COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP415 **Cir. Ct. No. 2003CF5809**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY K. PINDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Johnny K. Pinder, *pro se*, appeals an order denying his motion for postconviction relief. Pinder contends that he received ineffective assistance from his postconviction/appellate lawyer, Joseph Cincotta. Pinder contends that Attorney Cincotta should have raised the following issues during his

direct appeal: (1) that there was insufficient evidence to convict Pinder of misappropriation of identifying information with respect to two of the victims; (2) that his trial lawyer was ineffective for failing to request a limiting jury instruction with respect to other acts evidence; (3) that his trial lawyer was ineffective for failing to object to a police officer's testimony that some of the checks found at the time of Pinder's arrest were taken from the owner in a burglary; (4) that his trial lawyer was ineffective for making unnecessary concessions in his opening argument; and (5) that his trial lawyer was ineffective for failing to object to the prosecutor's reference during opening argument to a victim who did not testify. We affirm.

¶2 A familiar test governs claims that counsel was constitutionally ineffective. The defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his lawyer's acts or omissions were not reasonable under prevailing professional norms. ***Id.*** at 688. To prove prejudice, a "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.

¶3 To obtain a hearing on a claim of ineffective assistance of counsel, a defendant must do more than merely assert in a conclusory fashion that postconviction counsel was ineffective. ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, a convicted defendant must "make the case" that his lawyer was ineffective. *See* ***id.***, ¶67. The necessary factual allegations must appear within the four corners of his postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

¶4 Pinder first argues that Attorney Cincotta should have argued on direct appeal that there was insufficient evidence to convict him of misappropriation of identifying information with respect to two of the victims, Loree Cook-Daniels and Marion Ballos. Pinder contends that there was no evidence in the appellate record showing that these victims did not give him consent to use their identifying information because the transcript of these victims' testimony was not included in the record on direct appeal.

¶5 We reject the argument that there was insufficient evidence to convict Pinder of misappropriation of identifying information with regard to these two victims. Our review of the trial transcripts shows that both victims testified that they did not give Pinder permission to use their identifying information. To the extent that Pinder's argument is based on the fact that the trial transcripts of this testimony were not included in the appellate record during the direct appeal, the transcripts were not necessary to the arguments Pinder's attorney raised on direct appeal, so Pinder was in no way prejudiced by their omission.

¶6 Pinder cites to ***State v. Perry***, 136 Wis. 2d 92, 99, 401 N.W.2d 748 (1987), for the proposition that his convictions should be reversed and a new trial ordered based on the fact that these transcripts were omitted from the appellate record on direct appeal. ***Perry*** is inapposite. It involved a situation where transcripts were missing and could not be reconstructed, thus preventing meaningful appellate review of trial court proceedings. ***Id.*** at 94. Here, the transcripts were apparently inadvertently omitted from the appellate court record on direct appeal, but were prepared and filed, and are now part of the appellate record in this appeal, allowing review of the victims' testimony. Pinder is not entitled to a new trial based on the fact that the transcripts were not part of the appellate record during his direct appeal.

¶7 Pinder next argues that Attorney Cincotta should have argued that his trial lawyer provided ineffective assistance by failing to request a limiting jury instruction with respect to other acts evidence. The circuit court granted the State's motion to allow evidence of additional forgeries and identity thefts found in a blue binder in the vehicle where Pinder was arrested. The circuit court concluded that the evidence of the uncharged crimes was admissible to show Pinder's overall general plan and to show that his misappropriation of the victim's identities was not done by mistake or accident. Pinder does not challenge the admission of the evidence. Instead, he faults his trial lawyer for failing to request a limiting jury instruction regarding proper consideration of the evidence.

¶8 Pinder's trial lawyer made a reasonable decision not to seek a limiting instruction on the other acts evidence. He stated in opening argument that Pinder would not challenge any of the victims who said that their checkbooks were used without their permission because *he* did not dispute that these individuals had been the victims of identity theft; he disputed that he was the one who did it. Pinder's defense was that the police had nabbed the wrong person and he was not involved with these criminal acts at all. Pinder's lawyer's decision not to seek a limiting instruction on the purposes for which the jury could consider the other acts evidence was consistent with this defense strategy. We will not second-guess a lawyer's "'exercise of a professional judgment in the face of alternatives that have been weighed by … counsel.'" *See* ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). In fact, "strategic choices made after thorough investigation of [the] law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690. We reject Pinder's argument that his trial lawyer rendered constitutionally ineffective

assistance to him when he failed to request a limiting instruction based on the other acts evidence.

¶9 Pinder next contends that Attorney Cincotta should have argued that his trial lawyer was ineffective for failing to object to a police officer's testimony at trial that some of the checks found at the time of Pinder's arrest were taken from the owner in a burglary. We agree with the circuit court's analysis of this issue and its conclusion that Pinder's trial lawyer was not ineffective in his representation of Pinder:

> Mr. Pinder's … claim is that he was prejudiced when a police officer mentioned to the jury that certain checks found at the time of Mr. Pinder's arrest were taken from the owner in a burglary. Mr. Pinder contends that the testimony suggested to the jury that he was involved in that burglary and that this suggestion caused him to be convicted.
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> Mr. Pinder points to a fleeting reference to a burglary made by a Greendale police officer who was describing documents recovered from Mr. Pinder. The officer mentioned the names on the checks and then described those individuals as "clients of Mr. Sam McCaulley (phonetic), the burglary victim in Wauwatosa." No other mention was made of the burglary and no other details of the burglary were offered to the jury.
>
> This reference to a burglary was too insubstantial to persuade a reasonable jury that Mr. Pinder was the culprit in the burglary. Furthermore, there was ample evidence supporting the twenty-two charges that were tried … which leads to the conclusion that even in the highly unlikely event a jury suspected that Mr. Pinder was involved in the burglary, he cannot claim prejudice. Even without unwarranted suspicion of his involvement in a burglary he would have been convicted of the charged offenses.

(Citations to the record omitted.)

¶10 Pinder next argues that Attorney Cincotta should have argued that his trial lawyer was ineffective for making unnecessary concessions in his opening

argument. We agree with the trial court's analysis of this issue and its conclusion that Pinder's trial lawyer was not ineffective:

> Mr. Pinder's next claim is, essentially, that his lawyer threw in the towel even before the trial began. Mr. Pinder highlights two statements made by his lawyer in [the] opening statement:
>
> - "Mr. Pinder and I are not going to be challenging any of these individual victims that came in and say that their checkbooks were used and used without their permission."
>
> - "We are not going to be putting on any type of a defense other than cross-examination of the various witnesses."
>
> Taken out of context, it might appear that Mr. Pinder's lawyer conceded his defense. *Cf. State v. Gordon*, 2003 WI 69, 262 Wis. 2d 380.
>
> But the rest of the opening statement makes it clear that Mr. Pinder's lawyer was not conceding. The focus of his defense was identification, that is, on whether any of the witnesses could identify Mr. Pinder. His lawyer told the jury "what the evidence won't show is Mr. Pinder … cannot be identified in any of these scenes. He cannot be identified through any pictures. The tellers will not be able to identify him." He went on to tell the jury that the evidence to be offered by the State was a combination of happenstance and testimony from two others caught red-handed who might be expected to curry favor with the State by pointing the finger at Mr. Pinder.
>
> Not only is it clear from the opening statement that Mr. Pinder's lawyer was not conceding his defense, Mr. Pinder fails to demonstrate how the outcome of the case would have changed had his lawyer not made the reasonable and strategy concessions Mr. Pinder highlights. Thus, in any event, Mr. Pinder cannot claim to have been prejudiced by the remark.

(Citations to the record omitted.)

¶11 Finally, Pinder argues that Attorney Cincotta should have argued that his trial lawyer was ineffective for failing to object to the prosecutor's brief

reference during opening argument that Robert Rondini's checkbook was found during the investigation of this case, but he would *not* be calling Rondini to testify. To put this statement in context, during his opening statement, the prosecutor began to preview the evidence, including dozens of transactions involving stolen checks, stolen checkbooks, and stolen bank statements, taken from many different people. The prosecutor mentioned Rondini's checkbook because one of his checks had been used in the scheme, although that crime was not one of the charged offenses. We agree with the circuit court's analysis of this issue and its conclusion that Pinder cannot show that he was prejudiced:

> Mr. Pinder's next claim is the prosecutor made claims in his opening statements about crimes that were never proven at trial, in particular, about a crime victim named Robert Rondini who never testified during the trial. He faults his lawyer for not objecting.
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> During the opening statement, the prosecutor told the jury that during the investigation of Mr. Pinder's crimes the police found a checkbook belonging to Robert Rondini. The prosecutor also told the jury the police were "informed by security people from St. Francis Bank that on September 3, check 1333, written on an account held by Robert Rondini, had also been split deposited against" the account of one of the victims named in the information, Cheryl Seefeldt. But the prosecutor went on to say "I can tell you right off the bat that you will not hear testimony from Mr. Robert Rondini…. He would have been an additional witness that we're not going to call."
>
> Mr. Pinder contends that he was prejudiced by this reference, because it suggested to the jury that Mr. Pinder be held responsible for victimizing Mr. Rondini. This claim meets the same fate as the previous claim. The claim that Mr. Rondini was victimized was tangential; he is not one of the victims mentioned in the information and need not have testified to prove those charges, but his name necessarily came up at trial because Mr. Pinder and his associates split deposited Mr. Rondini's check using the checking account of one of the victims. Because Mr. Pinder's m.o. involved split deposits, it comes as no surprise that others were affected by his crimes. But because there was ample evidence supporting his

> convictions of the twenty-two charges that were tried, Mr. Pinder cannot claim prejudice. Even had Mr. Rondini's name not been mentioned, he would have been convicted of the charged offenses.

(Citations to the record and footnote omitted.)

We therefore conclude that Pinder did not receive constitutionally ineffective assistance from Attorney Cincotta because Pinder cannot show that Attorney Cincotta's actions prejudiced him. *See* ***Strickland***, 466 U.S. at 687 (a claim of ineffective assistance of counsel will not lie where a defendant fails to show that counsel's actions prejudiced him).

By the Court.—Order affirmed.

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