COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP214 **Cir. Ct. No. 2002CF2286**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANDRIS T. JINES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Landris T. Jines appeals from an order summarily denying his postconviction motion. We conclude that Jines has failed to

"*affirmatively* prove" the prejudice necessary to prevail on an ineffective assistance of counsel claim.[1] Therefore, we affirm.

¶2 A jury found Jines guilty of attempted first-degree intentional homicide while armed, and possession of a firearm as a felon, each as a party to the crime and as a habitual offender. Jines then filed a postconviction motion alleging the ineffective assistance of trial counsel, which the trial court summarily denied. On direct appeal, this court affirmed the judgment and the postconviction order, addressing the ineffective assistance issues on their merits. *See* ***State v. Jines***, No. 2004AP2615-CR, unpublished slip op., ¶¶7-8 (WI App June 23, 2005).

¶3 Jines then filed a postconviction motion alleging the ineffective assistance of postconviction counsel for failing to raise a specific issue in his direct appeal, and for failing to challenge trial counsel's effectiveness in six respects. The trial court denied the motion without a hearing, but addressed several of Jines's claims on their merits, while summarily denying the others. Jines appeals.

¶4 Jines challenges postconviction counsel's effectiveness. He first challenges postconviction counsel's failure to raise the following issue in postconviction proceedings pursuant to WIS. STAT. RULE 809.30(2)(h) (2003-04), namely the trial court's error in communicating with the jury outside the presence of counsel. The remaining challenges are to postconviction counsel's effectiveness for failing to challenge trial counsel's effectiveness in the following respects: (1) for failing to object to the admissibility of evidence from a photo

[1] ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***).

array that had been lost and no longer existed; (2) for failing to object to the prosecutor's allowing a co-defendant to allegedly misstate the terms of the State's sentencing concession in exchange for that co-defendant's testimony against Jines; (3) for failing to object to the prosecutor's cross-examination of Jines on his selling illegal drugs and his being incarcerated; (4) for failing to fully investigate one of the trial witnesses before calling him to testify; (5) for failing to object to parts of the prosecutor's closing argument; and (6) for failing to object to sending certain exhibits, such as photographs and letters written by Jines, to the jury room for deliberations.

¶5 To avoid ***Escalona***'s procedural bar, a defendant must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Jines alleges that his postconviction counsel's ineffectiveness is the reason why these claims were not raised on direct appeal. Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). We conclude that Jines's reason is sufficient to overcome ***Escalona***'s procedural bar.

¶6 Jines's claims all involve the alleged ineffective assistance of counsel.[2] To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

[2] Although Jines alleges these claims as postconviction counsel's ineffectiveness, we analyze all but the first as trial counsel's ineffectiveness since all but the first of Jines's claims (continued)

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 Additionally, Jines must demonstrate that trial counsel was ineffective. To maintain an ineffective assistance of counsel claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

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against postconviction counsel are entirely dependent on and derivative of trial counsel's alleged ineffectiveness.

different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

> ¶8 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. However, the ultimate conclusion of whether the attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law, and we do not give deference to the trial court's decision.

State v. Johnson, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986) (citations, brackets and internal quotation marks omitted).

¶9 We analyze Jines's seven ineffective assistance claims. Each claim is fatally flawed because each lacks the affirmative proof of prejudice necessary to maintain an ineffective assistance claim.

¶10 Jines's first claim of error is directly against postconviction counsel for failing to challenge the trial court's communications (outside counsels' presence) with the jury. The trial court rejected this claim when it explained that counsel had previously agreed upon which exhibits would be given to the jury, and the trial court indicated that only those exhibits that had been received into evidence would be provided to the jury at the jury's request. The trial court also told counsel that if the jury had questions "requiring input," the court would contact counsel. When the jury requested certain exhibits that had been received

in evidence, and the trial court submitted those exhibits to the jury, it saw no need to contact counsel.

¶11 Jines has not shown that the trial court's explanation was inaccurate, or that its procedure, which counsel had approved, was flawed. On the basis of the record before us, we would have rejected this issue had postconviction counsel pursued it on direct appeal. Consequently, there is no affirmative proof of prejudice, and postconviction counsel cannot have been ineffective for failing to pursue this issue.

¶12 Jines next contends that his trial counsel was ineffective for failing to challenge the admissibility of Jines's identification from a photo array that was later lost or destroyed. Bradley Kust, then a Milwaukee Police Detective, testified about the report he took following the victim's identification of Jines from a photo array. On cross-examination, Kust admitted that the photo array was no longer in existence. Kust explained that he had not been involved in this investigation from the outset, but had been asked to do "follow-up. [He] hadn't had the front part of this investigation."

¶13 The jury was well aware that the photo array no longer existed. As we stated in our opinion on direct appeal, "[t]he victim identified Jines as the shooter. So did his accomplice. Other witnesses, both disinterested and interested, gave testimony of Jines's presence at the crime scene and Jines's involvement in the shooting." ***Jines***, No. 2004AP2615-CR, unpublished slip op., ¶8. The testimony against Jines was overwhelming. Jines has not shown that trial counsel was ineffective for failing to object to the admissibility of evidence relating to the photo array, particularly when trial counsel vigorously cross-

examined Kust on this missing photo array. Jines has not affirmatively shown prejudice, and cannot prevail on an ineffective assistance claim.

¶14 Jines contends that his co-defendant, Rashad Junior, did not accurately or fully state to the jury the terms of his agreement with the State in exchange for his testimony against Jines. The trial court denied this claim because at the time of Jines's trial, Junior was promised that the State would recommend "a sentence of prison" in exchange for his testimony against Jines. At the time of Junior's sentencing, the prosecutor changed his recommendation to probation; however, that change in recommendation was prompted by developments subsequent to Jines's trial. When Jines's jury was told that Junior was promised a sentencing recommendation of "prison," that was an accurate rendition of the current status of Junior's plea-bargain with the State.

¶15 At the beginning of Junior's testimony, the prosecutor asked him to tell the jury about his own plea-bargain with the State. The prosecutor read the extensive terms of the plea-bargain offered to Junior for information regarding these offenses that involved Jines. The State sought "truthful[] and complete" information, and reminded Junior that "false, misleading or intentionally incomplete information or testimony would subject [him] to possible prosecution for perjury, obstructing, or false swearing." Junior agreed to be willing to take a polygraph test, and agreed to other conditions of his cooperation. "[T]he paramount consideration will be Mr. Junior's candor and forthrightness in any information he provides. Following [the prosecutor's] evaluation [he] will advise [Junior] whether the State wishes to propose any plea agreement. Please note also that the State would consult with the victim … before extending any plea agreement." Junior then read the remainder of the written plea proposal to the jury:

> Junior will plead guilty to carrying [a] concealed weapon and to an amended charge of aiding a felon, a Class E felony. At the time of sentencing the State will recommend that the Court impose a prison sentence but will make no recommendation as to the length of any such sentence. The defense will be free to recommend whatever sentence it believes is appropriate.

¶16 Jines has not shown that the terms of Junior's plea-bargain at the time of his trial testimony were inaccurate or incomplete. The trial court found that Junior's rendition of his plea-bargain to Jines's jury at trial was an accurate statement of the plea-bargain. Additionally, we had previously found that the evidence against Jines was overwhelming. *See* ***Jines***, No. 2004AP2615-CR, ¶8. The absence of evidence that Junior or the prosecutor misstated that term of their plea-bargain would be harmless in the context of overwhelming evidence of Jines's guilt. Consequently, Jines is unable to affirmatively prove that trial counsel's failure to object was prejudicial.

¶17 Jines next criticizes trial counsel for failing to object to the prosecutor's cross-examination of him about his drug-dealing and his previous incarceration. The trial court summarily rejected this criticism.

¶18 Jines testified that he had sold a vehicle to another witness in this case within weeks of having bought the vehicle because he "needed the money," (as opposed to selling it because it could have implicated him in the shooting). During cross-examination, Jines was asked to explain how his financial situation had changed, and he admitted that it had "increased" by "[i]nvesting." When the prosecutor asked Jines about his "investing," Jines reluctantly admitted that his financial situation had improved because he was selling illegal drugs. The prosecutor also asked Jines about letters he had written that he had "[i]ntentionally

falsified." Jines responded that he falsified the name on the return address to avoid prison officials tampering with his mail.

¶19 Both lines of cross-examination were directly related to issues in the case. Jines has not shown that trial counsel's failure to object to either line of questioning constituted deficient performance. Even if he had, he has not affirmatively proven that trial counsel's failure to object was prejudicial. There is no basis to conduct an evidentiary hearing for an ineffective assistance claim on these bases.

¶20 Jines criticizes trial counsel for failing to investigate one of the witnesses at trial, Keiba Johnson, before calling him as a witness. The trial court summarily rejected this claim, noting that the evidence was "completely overwhelming." As such, any error, and we do not determine that this was error, would have been harmless, negating the prejudice necessary for an ineffective assistance claim.

¶21 Jines has not shown that trial counsel did not investigate Johnson's background. In fact, trial counsel moved for and obtained an adjournment to further investigate Johnson. The fact that trial counsel could not preclude Johnson's unfavorable testimony does not show an absence of a pretrial investigation, only that Johnson had both favorable and unfavorable information to tell the jury.

¶22 The prosecutor and trial counsel agreed that one of them would call Johnson as a witness. Johnson had relevant information, some of it was favorable to Jines, and some of it was unfavorable. Had trial counsel not called Johnson as a witness, the prosecutor would have. Consequently, the decision was not whether Johnson would testify, but which side would call Johnson to testify.

Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91. Specifically, "[w]e will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment." ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). Insofar as calling Johnson as a defense witness (as opposed to cross-examining Johnson as the prosecution's witness) was a matter of trial strategy, we conclude that this defense strategy was reasonable; consequently, there is no ineffective assistance claim on this basis.

¶23 Jines also claims that trial counsel was ineffective for failing to object to the prosecutor's closing argument, during which Jines claims the prosecutor editorialized and interjected his personal views of the evidence. The trial court denied that claim, explaining that:

> The court has reviewed the State's closing argument and finds nothing improper about it. The prosecutor was free to comment on the credibility of defense witnesses, including the defendant. He was free to demonstrate how he reached his conclusion that the defendant (or his witnesses) were lying. In this case, the defendant completely removed himself from the incident and said he wasn't there and didn't know the victim. The State was free to show that the defendant was being untruthful.

¶24 The supreme court has explained:

> [C]ounsel in closing argument should be allowed "considerable latitude," with discretion to be given to the trial court in determining the propriety of the argument. The prosecutor may "comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors."
>
> "The aim of the prosecutor in a judicial inquiry should be to analyze the evidence and present facts with a

> reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions."
>
> The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.

State v. Draize, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citations omitted).

¶25 The trial court instructed the jury that it should "[c]onsider carefully the closing arguments of the attorneys, but their arguments, conclusions and opinions are not evidence. Draw your own conclusion from the evidence and decide upon your verdict according to the evidence under the instructions given to you by the court." The jury is presumed to have followed the court's instructions. ***State v. Williamson***, 84 Wis. 2d 370, 396, 267 N.W.2d 337 (1978), *declined to follow on a different ground than for the proposition cited here,* ***Manson v. State***, 101 Wis. 2d 413, 422, 304 N.W.2d 729 (1981). Jines has not persuaded us that the prosecutor's remarks crossed the line into impermissible argument, much less that trial counsel was ineffective for failing to repeatedly object to proper closing argument, much less that postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness.

26 Jines next faults counsel for failing to object to the trial court's sending certain exhibits to the jury during deliberations, such as letters he had written, and photographs of various items from the offenses, such as the vehicle "that was shot into," blood-stained seats, and bloody clothing. The trial court explained why it rejected this claim:

> The jurors asked for exhibits that were admitted and received, and the court forwarded those exhibits to the jury after they requested them. There was no need to contact the lawyers for forwarding these exhibits because it had

> already been understood that the court would send them if asked for. With respect to Exhibit 26 (letter from Jines [to Rashad Junior]), the court contacted both attorneys, and no objection was made with regard to sending it to the jury. Defendant submits, however, that the court should have given a limiting instruction on how the letter (Exhibit 26) was to be used (i.e. to show only that he told the recipient of the letter not to call him by his nickname "Loc" any more, and for no other reason). Without an objection from trial counsel or a request for a limiting instruction, he asserts that the letter made him look bad to the jury. The letter had been received as evidence, and the parties agreed it could go to the jury as it was. Any objection would have been overruled by the court. Under the circumstances, the court cannot find that trial counsel was ineffective for failing to object to Exhibit 26 or to seek a limiting instruction, and therefore, any claim raised by postconviction counsel on this issue would not have met with success.

¶27 The standard of review for determining whether to submit an exhibit to the jury during deliberations is an erroneous exercise of discretion. *See* ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74.

> Factors that a [trial] court considers in determining whether an exhibit should be sent into the jury room include "whether the exhibit will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibit, and whether the exhibit could be subjected to improper use by the jury."

Id. (footnote omitted).

¶28 The jury requested some of the correspondence and photographs during deliberations. The trial court addressed the protocol it used when reviewing the exhibits, telling counsel that if the jury requested any of the exhibits that counsel had previously agreed were appropriate, and the trial court sought no further input from counsel, that it would simply send those exhibits to the jury. Each exhibit had been received in evidence and was therefore expected to "aid the jury in proper consideration of the case." Jines has not shown otherwise. Counsel

was not ineffective for failing to object to a legitimate exercise of trial court discretion in allowing exhibits that had been received in evidence to be submitted to the jury at the jury's request.

¶29 Jines has not shown that it is reasonably probable that he would have prevailed on any of these issues. Consequently, he has not affirmatively proven that postconviction counsel's failure to raise any of these issues constituted the prejudice necessary to maintain an ineffective assistance claim.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).