COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1443-CR **Cir. Ct. No. 2011CF5976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MERRILL D. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Merrill D. Williams appeals from a corrected judgment of conviction entered after a jury found him guilty of two counts of armed robbery as a party to the crimes. *See* WIS. STAT. §§ 943.32(2) & 939.05

(2011-12).[1] He also appeals the order denying his postconviction motion based on claims of ineffective assistance of trial counsel. We affirm.

I. BACKGROUND

¶2 According to the complaint, Williams participated in two separate armed robberies on the same evening: the alleged victims were D.J. and T.C. D.J. told police three males between the ages of fifteen and seventeen approached her as she waited for a bus. The men stopped at the bus stop and a short while later, one approached D.J. with a handgun in his hand. D.J. told police she handed over her purse and that while the robbery was happening, the other two men stood nearby "'looking out.'" Phone records from D.J.'s phone, which was inside her purse, revealed that numerous calls were made to a number linked to Williams[2] and to a number linked to Williams' girlfriend following the robbery. D.J. identified Williams as one of the lookouts during a photo array procedure initiated by the police.

¶3 The robbery of T.C. occurred approximately two hours later the same night. T.C. told police that she and her daughter were walking home from the bus stop, when they encountered two men on the street. One of the men reached into his pocket as if he had a gun and demanded T.C.'s purse. After T.C. gave up her purse, both men fled.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Trial testimony revealed that this was Williams' mother's cell phone number.

¶4 Police executed a search warrant at Williams' home and recovered T.C.'s wallet and various items that were in her purse. T.C. identified Williams as one of the subjects who robbed her during a photo array procedure initiated by the police.

¶5 The case proceeded to a jury trial. Because the issue on appeal centers on trial counsel's performance as it relates to T.C.'s testimony, we will focus primarily on the charge that involves her.

¶6 T.C. testified, consistent with the allegations set forth in the complaint, that she was walking home with her nine-year-old daughter when two men dressed in black approached and robbed her. She identified Williams as the man who took her purse. The purse taken from T.C. contained a flash drive, wallet, money, credit cards, a school identification card, and family photographs. T.C. told the jury that the police, using folders, showed her a photo array while the investigation was underway and that she identified Williams, whose photograph was in folder number three.

¶7 Police Officer Procopio Orlando testified that he showed a photo array to T.C., which consisted of eight numbered folders containing six photographs. Officer Orlando further explained that police also create "a six[-]pack," which is a sheet containing a photograph of the suspect and five other individuals. The victim is not shown the six-pack, instead, it serves as a "master sheet" from which individual photographs are printed, cut out, and placed in the folders. The numbering on the folders does not correlate to the numbering of the photographs on the six-pack. Officer Orlando said that T.C. picked the photograph of Williams found in folder number three.

¶8 Police Officer Steven Strasser testified that he was involved in investigating the robberies of D.J. and T.C., which had occurred within a few blocks of each other. Officer Strasser executed a search warrant at Williams' residence and found a flash drive and purse that were subsequently identified as having been taken from T.C. during the robbery.

¶9 In his closing argument, Williams' trial counsel asserted that this was a case of misidentification and argued that T.C. had picked photo number three in the police-initiated photo array, when the photo of Williams was actually number four. In rebuttal, the prosecutor told the jury not to be confused as to D.J. and T.C.'s identification of Williams and reiterated that the police presented the photos in separate folders whose numbers did not correspond to the order of the photos in the six-pack, the exhibit that defense counsel had referenced.[3]

¶10 During jury deliberations, the trial court received a note from the jury stating, "Transcript of [T.C.], her statement to police." The court responded by instructing the jury "to rely on your collective memories."

¶11 The jury submitted a second note during deliberations asking whether the jurors could "reach a verdict on one charge and not the other." The trial court responded by referring the jury to the instruction specifying that jurors are to consider each charge separately.

[3] The trial exhibits were not included in the appellate record. Notwithstanding, it is undisputed that Williams' photograph was number four in the six-pack array, which was the same array shown by the defense investigator to T.C. However, Williams' photograph was in folder number three in the police-administered photo array. Thus, there is some question as to whether T.C. was misled to believe that photograph number three in the six-pack array corresponded to folder number three in the police-initiated photo array. This is an issue that need not be resolved for purposes of deciding this appeal.

¶12 The jury ultimately found Williams guilty on both counts.

¶13 The trial court sentenced him to seven years of initial confinement and five years of extended supervision on each count, with the sentences to run consecutively.

¶14 Williams filed a postconviction motion based on claims of ineffective assistance of counsel. Williams argued his trial counsel was ineffective for failing to present evidence that T.C. told a defense investigator, shortly before trial, that she had never seen Williams before the investigator showed her his photograph. With the motion, Williams submitted the investigator's written report stating that T.C. identified another person as having been involved in the robbery and that T.C. had never seen Williams before. Additionally, the report relayed that if her property was found at Williams' home, then T.C. believed he was involved. Williams argued that T.C.'s statement to the investigator contradicted her identification of Williams at trial as the man who had robbed her.

¶15 The trial court denied the postconviction motion without holding an evidentiary hearing after concluding that Williams had not shown prejudice. In its written decision, the trial court explained that the evidence against Williams "was simply overwhelming," that T.C.'s "identification was clear and positive all along," and that many of her items were found in Williams' home.

II. DISCUSSION

¶16 The sole issue on appeal is whether Williams was denied the effective assistance of counsel when his trial attorney failed to impeach T.C. with her statement that she had never seen Williams before being shown his picture. According to Williams, this was a direct exculpatory statement regarding the

central issue of identification. We are not convinced and instead, agree with the trial court that Williams' argument fails because he has not demonstrated prejudice.

¶17 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice "[t]he 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." ***Id.*** at 694. We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

¶18 Based on the defense investigator's report attached to Williams' postconviction motion, when the investigator specifically directed T.C.'s attention to Williams' photo, T.C. said that she had never seen him before. According to Williams, effective impeachment with this prior statement would have significantly weakened the credibility of T.C.'s in-court identification of him in two ways. First, the impeachment would have demonstrated that when shown Williams' picture the week before trial, T.C. stated that she had never seen him before, which directly contradicted her in-court identification and her photo identification in the police-initiated procedure. Second, the impeachment would have brought forth T.C.'s statement that if her property was found at Williams' house, then he must have been one of the robbers. According to Williams, "[t]his statement implies that T.C. was willing to make an identification on the basis of information provided to her about the police investigation, rather than relying upon her ability (or inability) to recognize the robbers."

¶19 Williams submits that the impeachment evidence, in turn, may have caused one or more jurors to have a reasonable doubt about the accuracy of T.C.'s identification—particularly given that even without this evidence, the jury submitted two notes that he claims "suggested difficulty in reaching a verdict regarding the robbery of T.C." Had the jury heard the evidence at issue, Williams claims a reasonable probability exists that he would have been acquitted or a hung jury would have resulted, at least as to the robbery of T.C.

¶20 In his analysis, Williams minimizes the other evidence presented at trial—namely, the recovery of T.C.'s flash drive and purse from the Williams residence. He argues: "That evidence is not dispositive because it does not establish the time of recovery; the time when or the manner in which the items were placed there; or whether Merrill Williams had ever handled the items." Williams implies that other family members, friends, or acquaintances could be responsible for how the flash drive and purse ended up there.

¶21 At trial, however, Officer Strasser told the jury that Williams' mother "stated none of the property that we took belonged to anyone in the house." Additionally, as the State points out, in cross-examining T.C. and Officer Strasser, Williams' trial counsel did not challenge any of their testimony about the stolen items. Moreover, Williams rested without testifying, without presenting any witnesses, and without presenting any evidence relevant to the stolen items. This left the jury with the only obvious and logical explanation or inference as to the presence of the stolen items in his home: Williams stole them from T.C. Consequently, we agree with the State that "even assuming the 'never seen' remark would have weakened [T.C.]'s photo-array identification, the seizure from Williams'[home] of items indisputably stolen from [T.C.] both confirmed [T.C.]'s identification of Williams as the perpetrator and provided independent beyond-a-

reasonable-doubt (and unrefuted) proof of Williams as the perpetrator."[4] *See* ***State v. Bohannon***, 2013 WI App 87, ¶30, 349 Wis. 2d 368, 835 N.W.2d 262 ("A conviction may be based in whole or in part upon circumstantial evidence. Circumstantial evidence is often more probative than direct evidence; indeed, circumstantial evidence alone may be sufficient to convict.") (internal quotation marks; brackets; and citations omitted).

¶22 Because the omitted evidence does not undermine confidence in the result of the trial, we affirm the trial court's decision to deny Williams' postconviction motion without holding an evidentiary hearing. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("The defendant must affirmatively prove prejudice."); *see generally* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation does not satisfy the prejudice prong of ***Strickland***).

By the Court.—Judgment and order affirmed.

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

[4] Williams relies heavily on ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305, ***State v. Prineas***, 2012 WI App 2, 338 Wis. 2d 362, 809 N.W.2d 68, and ***State v. Cooks***, 2006 WI App 262, 297 Wis. 2d 633, 726 N.W.2d 322. Additionally, Williams submits that the recently decided case of ***State v. Jenkins***, 2014 WI 59, ___ Wis. 2d ___, 848 N.W.2d 786, supports his position. In each of those cases, however, the effect of the omitted evidence (or the evidence not made fully available to the jury) at issue was of far greater significance than in this case, where there was compelling physical evidence of Williams' guilt.