

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP718-CR

Cir. Ct. No. 2013CM147

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVANTI D. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Travanti Schmidt appeals a judgment convicting him of disorderly conduct and an order denying his motion for a new trial based

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version, the version in effect at all pertinent times here.

on his claim of ineffective assistance of counsel. Schmidt argues that the circuit court erred in denying him a *Machner*² evidentiary hearing on his claim. I conclude that, even if Schmidt could have established at a *Machner* hearing that counsel performed deficiently, Schmidt cannot satisfy the prejudice prong of the test for ineffective assistance of counsel. I therefore disagree that the circuit court erred, and affirm.

Background

¶2 Schmidt's conviction for disorderly conduct stemmed from an incident that occurred while Schmidt was a prison inmate, in which Schmidt allegedly splashed milk intentionally at a corrections officer. At a jury trial, the officer and Schmidt both testified. In addition, the prosecutor showed the jury a surveillance video depicting the incident from a side view, some distance away, outside of Schmidt's cell. Schmidt's counsel did not object to the State's use of the video, instead arguing to the jury that the video supported Schmidt's claim that Schmidt accidentally splashed milk on the officer. The jury found Schmidt guilty.

¶3 After conviction and sentencing, Schmidt moved for a new trial, arguing that trial counsel was ineffective by failing to object to the video as improperly authenticated. The circuit court denied Schmidt's motion without holding a *Machner* hearing.

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

Discussion

¶4 Whether the allegations in Schmidt’s motion are sufficient to require a *Machner* hearing presents a question of law that I review de novo. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A *Machner* hearing is not necessary “if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.” *Id.*

¶5 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that counsel’s errors were prejudicial. *State v. Smith*, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854. “A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one.” *Id.* With respect to the prejudice component, the defendant ““must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding[s] would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”” *Id.*, ¶16 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶6 As I understand Schmidt’s factual allegations and legal arguments, Schmidt asserts that it is doubtful that the prosecutor could have properly authenticated the surveillance video had trial counsel objected to the video on that ground. Schmidt asserts that a *Machner* hearing was necessary to determine whether counsel had any strategic reason for not objecting. Schmidt argues that, had the jury not been shown the video, there is a reasonable probability that the jury would have rendered a not guilty verdict.

¶7 I will assume without deciding that trial counsel should have objected to the video and that an objection should have led to the video's exclusion for lack of proper authentication. Regardless, I conclude that Schmidt's ineffective assistance claim fails on the prejudice prong of the test. Neither Schmidt's motion in the circuit court nor his appellate arguments persuade me that there is a reasonable probability that the result would have been different absent the video. As discussed below, the jury had to decide whether the officer's testimony or Schmidt's testimony was more credible in order to determine whether Schmidt acted intentionally, and I am confident that the video would not have made a meaningful difference in this credibility assessment.

¶8 At trial, the officer told the jurors the following. On the day of the incident, Schmidt complained about a problem with a carton of milk that Schmidt received. The officer proceeded to Schmidt's cell, and Schmidt showed the officer that the carton appeared to be open. The officer left to obtain a replacement carton for Schmidt, then returned to give Schmidt that carton through the "trap," an opening in Schmidt's cell door at about waist height through which material can be exchanged. As the officer was standing in front of the open trap to give Schmidt the replacement carton, milk came "flying out" and hit the officer in the stomach and legs. The officer then saw Schmidt make a "dashing or ... throwing motion," and the milk carton hit part of the cell door and trap, eventually falling out of the cell and onto the floor. The officer picked up the carton and saw that it was fully open at the top.

¶9 Schmidt also testified at trial. He told the jury that, when he received the first carton of milk, it was already open in such a way that, when Schmidt squeezed the carton, "[milk] started bubbling on top." According to Schmidt, he was tipping the carton toward the officer to show the officer the

problem by squeezing the carton “a little bit” and that, as Schmidt was squeezing, “milk went everywhere,” including onto the officer. Thus, Schmidt admitted that milk splashed out of the cell onto the officer, but maintained that the splash was an accident. As to the carton, Schmidt testified that he tried to set it on the trap, but the carton slipped off.

¶10 The surveillance video the jury viewed shows liquid squirting out from the trap toward the officer. The video also shows what appears to be a milk carton coming out of Schmidt’s cell immediately thereafter, but it is difficult to follow the carton’s trajectory and, thus, difficult to tell whether Schmidt may have thrown the carton. In sum, the video is consistent with both the officer’s and Schmidt’s testimony.

¶11 Not surprisingly then, the prosecutor did not focus on the video during closing arguments. Rather, the prosecutor focused on the improbability of Schmidt’s explanation for why the milk came splashing out of Schmidt’s cell. In particular, the prosecutor argued to the jurors that their common sense and experience should tell them that milk cartons do not usually burst open at the top when they are being lightly squeezed in the manner that Schmidt claimed he was squeezing the carton. The prosecutor also reminded the jury of the officer’s testimony that the officer had seen Schmidt make a throwing motion.

¶12 Schmidt argues that “[t]he importance of the video in this case was to show whether Schmidt intentionally threw the milk, as the state contended, or whether Schmidt spilled the milk, as Schmidt contended.” Similarly, Schmidt argues that, without the video, it was the officer’s word against Schmidt’s, “with [the officer] saying Schmidt intentionally threw the milk and Schmidt saying it accidentally spilled.” However, for the reasons above, it is unlikely that the video

had the effect on the jury that Schmidt argues. Much more likely is that the jury simply disbelieved Schmidt's questionable explanation for the incident and concluded, based on the officer's testimony, that Schmidt acted intentionally. In other words, the jury most likely agreed with the prosecutor's closing argument that Schmidt's explanation for the milk splash was improbable. I fail to see how the absence of the video would have been likely to change the jury's assessment of the officer's or Schmidt's credibility.

¶13 Schmidt points out that the record shows that the jury viewed the video a total of five times: twice during the presentation of evidence, including once at half speed, and three more times during deliberations, including once more at half speed. As I understand it, Schmidt contends that these multiple viewings show that the video must have played an important part in the jury's verdict. I disagree. Because the pertinent portion of the video lasts no more than several seconds and events happen quickly, a more reasonable inference is that the jury viewed the video repeatedly in an *attempt* to see if it was more consistent with the officer's or Schmidt's testimony. Having viewed the video multiple times myself, I conclude that no reasonable juror would have relied on the video to decide who was more credible.

Conclusion

¶14 In sum, for the reasons stated, I affirm the judgment convicting Schmidt of disorderly conduct and the order denying Schmidt's motion for a new trial based on Schmidt's allegations of ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

