COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1908-CR **Cir. Ct. No. 2009CF424**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY S. IRVING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 GUNDRUM, J. Anthony S. Irving appeals from his jury convictions on six counts of armed robbery with threat of force and the order denying his motion for postconviction relief. Irving contends he was deprived of

his right to self-representation and that his trial counsel was ineffective by failing to conduct certain cross-examination during trial. We disagree and affirm.

Self-Representation

¶2 In the months leading up to his trial, Irving complained to the court about his representation and gave some indication of a willingness to represent himself, but repeatedly expressed his desire for legal representation. At one point, Irving filed a complaint against his counsel with the Office of Lawyer Regulation (OLR). During a hearing where the matter was addressed, Irving requested that new counsel be appointed. The court approved of the appointment of new counsel, but told Irving that if he sought to remove his next counsel from the case, assuming there were proper grounds, it would grant the request but "you're on your own at that point." Irving responded, "Okay."

¶3 At a hearing four days before trial, Irving complained about his new counsel and told the court he was planning to file a complaint against him with the OLR. The court informed Irving it was prepared to make him represent himself. In response, Irving stated, "I ain't going to do it."

¶4 The morning of the first day of trial, Irving told the court he wanted to fire his counsel. The court asked Irving, "And is it your intent to represent yourself?" Irving said, "Yes. I have no choice. You told me I had to, so yes." Irving told the court that "if" counsel did not sign a list of issues Irving wanted brought up at trial, "then I'm going in there on my own, and I will come back automatically [on appeal], so let's waste the Court's time. I don't even care." The court again asked Irving if it was his intent to represent himself. Irving responded by asking his counsel, "How come you won't sign the paper?" The court asked Irving if representing himself was his "final decision" and Irving said, "Yes, it is."

¶5 As the proceedings continued, the court and Irving discussed Irving's understanding of the rules of evidence. The court informed Irving he could still change his mind and proceed with his attorney. In response, Irving asked the court, "If I allow him to represent me and I feel like he's not doing what I want him to do, I can still fire him in the process of the trial, and it's not against my constitutional right that I can still represent myself; is that correct?" The court informed Irving it was up to the court whether Irving would be allowed to discharge his attorney.

¶6 The court explained standards Irving would have to follow at trial if he proceeded pro se. While discussing possible video evidence that might be used at trial, Irving stated, "*Even if I want to represent myself* ... I can't even put up a defense for that. I don't even know how I never even prepared—I never went to trial before, never even represented myself." (Emphasis added.)

¶7 The court ruled that Irving's counsel would continue representing Irving, noting, among other considerations, that Irving had indicated his desire to be represented by counsel throughout the pendency of the case.

¶8 Shortly before the jury was brought into court, Irving voiced concerns regarding a piece of evidence. When the court asked Irving if he understood he was still being represented by counsel, Irving responded, "Yeah. He's forced to be representing me by you. That wasn't my wishes."

¶9 Irving contends the trial court denied him his state and federal constitutional right to represent himself at trial. Whether the right to self-representation has been violated presents a question of constitutional fact we review independently as a question of law. ***State v. Klessig***, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997).

¶10 The Wisconsin and United States Constitutions provide a right to counsel and a right to self-representation in criminal proceedings.[1] ***State v. Imani***, 2010 WI 66, ¶20, 326 Wis. 2d 179, 786 N.W.2d 40. Exercising the right to proceed pro se represents a waiver of the right to counsel. ***Pickens v. State***, 96 Wis. 2d 549, 555, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***Klessig***, 211 Wis. 2d at 206. The right to counsel is highly regarded and nonwaiver of the right is presumed. ***Id.*** A defendant choosing to forgo the right to counsel and invoke the right to self-representation must do so with a clear and unequivocal declaration. ***State v. Darby***, 2009 WI App 50, ¶24, 317 Wis. 2d 478, 766 N.W.2d 770.

¶11 Irving contends he made a "clear and unequivocal" request to represent himself. We disagree. Throughout the proceedings, Irving repeatedly gave the trial court mixed signals.

¶12 As the trial court noted, throughout the pendency of his case, Irving indicated a desire to be represented by counsel. When the court warned Irving four days before trial that it might require Irving to represent himself, Irving responded, "I ain't going to do it." On the day of trial, when Irving indicated he wanted to fire his counsel and the court asked Irving if he intended to represent himself, he responded that he would do so because he had "no choice." When the court again asked Irving if he intended to represent himself, Irving asked his counsel why he would not sign the list of issues Irving wanted counsel to bring up at trial, indicating a continued desire to be represented by counsel. While Irving

[1] We treat the right to counsel and the right to self-representation the same under the Wisconsin and United States Constitutions. *See* ***State v. Klessig***, 211 Wis. 2d 194, 202-03, 564 N.W.2d 716 (1997).

did at one point indicate that representing himself was his "final decision," he subsequently asked the court about the possibility of his counsel continuing to represent him, but Irving retaining the right to discharge him during the trial if counsel was not doing what Irving wanted him to do. Then, while discussing certain evidence that might be used at trial, Irving indicated he could not defend against the evidence, "[e]ven if [he] want[ed] to represent [himself]."

¶13 Irving's conduct well illustrates one of the primary purposes of the clear and unequivocal standard, to require a defendant to make an explicit choice. The standard seeks to prevent a defendant, such as Irving, who "vacillates at trial" between the desire for counsel and self-representation from later claiming he was denied either the right to self-representation or the right to counsel, depending on how the court interprets conflicting comments. *See* ***Darby***, 317 Wis. 2d 478, ¶20 (quoting ***Adams v. Carroll***, 875 F.2d 1441, 1444 (9th Cir. 1989)). Here, Irving never clearly and unequivocally invoked his right to self-representation.

Assistance of Counsel

¶14 After a four-day trial, a jury found Irving guilty of six counts of armed robbery with threat of force. Irving moved for postconviction relief and asked the court to reverse the convictions on the ground that Irving's counsel provided ineffective assistance. Irving argued that his counsel's assistance was ineffective because counsel failed to impeach the testimony of State witnesses Sean Lloyd, Ronda Butler, Rochelle Tarr, and Garrett Greene with available information that would have undermined their credibility. Irving also claimed his counsel failed to present additional available evidence to support his defense that he was not the person who committed the robberies.

¶15 Following a ***Machner***[2] hearing, the court denied Irving's motion. The court concluded that Irving's counsel erred in multiple respects, but that Irving was not prejudiced by the performance. The court reasoned that several other factors besides the testimony of the challenged witnesses pointed to Irving as the robber. First, evidence indicated that the same person committed all six robberies. Second, "[n]on-controversial witnesses" placed Irving near the scene of two of the robberies (with Lloyd placing him near a third). Third, Irving had access to physical evidence that connected him to each of the robberies. The court observed that the testimony provided by Lloyd, Butler, and Tarr was corroborated by other evidence. The court did not discuss Greene's testimony, concluding that it "was so vague that it was of little importance."

¶16 On appeal, Irving renews his argument that his trial counsel provided ineffective assistance. A claim of ineffective assistance of counsel is a mixed question of law and fact. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The trial court's findings of fact are reviewed under a clearly erroneous standard. ***Id.*** Whether counsel's assistance was ineffective is reviewed de novo. ***State v. Williams***, 2006 WI App 212, ¶11, 296 Wis. 2d 834, 723 N.W.2d 719 (citing ***State v. Felton***, 110 Wis. 2d 485, 504-05, 329 N.W.2d 161 (1983)).

¶17 A defendant claiming ineffective assistance of counsel must prove both prongs of a two-part test. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. The defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. ***Strickland***, 466 U.S.

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

at 687. An ineffective assistance of counsel claim will fail if either prong is not satisfied. ***Id.*** at 697; ***Williams***, 296 Wis. 2d 834, ¶18. Because we conclude Irving was not prejudiced by his counsel's alleged errors, we do not reach the issue of whether counsel's performance was deficient.

¶18 To establish prejudice, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. If multiple errors are alleged, prejudice is "assessed based on the cumulative effect of those errors." ***State v. Zimmerman***, 2003 WI App 196, ¶34, 266 Wis. 2d 1003, 669 N.W.2d 762.

¶19 Irving's first complaint is that counsel failed to undermine the credibility of State witnesses Lloyd, Butler, and Tarr by cross-examining each with his or her record of multiple prior criminal convictions. Second, Irving complains that counsel failed to cross-examine Butler regarding a sentencing hearing she had pending at the time of Irving's trial, Tarr regarding a felony trial she had pending when she provided statements to police and her probationary status at the time of Irving's trial, and Greene regarding the fact that his statement to police was made when he was arrested pursuant to a warrant on another case and that his own sentencing on a separate case took place around the time of Irving's trial. In essence, Irving argues that cross-examination on these matters would have undermined the witnesses' credibility by exposing possible motives for cooperating with the State. Irving also complains that his counsel failed to cast doubt on the veracity of Lloyd's, Tarr's, and Greene's testimony against Irving by presenting to the jury inconsistent aspects of prior statements they made to authorities, as well as calling into question the interrogation process with regard to

each. Lastly, Irving contends his counsel should have done more to develop an alibi for the charge that Irving robbed a nearby Subway restaurant.

¶20 Each issue, except the last, relates to counsel's alleged failure to undermine the credibility of the challenged witnesses' testimony at trial. However, even if counsel had impeached Lloyd, Butler, Tarr and Greene in the manner Irving suggests, the credibility of their testimony, and the strength of the State's case, was supported by other evidence.

¶21 Tarr's and Greene's testimony related to the last of the six robberies, at Burger King. Tarr testified to clothing she provided Irving prior to the Burger King robbery, as well as observing Irving cut eyeholes in a blue stocking cap she gave him at his request. Greene was at Burger King at the time of the robbery. In its postconviction ruling, the trial court found Greene's testimony to have been "so vague that it was of little importance." To the extent Greene's testimony had importance, it was because he testified to having some familiarity with Irving prior to the robbery and having "an idea" during the robbery that the masked robber might have been Irving.

¶22 Lloyd's testimony largely related to the Burger King robbery but also included Irving's confession to Lloyd that he (Irving) was the one who had committed all the robberies. While Irving complains that his counsel failed to impeach Lloyd's credibility, the jury was afforded an opportunity to question Lloyd's credibility based on the fact it was informed Lloyd was incarcerated at the time of trial, and, according to the trial court, Lloyd wore a jail uniform in court and was "visibly shackled" when he testified. The jury was also informed that Lloyd received a plea deal for his cooperation in the case and of the terms of that deal, including that Lloyd's sentencing related to the deal was still pending. A

detective also testified about information that referred to Lloyd as a "serious crack cocaine user" and a "thief."

¶23 Lloyd testified to clothing he gave Irving, which was connected to the Burger King robbery; to waiting in the car while Irving went into Burger King around the time of the robbery and driving the vehicle away once Irving returned; to driving with Irving to Colleen Calpin's residence after departing Burger King and putting clothing Irving had given him to "get rid of" in a dumpster at Calpin's; and to Irving's confession about having committed all the robberies. Lloyd further testified to Irving showing him a "bunch of money" while at Calpin's residence and to overhearing Irving tell his brother on the phone that he just "got" Burger King.

¶24 The testimony of unchallenged witnesses, however, corroborated the testimony of Lloyd, Tarr, and Greene. A Burger King employee's description of multiple articles of clothing worn by the robber matched up with clothing Detective Paul Olsen observed Irving wearing shortly before the robbery. The employee's description of the robber's clothing also matched up with clothing Olsen found at Calpin's residence when police arrested Irving there just hours after the robbery, including a blue stocking cap with cut out eye holes. Further, the employee described the robber's "gun" as not looking real, but looking like an "airsoft gun." When Irving was arrested, Olsen found a BB gun under a plant just outside Calpin's residence.

¶25 Further, as the trial court observed, there were similarities in all six robberies indicating the same person committed all six. First, the robberies were all committed within a fifteen-day period. Also, the Burger King robbery occurred around 10:45 p.m. Four of the five prior robberies occurred between 10:00 and

11:00 p.m., with three of those occurring around 10:45 p.m. The Burger King employee described the robber as wearing a mask and displaying a gun, just like the robber in the prior five robberies. The Burger King employee described the robber as being five feet six inches tall. Witnesses from the other five robberies identified the robber as being between five feet four inches and five feet nine inches tall. The trial court stated in its postconviction decision that it was "aware from its own observations that Mr. Irving is short in stature."

¶26 Irving also complains that his counsel failed to undermine Butler's credibility by cross-examining her regarding her record of multiple prior criminal convictions and a sentencing hearing she had pending at the time of Irving's trial. Butler's testimony was also supported by other evidence.

¶27 Butler testified that Irving moved into her household around July 1 or 2. The robberies began on July 5. Butler's incriminating testimony related largely to identifying distinctive articles of clothing worn by the robber in surveillance videos from various robberies as matching up with clothing from her household. She also testified to becoming emotional when she recognized the robber's voice on a store surveillance video as being Irving's.

¶28 However, three of Butler's children, Ashley, Shelby, and Bradley, also testified that they recognized distinctive articles of clothing worn by the robber in the videos as matching up with clothing from the Butler household. Further, a detective who was with Butler when she viewed the surveillance videos confirmed in his testimony that Butler "broke down and started to cry" when she heard the robber's voice on the surveillance tape and that she then stated that the voice was Irving's. Ashley also testified to recognizing the voice of the robber on a store surveillance video as being Irving's.

¶29 Lastly, Irving contends that his counsel should have done more to develop an alibi for the charge that he robbed a Subway restaurant near the Butler home, the fifth of the six robberies. He argues that counsel should have used statements by Butler and Shelby indicating it was their belief Irving was on the porch at the time Subway was robbed. The trial court found the potential alibi evidence "lacking." We agree.

¶30 Officer Jason Pacey testified that Subway was about 300 feet from the Butler home. In their various statements to police, Butler and Shelby were unable to say with certainty that Irving would not have been able to commit the Subway robbery. Irving refers to a statement by Butler to police indicating she knew Irving was on the porch during the robbery; but in another statement Butler gave to police around the same time, she indicated she was in the shower at the time of the robbery. The officer involved with the statement reported that it was Butler's and Shelby's "impression" that Irving was on the porch at the time of the robbery. Considering Pacey's testimony about the distance between Subway and the Butler residence, as well as an exhibit demonstrating the nearness of the two, the trial court observed in its postconviction ruling that "a person could easily jog from the Butler residence to the Subway and back to the Butler residence in a minute or less." We agree with the trial court's conclusion that "[i]t is reasonable to infer that Mr. Irving could have spent the vast majority of the evening at the Butlers' and still have done the Subway robbery."

¶31 Further, Pacey testified that he was three blocks away from Subway when he received word by radio that it had been robbed. Pacey went in the direction it had been reported the suspect had fled and made contact with Irving at the Butler residence. He observed Irving to be sweating and "out of breath." When Pacey asked Irving if he had observed anything, "[i]nstantly he made a

comment about the Subway got robbed again and how he was upset that this was going on in his neighborhood .... Struck me as odd, the behavior."

¶32 In its ruling, the trial court also identified some of the other key evidence linking Irving to the Subway robbery. Among other evidence, a surveillance video from Subway showed the robber jumping onto the counter wearing distinctive shoes which Shelby and Ashley testified that they recognized as being Shelby's shoes. When police arrested Irving at Calpin's residence five days after the Subway robbery, Olsen found shoes in the bedroom Irving was in which matched the type of shoes Shelby and Ashley recognized from the Subway video. Further, Olsen testified that the tread pattern on the shoes he found with Irving was "consistent" with the tread pattern he recovered off the Subway counter.

¶33 The testimony of Lloyd, Butler, Tarr, and Greene was corroborated by independent witnesses and supported by other evidence. Further, Irving's alibi, that he was on the porch at the time of the Subway robbery, was "lacking." The trial court concluded there was no reasonable probability that had Irving's counsel performed as Irving contends he should have, the results of the trial would have been different. The court found that "[c]onfidence in the jury's verdict is justifiably strong on all six counts. Mr. Irving was convicted because the State's case was strong. He was not convicted because of mistakes by [his trial counsel]." We agree.

By the Court.—Judgment and order affirmed.

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