COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2168 **Cir. Ct. No. 2006CF2091**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM MARTIN, A/K/A WILLIAM LEACH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 FINE, J. In 2006, a jury found William Martin guilty of robbery. *See* WIS. STAT. § 943.32(1). We affirmed Martin's conviction on direct appeal. *See* ***State v. Martin***, 2007AP1293-CR, unpublished per curiam (WI App Feb. 16, 2009). In August of 2011, Martin filed a WIS. STAT. § 974.06 motion claiming

that his trial and postconviction lawyer gave him constitutionally deficient representation. *See* ***State ex rel Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction lawyer may be a sufficient reason for not having previously raised issues). The trial court denied the motion without holding a hearing under ***State v. Machner***, 92 Wis. 2d 797, 286 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer gave a defendant ineffective assistance). Martin appeals *pro se*. We affirm.

I.

¶2 Martin was charged with one count of attempted armed robbery and one count of armed robbery after he entered a business, demanded money while pressing what turned out to be a toy gun into the back of a female employee and then demanded the wallet of a male employee. When the male employee realized the gun was a toy, he tackled Martin and called police. The jury acquitted Martin of attempted armed robbery and convicted him of the lesser-included crime of robbery.

¶3 Martin argues that his postconviction lawyer gave him constitutionally ineffective representation because the lawyer did not raise the issue of his trial lawyer's ineffectiveness. Martin contends his trial lawyer was ineffective because the lawyer: (1) did not object to the lesser-included offense; (2) did not object to the trial court's jury instruction on possession of stolen property; and (3) did not get the toy gun and wallet tested for fingerprints.

¶4 Martin also argues that his postconviction lawyer was ineffective because the lawyer did not argue the following contentions in his direct appeal: (1) the prosecutor's misstatement during closing that Martin had to prove he did

not have a gun; (2) the prosecutor's use of a witness who "FLAT OUT LIED"; (3) the prosecutor's interaction with a juror in the courtroom hallway; (4) the trial court's bias; and (5) the prosecutor's withholding of "favorable" evidence. Martin also claims the trial court should have held a ***Machner*** hearing. We reject all of Martin's contentions.

II.

¶5 To establish constitutionally ineffective representation, Martin must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id.***, 466 U.S. at 690, and to prove resulting prejudice, he must show that his lawyer's errors were so serious that he was deprived of a fair trial and reliable outcome, *see* ***id.***, 466 U.S. at 687. We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶6 The circuit court must hold an evidentiary hearing on an ineffective-assistance claim only if the defendant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123, 700 N.W.2d 62, 68 (quoted source omitted). If the postconviction motion does not assert sufficient facts, or presents only conclusory allegations, or if the Record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the claim without a hearing. ***Ibid.*** We review *de novo* whether a defendant is entitled to an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996).

A. *Lesser-Included Offense*.

¶7 Martin first complains that his trial lawyer should have objected to the lesser-included instruction. A lesser-included instruction should be given when there are reasonable grounds in the evidence for acquittal of the greater charge and conviction of the lesser charge even when a defendant objects to the instruction. *See* ***State v. Moua***, 215 Wis. 2d 511, 519, 573 N.W.2d 202, 205 (Ct. App. 1997). Here, Martin was charged with armed robbery. Robbery is a lesser included offense of armed robbery. The trial court found the evidence supported the lesser-included charge because Martin used a toy gun, and, therefore the jury could have reasonably found that he was not "armed." Any objection to the lesser-included instruction would have been overruled; therefore failing to object was not prejudicial. *See* ***Strickland***, 466 U.S. at 694.

¶8 Martin also claims that the State violated his due process rights by making the lesser-included request. We disagree. "When a defendant is charged with a crime he is automatically put on notice that he is subject to an alternative conviction of any lesser included crime[.]" ***Dunn v. State***, 55 Wis. 2d 192, 197, 197 N.W.2d 749, 752 (1972).

B. *Jury Instruction*.

¶9 Martin next claims that his trial lawyer should have objected to the trial court's instruction on stolen property, claiming that the instruction told the jury that Martin possessed stolen property. Martin is wrong. The jury instruction said: "*Evidence has been presented* that the defendant possessed recently stolen property." (Emphasis added.) The instruction did not say that "Martin possessed recently stolen property." The trial court would have overruled any objection to

this instruction on the basis Martin asserts. Thus, failing to object was not prejudicial.

C. *Testing toy gun and wallet for fingerprints.*

¶10 Martin claims his trial lawyer should have tested the toy gun and wallet for fingerprints because it may have shown that Martin's fingerprints were not on either, and proven that he did not "possess" the toy gun or wallet. Aside from this general conclusory speculation, Martin does not show how any testing would have changed the outcome. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (A defendant who alleges that his lawyer was ineffective because the lawyer was deficient in his or her representation must show what the lawyer should have done and how it would have accomplished the result the defendant now seeks.) As the State suggests, testing may have shown that Martin's fingerprints were on both the wallet and toy gun. And no fingerprints would not have changed the eyewitness testimony that Martin held the gun to the victim's back or demanded the other victim's wallet.

¶11 Inasmuch as Martin's trial lawyer did not give him ineffective representation, it follows that Martin's postconviction lawyer did not give Martin ineffective representation by not contending that the trial lawyer was ineffective. We now turn to the specific allegations of postconviction ineffectiveness.

D. *Prosecutor's misstatement in closing.*

¶12 During the rebuttal closing argument, the prosecutor said: "For the defendant to prevail, he must convince you that he did not bring a gun there." Martin's lawyer objected and moved for a mistrial. The trial court denied the motion and gave a curative instruction:

> Ladies and gentlemen, during [the prosecutor's] rebuttal argument to you he misstated the law. He made a statement to the effect that … for the defendant to prevail he had to … convince you that he did not bring a gun…. That is a complete misstatement of the law.
>
> A defendant has no obligation to prove anything in a trial. Defendants are presumed innocent, and they're not required to prove their innocence in any manner. And the law presumes every person charged with the commission of an offense to be not guilty. And the presumption requires a finding of not guilty, unless in your deliberations you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty. And the burden of establishing each and every fact necessary to constitute guilt is upon the State. And before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.
>
> In this case Mr. Martin did not have to take the witness stand. He did not have to prove any single fact in the course of this trial. The complete burden is on the State to convince you beyond a reasonable doubt that the defendant is guilty. And so that argument by [the prosecutor] is struck from the record, and you are to disregard it.

Martin contends his postconviction lawyer should have challenged the prosecutor's error on direct appeal. As we have seen, the error was immediately corrected by the curative instruction. We presume the jury followed the curative instruction. *See* ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 841, 709 N.W.2d 497, 514. Martin has not shown that raising this issue on direct appeal would have changed the outcome.

E. *Use of "lying" witness.*

¶13 Martin claims that his postconviction lawyer should have challenged the prosecutor's knowing use of a "lying" witness. Martin says that Nick Vorberg, who was entering the building as Martin left, lied when Vorberg testified that Martin "pulled the wallet out of his jacket" "and threw it to the ground." Martin

says a photo of Martin "without a jacket" and Martin's claim that he never had the victim's wallet makes Vorberg's testimony false.

¶14 Martin's claims of a lying witness are speculative and conclusory. He does not show either that the witness lied or that the prosecutor had any reason to believe the "jacket" testimony was untrue. At best, Martin shows an inconsistency in a witness's testimony. The jury resolved any inconsistencies in the testimony when they reached a verdict finding Martin guilty. *See* ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43, 46 (1972). Martin has not shown that raising this issue on direct appeal would have changed the outcome. *See* ***Strickland***, 466 U.S. at 694.

F. *Prosecutor's hallway talk with juror.*

¶15 One of the juror's saw the prosecutor in the courtroom hallway and asked for directions to the courtroom. The prosecutor told the juror: "I can't talk to you." Martin argues this *ex parte* contact warrants a new trial and should have been raised on appeal. The trial court questioned the juror about the contact and the juror said the interaction did not affect his ability to be fair and impartial.

¶16 Martin has not shown how this incidental contact with the prosecutor prejudiced him.

G. *Trial Court's alleged bias.*

¶17 Martin contends that the trial court was biased against him and that this issue should have been raised by his postconviction lawyer. Martin says the following rulings and comments show trial court bias:

- When the trial court denied his lawyer's request to withdraw two pages of a police report that his lawyer had just asked to be admitted;

- When the trial court denied Martin's request to personally state on the Record that he thought his lawyer's representation was "faulty";

- When the trial court told his lawyer to "return to the counsel table" "unless you have other exhibits to show the witness";

- When the trial court sustained the prosecutor's objection, ruling: "It's cumulative. You've made your point.";

- When the trial court said at sentencing that: Martin "perjured himself. And the Court will reject the entire testimony." And, the trial court "would have found the defendant guilty of both counts as originally charged. The evidence was clear, direct, uncontradicted, except by the defendant's lies that he told during the course of the testimony."

¶18 A trial court is obligated to recuse itself if it is biased against a defendant. *See* WIS. STAT. § 757.19. The examples that Martin lists, however, do not show judicial bias. Several of the allegedly biased statements are either proper evidentiary rulings or comments made to keep order in the courtroom. The trial court's evidentiary rulings here do not show bias. Further, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." ***Liteky v. United States***, 510 U.S. 540, 555 (1994). None of Martin's cited examples "display a deep-seated favoritism."

See ***ibid.*** Further, the trial court's sentencing comments do not show bias. A sentencing court may take into account the credibility of the defendant and acquittals when determining a sentence. *See* ***State v. Arrendondo***, 2004 WI App 7, ¶¶53–55, 269 Wis. 2d 369, 404–405, 674 N.W.2d 647, 663 (acquittals); ***State v. Tiepelman***, 2006 WI 66, ¶36, 291 Wis. 2d 179, 199, 717 N.W.2d 1, 11 (credibility).

H. *Prosecutor's alleged withholding of evidence*.

¶19 Finally, Martin claims his postconviction lawyer should have challenged the prosecutor's withholding of a witness named "Mr. Stephan" who allegedly heard Martin say that he did not have the victim's wallet as the victim and Martin left the building. Martin makes this conclusory assertion without any substantiation. He does not show how Mr. Stephan's statement would have been admissible or would have changed the outcome of his case. Martin has thus not shown prejudice. *See* ***Strickland***, 466 U.S. at 694.

I. *Alleged entitlement to an evidentiary hearing on Martin's claims*.

¶20 Martin also contends that the trial court should have held an evidentiary hearing so his trial lawyer could testify. As we have seen, however, none of Martin's contentions are supported by specific material facts that are in dispute, and the Record here "'conclusively demonstrates that the defendant is not entitled to relief.'" *See* ***Love***, 2005 WI 116, ¶26, 284 Wis. 2d at 123, 700 N.W.2d at 68 (quoted source omitted). Thus, remand for an evidentiary hearing is not warranted.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.