovered that the inventory did not list Seymour's own money. He asserts that showing the jury Seymour and Allikas had their own money would have disproved—or at the very least caused the jurors to doubt—that the attempted robbery had occurred and would have substantiated his testimony that he was at the mall to shop. Seymour claims trial counsel's deficient performance in this regard is highlighted by the question from the jury: "Was there a wallet recovered from Damon Seymour's person?" He argues that this question shows that the jury was considering motives and that if he had his own money, the jury would have concluded there was no reason to rob.

¶14 "'[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted). Seymour's allegations fall short.

¶15 First, Seymour's assertion that an investigation would have revealed that his own money was missing from the inventory list is conclusory. As the State points out: "Seymour alleged nothing to indicate he could have proved at a hearing, if one were held, that the Wauwatosa Police Department was in possession of a money receipt that would show Seymour was carrying money at the time of his arrest." A defendant moving for postconviction relief may not rely on conclusory allegations of deficient trial preparation, hoping to supplement them at a hearing. ***Bentley***, 201 Wis. 2d at 313.

¶16 Moreover, if he was carrying his own money at the time of his arrest, Seymour could have told his trial counsel. As it stands, there is no indication that this issue was brought to trial counsel's attention. Information that a defendant

knows but fails to disclose to his or her attorney cannot form the basis for a claim that the attorney was ineffective. ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325. Lastly, Seymour's assertion that evidence he had his own money would have disproved or led the jury to doubt that an attempted robbery had occurred is unpersuasive. We agree with the circuit court that "evidence that the defendant had his own money with him does not necessarily make it any less believable that robbery was at least part of his motive for coming to Mayfair Mall with a handgun."

¶17 Because Seymour fails to show that his trial counsel performed deficiently in not locating a money receipt that may or may not have existed, he cannot demonstrate that the lawyer gave him constitutionally ineffective representation. *See* ***Strickland***, 466 U.S. at 697 (requiring defendant to show both deficiency and resulting prejudice).

b. Failure to impeach Allikas.

¶18 Seymour next complains that his trial counsel was ineffective for failing to impeach Allikas. Seymour claims that if trial counsel had conducted a proper and thorough pretrial investigation, she would have interviewed the other individuals who were at the party the night before the incident and would have been able to show that Allikas' testimony was false. Seymour contends that months before trial, he told his trial counsel that others who were at the party would testify in his defense. According to Seymour, these witnesses would have discredited Allikas' testimony that Seymour had a gun at the party, which would have "[e]ssentially eliminat[ed] a gun the next day." Seymour provides the sworn statement of Michael Herndon, who writes that he was at the party and never saw Seymour with a gun. To highlight the importance of this testimony, Seymour

points out that the jury asked: "Why wasn't the girlfriend or other people at [the] party questioned or asked to witness in trial?"

¶19 Seymour also claims trial counsel should have used Allikas' first interview with police to show the jury that Allikas perjured himself. During the initial interview, Allikas denied any wrongdoing and claimed he had no prior knowledge that Seymour was armed with a gun or was planning to rob someone at the mall.

¶20 To address these claims, we adopt as our own the circuit court's reasoning found in its decision denying Seymour's postconviction motion. *See* WIS. CT. APP. IOP VI (5)(a) (May 22, 2012) ("When the [circuit] court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the [circuit] court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion."). The circuit court explained:

> Herndon's testimony would not have been useful to the defendant at his jury trial. Herndon was not with Allikas and the defendant when Allikas testified that they were driving to Mayfair Mall and the defendant pulled out a gun. Herndon was not a witness to what occurred in the bathroom [at the] mall and could not offer any testimony about whether the defendant had a gun during that incident. Under the circumstances, counsel's failure to call this witness was neither deficient nor prejudicial.[4] With regard to Allikas' conflicting police statements, the record shows that defense counsel effectively cross-examined Allikas about the fact that he had changed his story to implicate the defendant. By implicating the defendant, however, Allikas also implicated himself in the robbery plan and was charged. The jury heard that the defendant

[4] As highlighted by the State, other than Michael Herndon, Seymour failed to identify any specific witnesses who would have been available to testify at his trial.

> was given a significant charging concession in exchange for his cooperation and was free to weigh the credibility of this witness.

¶21 Additionally, Seymour claims Allikas gave inconsistent statements to police regarding what he saw. With his postconviction motion, Seymour attached an excerpt from a police report indicating that at one point Allikas told police he saw the robbery take place, but during trial Allikas said he learned of the attempted robbery when Braovac ran by him claiming there was a man with a gun in the restroom. Pointing this inconsistency out, Seymour argues, would have "undoubtedly" changed the minds of the jury. Even if Seymour's trial counsel failed to highlight this particular inconsistency, Seymour's conclusory statement regarding the undoubted effect of the error is insufficient to establish prejudice. *See* ***Pote***, 260 Wis. 2d 426, ¶16 (Prejudice requires "show[ing] that trial counsel's errors had an actual, adverse effect on the defense.").

c. Failure to adequately prepare Seymour to testify.

¶22 We next examine Seymour's contention that his trial counsel was ineffective for directing him to testify at trial without adequate preparation. He claims the decision for him to testify came minutes before he took the stand and that his trial counsel erred when she allowed the jury to hear that he had seven prior convictions.

¶23 As noted by the State, Seymour does not allege that he was prejudiced by the inadequate preparation. He does not indicate how additional preparation would have altered his testimony or how it would have resulted in a different outcome at trial. Consequently, we are not convinced that Seymour's trial counsel was ineffective in this regard. *See* ***Pote***, 260 Wis. 2d 426, ¶16 (To prove prejudice, Seymour "must establish that 'there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (citation omitted).

¶24 As for the admissibility of his prior criminal convictions, the record reveals that Seymour's trial counsel filed a motion *in limine* to exclude any such evidence. During the hearing, Seymour's trial counsel conceded that if Seymour testified, the prosecutor could ask him if he had ever been convicted of a crime and if so, how many times with the answer being seven times. The circuit court reiterated this to Seymour who said he understood.

¶25 At trial, before Seymour testified, the circuit court asked whether he had discussed his decision to testify with his attorney, and Seymour answered affirmatively. The circuit court again asked Seymour if he understood that by testifying, the prosecutor could inquire whether Seymour had ever been convicted of a crime and could ask how many times with the answer being seven times. Seymour confirmed that he understood.

¶26 Twice Seymour was warned that evidence of his prior convictions was admissible if he decided to testify and twice Seymour confirmed that he understood. Seymour chose to testify and now claims that his trial was prejudiced by evidence of his prior convictions. To the extent he is arguing that his trial counsel was ineffective for not arguing more strenuously that evidence of Seymour's prior convictions should have been excluded on grounds that the probative value of his criminal record was substantially outweighed by the danger of unfair prejudice, there is nothing to indicate that if counsel had made such an argument that she would have been successful.

¶27 Evidence of criminal convictions is expressly admissible under Wisconsin statutory law. "For the purpose of attacking the credibility of a

witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible." WIS. STAT. § 906.09(1). The statute reflects the presumption that "one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). Seymour has not made a compelling argument as to why the probative value of his prior convictions is substantially outweighed by unfair prejudice. If his blanket assertions of prejudice were sufficient, evidence of criminal convictions would never be allowed. That, however, is not the law. Without more, we cannot conclude that Seymour's claim of ineffective assistance of counsel warranted an evidentiary hearing.[5] *See* ***State v. Washington***, 176 Wis. 2d 205, 214, 500 N.W.2d 331 (Ct. App. 1993) (A conclusory allegation unsupported by any factual assertions is legally insufficient to warrant an evidentiary hearing.).

II. ***Prosecutorial misconduct.***

¶28 Seymour argues that the prosecutor made impermissible comments during closing arguments that denied him his due process right to a fair trial. His argument hinges on the following remarks:

> Mr. Allikas, yes, he's getting attempted theft from person. Like I told you, I don't pick their co-actors. He picks his co-actor. I don't pick his co-actor. If I picked his co-actor it wouldn't have been Mr. Allikas. But I don't have a choice, and *I do believe that Mr. Allikas testified*

[5] On appeal, Seymour further faults his trial counsel for not highlighting inconsistent statements made by Braovac. When first interviewed, Braovac said Seymour pressed the muzzle of a black handgun to the center of his forehead, whereas at trial, Braovac testified that Seymour held a chrome or silver handgun eight to twelve inches from Braovac's face and demanded money. This issue was not presented to the circuit court, and as such, we will not address it. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (we do not address issues raised for the first time on appeal).

> *truthfully. He was truthful with the Wauwatosa Police the very night this incident occurred, and he was truthful with you today.* He told you what was going on. He took responsibility, unlike Mr. Seymour. He told you we were planning to rob someone. We were planning to rob someone at an ATM but for whatever reason that didn't work out. We went to Mayfair Mall. I knew something was going to happen, knew I was going to get some proceeds. I saw a gun. That's what Mr. Allikas told you. Those are all statements against his self[-]interest. Those statements don't help him other than *he was truthful with you today*.

(Emphasis added.) Seymour's trial counsel objected at this point and argued that the prosecutor could not vouch for the credibility of a witness. The circuit court responded by reminding the jury that the opinion of the attorneys were simply opinions, not evidence.

¶29 The prosecutor continued: "The corroboration [sic] agreement that the State entered into with the defendant [sic], I had the defendant [sic] read parts of it to you. You know the deal he got. You also know that he had to appear and *testify truthfully* to any questions asked." (Emphasis added.) Seymour's trial counsel again objected, and the circuit court reiterated that statements of counsel are not evidence. The prosecutor then stated:

> I want to be clear. I'm not vouching for him. Neither I nor [defense counsel] were in the bathroom when it happened, but the cooperation agreement that has been put forth today told you that part of his deal was to testify and that is a very important component of the plea deal that the State entered into.

¶30 Seymour claims the prosecutor's repeated inflammatory and prejudicial comments coupled with the circuit court's failure to direct the jury away from the impermissible inferences denied him due process. We disagree.

¶31 Prosecutors are permitted to argue their cases with vigor and zeal, and may strike hard blows, but not foul ones. *See* ***United States v. Young***, 470 U.S. 1, 7 (1985).

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus we examine the prosecutor's arguments in the context of the entire trial.

State v. Neuser, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (internal citations and quotations omitted).

¶32 Viewed in context, we do not deem the prosecutor's remarks so prejudicial as to have deprived Seymour of a fair trial. "[A] prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented." ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). Therefore, to the extent the prosecutor's comments were derived from the cooperation agreement which required Allikas to testify truthfully, they were unobjectionable. In addition, the State is permitted to give opinions based on the evidence and to draw "'fair and reasonable deductions and conclusions.'" *See* ***State v. Nemoir***, 62 Wis. 2d 206, 213 & n.9, 214 N.W.2d 297 (1974) (citation omitted). Moreover, a prosecutor may "state that the evidence convinces him or her and should convince the jurors." ***Nielsen***, 247 Wis. 2d 466, ¶46.

¶33 Insofar as the prosecutor personalized what she believed the evidence showed when she said, "I do believe that Mr. Allikas testified truthfully,"

this does not automatically result in a due process violation. The prosecutor minimized the significance of that statement by later making clear that she was not "vouching" for Allikas. In any event, the jury was instructed that the arguments of counsel were not evidence and that it was the sole judge of credibility. The jury is presumed to have followed its instructions. ***State v. Olson***, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).[6]

By the Court.—Judgment and order affirmed.

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

[6] In the conclusion section of his brief-in-chief, Seymour references the circuit court's decision to include a lesser-included offense instruction. If this is an argument, we deem it undeveloped and do not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not address undeveloped arguments.).