COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP1108-CR
2011AP1109-CR

Cir. Ct. Nos. 2008CF501
2008CF537

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAURICE L. BIZZLE,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, Maurice L. Bizzle appeals from judgments of conviction and an order denying his motion for postconviction relief. He contends that there was insufficient evidence to convict

him of the crime of robbery with use of force. He further contends that he is entitled to a new trial because his right to be present at trial was violated. Finally, he contends that he received ineffective assistance of trial counsel. We reject Bizzle's claims and affirm the judgments and order.

¶2 Bizzle was convicted following a jury trial of robbery with use of force, two counts of armed robbery with use of force, two counts of first-degree recklessly endangering safety, and possession of a firearm by a felon. The charges stemmed from two separate cases which were consolidated for trial. In the first, Bizzle was accused of robbing Daniel Acevedo in a gas station parking lot. In the second, Bizzle was accused of robbing and shooting Jermil Henderson and David Ellis in a restaurant parking lot. After sentencing, Bizzle filed a motion for postconviction relief seeking a judgment of acquittal and/or a new trial. The circuit court denied the motion. This appeal follows.

¶3 Bizzle first contends that there was insufficient evidence to convict him of robbery with use of force. Specifically, he asserts that the State failed to prove that he used force in his robbery of Acevedo in the gas station parking lot.

¶4 In reviewing the sufficiency of the evidence to support a conviction, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorable to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, this court may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

¶5 To convict Bizzle of robbery with use of force for the incident in the gas station parking lot, the State was required to prove: (1) Acevedo was the owner of property, (2) Bizzle took and carried away property from Acevedo, (3) Bizzle took the property with the intent to steal, and (4) Bizzle acted forcibly. WIS JI-CRIMINAL 1479.[1] "Forcibly" means that Bizzle used force against Acevedo with the intent to overcome his physical resistance or physical power of resistance to the taking or carrying away of the property. ***Id.*** *See also* WIS. STAT. § 943.32(1)(a) (2007-08).[2]

¶6 At trial, Acevedo testified that at around 9:00 p.m. on April 24, 2008, he was at a gas station on Douglas Avenue in Racine. As Acevedo was leaving the gas station in his car, Bizzle approached the car, reached through Acevedo's open window, and grabbed Acevedo's wallet out of his hand. Acevedo testified that he did not give the wallet to Bizzle, but instead that Bizzle took it from him. He stated, "[Bizzle] just—when he took [the wallet] from me he took out the money and he threw it back at me …. He took it from my hands, he took the money out and he threw it quickly to one side."

¶7 Officer Nicholas Seeger of the Racine police department testified that at around 9:14 p.m. on April 24, 2008, he was dispatched to a gas station on Douglas Avenue in Racine. At the gas station, he spoke to Acevedo who was visibly upset. Acevedo told Seeger that

> he was at the gas station to pump gas, made a payment inside the gas station, returned to his vehicle, was

[1] Bizzle does not dispute that the first three elements of the offense were met. He argues only that the State failed to prove that he used force in the robbery

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

> attempting to leave the parking lot toward Douglas Avenue with his window down when he was approached by a male black [sic] who forcibly removed some cash from his wallet that was in his hand at the driver's seat.

¶8 Viewing this evidence in a light most favorable to the State and conviction, we conclude that a jury, acting reasonably, could have found that Bizzle used force when he took the wallet from Acevedo. As noted, Seeger testified that Acevedo told him that Bizzle forcibly took cash from his wallet. Although English was not Acevedo's first language, he spoke it well enough for Seeger to collect the details from the incident. Moreover, Acevedo testified that he did *not* give Bizzle the wallet, but that Bizzle *took the wallet from his hands*. Thus, it was reasonable for the jury to find that this action amounted to "force" and that it was done with intent to overcome Acevedo's physical resistance or physical power of resistance. As a result, we conclude that there was sufficient evidence to convict Bizzle of the crime of robbery with use of force.

¶9 Bizzle next contends that he is entitled to a new trial because his right to be present at trial was violated. In particular, Bizzle focuses on his absence during voir dire.

¶10 "The right to be present at jury selection is" protected by WIS. STAT. § 971.04(1)(c), as well as "by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution." ***State v. Harris***, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999).

¶11 The right to be present during voir dire cannot be waived. ***State v. Tulley***, 2001 WI App 236, ¶6, 248 Wis. 2d 505, 635 N.W.2d 807. Nonetheless, the defendant's absence at voir dire is subject to the harmless error inquiry. *See* ***id.***, ¶7; ***Harris***, 229 Wis. 2d at 839-40.

¶12 In general, "an error is harmless if there is no reasonable probability that it contributed to the conviction." ***Tulley***, 248 Wis. 2d 505, ¶7. "A 'reasonable probability' is one sufficient to undermine confidence in the outcome of the proceeding." ***Id.*** The beneficiary of the error bears the burden of proof to establish that the error was not prejudicial. ***Id.***

¶13 On the first day of trial, Bizzle, through counsel, "voiced objection" that he did not want to commence the trial. After discussing the State's pretrial offer and addressing some logistical concerns, Bizzle's counsel informed the court that Bizzle "does not wish to participate right now and wishes to leave." The court granted this request and asked that Bizzle be kept in a holding room in the event that he changed his mind. Bizzle then left the courtroom before voir dire began and did not return to participate in the trial until the next morning.

¶14 Although Bizzle acknowledges that his absence from voir dire is subject to the harmless error inquiry, he argues that he suffered prejudice in this case. He complains that he was unable to scrutinize the prospective jurors' gestures, attitudes, and facial expressions. In addition, he asserts that he knew one of the jurors, Antoine Hamilton, and that Hamilton was biased against him. According to an affidavit that Bizzle submitted after trial, he first met Hamilton in middle school around 1998 and several years later impregnated his cousin, which caused "tension" between their families and resulted in several verbal altercations.

¶15 Upon review of the record, we are satisfied that any error resulting from Bizzle's absence during voir dire was harmless. To begin, the alleged

prejudice that Bizzle cites is either speculative or unsupported by the record.[3] Furthermore, the evidence offered against him at trial was substantial: one eyewitness testified that Bizzle robbed him and another eyewitness testified that Bizzle robbed him and then shot him. For these reasons we conclude that there is no reasonable probability that Bizzle's absence from voir dire contributed to his convictions.

¶16 Finally, Bizzle contends that he received ineffective assistance of trial counsel. Specifically, Bizzle maintains that counsel (1) failed to move for a mistrial when he discovered that one of the jurors, Hamilton, was biased against him and (2) failed to adequately cross-examine two of the victims, Henderson and Ellis.

¶17 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶18 We reject Bizzle's claim that his counsel was ineffective for failing to move for a mistrial. As noted above, Bizzle submitted no credible evidence to

[3] During voir dire, the circuit court specifically asked the jury venire whether anyone knew Bizzle or "any member of his family." After this question was asked, the court stated, "[n]obody is raising their hand to that." Although Bizzle maintains that Hamilton lied to the court when he declined to admit knowing Bizzle, Bizzle submitted no credible evidence to support this allegation. He failed to testify to his assertion at the postconviction hearing. Likewise, he failed to subpoena Hamilton to testify.

support his allegation that Hamilton was biased against him. Moreover, as Bizzle's counsel testified at the postconviction hearing, Bizzle never relayed to him any of the alleged information about Hamilton. Indeed, at one point during trial, Bizzle's counsel specifically asked Bizzle if he had any knowledge of or relationship with Hamilton and Bizzle gave no indication that he did. Given these facts, counsel cannot be faulted for failing to move for a mistrial when there was no reason for him to do so. Additionally, we conclude that Bizzle suffered no prejudice from counsel's failure to move for a mistrial because he has shown no basis upon which a successful motion could have been made.[4]

¶19 We also reject Bizzle's claim that his counsel was ineffective for failing to adequately cross-examine two of the victims, Henderson and Ellis. Here, Bizzle argues that counsel should have attacked Henderson's credibility with regard to Henderson's testimony that he had not been drinking on the night of the crime. Bizzle further argues that counsel should have asked Ellis if he was under the influence of drugs or alcohol on the night of the crime. The problem with these arguments is that Bizzle has not shown how he was prejudiced by counsel's failure to ask such questions.

¶20 At trial, Henderson identified Bizzle as the man who robbed and shot him in a restaurant parking lot. Henderson indicated that he had known Bizzle for several years. Thus, whether Henderson had consumed alcohol on the

[4] Wrapped up in Bizzle's argument for mistrial is his implied assertion that counsel also should have moved for a mistrial because of an incident involving Hamilton at trial. During trial, Hamilton indicated that someone from Bizzle's family approached him during a break and told him that Bizzle "didn't do it." Hamilton assured the court that, despite the encounter, it would not affect him in reaching a verdict. Again, based on this response, there was no reason for counsel to move for a mistrial. Similarly, there would have been no reason for the circuit court to grant such a request.

night of the crime was not relevant to assessing his identification of Bizzle. Even if it were, one of the responding police officers, Hanns Freidel, testified that Henderson was coherent when he spoke to him afterwards and did not appear to be intoxicated.

¶21 As for Ellis, he testified at trial that he was with Henderson in the restaurant parking lot on the night of the crime. Like Henderson, Ellis indicated that he was robbed and shot. Unlike Henderson, Ellis was unable to identify the perpetrator. Accordingly, because he never identified Bizzle, or anyone else, as the person who robbed and shot him, whether Ellis had used alcohol or drugs on the night of the crime was not relevant to assessing his testimony and credibility as a witness.

¶22 For these reasons, even if counsel was somehow deficient in failing to adequately question Henderson's and Ellis' use of alcohol or drugs on the night of the crime, Bizzle has not demonstrated that such a performance prejudiced his defense. As a result, he cannot establish ineffective assistance of counsel.

By the Court.—Judgments and order affirmed.

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