COURT OF APPEALS
DECISION
DATED AND RELEASED

June 4, 1997

NOTICE

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-1233-CR
96-1234-CR
97-1428-CR
97-1429-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD L. HARRIS,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Richard L. Harris appeals from judgments convicting him of numerous counts of bail jumping and delivering a controlled substance, and one count of delivering a noncontrolled substance and from orders denying his postconviction motion.

Harris claims that his trial counsel was ineffective for failing to have the voir dire, opening statements and closing argument reported, that a juror was biased against him, and that the incomplete trial court record has deprived him of a meaningful appeal and necessitates a new trial. We reject each claim and affirm.

To support his claim that the incomplete trial court record has deprived him of a meaningful appeal, Harris relies upon ***State v. Perry,*** 136 Wis.2d 92, 401 N.W.2d 748 (1987), and ***State v. DeLeon,*** 127 Wis.2d 74, 377 N.W.2d 635 (Ct. App. 1985). ***Perry*** and ***DeLeon*** are not applicable under the facts of this case. Under ***Perry***, a new trial may be warranted when the transcript is so incomplete as to deprive a defendant of a meaningful appeal. *See* ***Perry,*** 136 Wis.2d at 99-100, 401 N.W.2d at 751-52. In ***Perry***, 136 Wis.2d at 96, 401 N.W.2d at 750, and ***DeLeon,*** 127 Wis.2d at 76, 377 N.W.2d at 636, the proceedings were reported but the reporter's notes for a portion of the proceedings were lost. Here, Harris never requested that the voir dire, opening statements and closing arguments be reported. Because the incomplete state of the record is attributable to him, Harris is not eligible for a new trial on the grounds of an incomplete record.

Harris next contends that trial counsel was ineffective for not having the opening, closing or voir dire reported and for not striking juror Parham, whom Harris alleges was biased against him as the transcript would have shown had the voir dire been reported.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his or her counsel made errors so serious

that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *See* ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *See* ***id.*** at 127, 449 N.W.2d at 847-48.

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. *See* ***id.*** at 127, 449 N.W.2d at 848. 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. *See* ***id.*** at 129, 449 N.W.2d at 848. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See* ***id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. *See* ***id.*** at 129-30, 449 N.W.2d at 848-49.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *See* ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and

prejudiced the defense are questions of law which this court decides without deference to the trial court. *See* ***id.***

Trial counsel testified at the postconviction motion hearing that he thought the voir dire, opening and closing were reported although he did not specifically request that they be reported. Harris testified that he was not aware that these proceedings were not being reported.

Even if counsel inadvertently failed to request that these proceedings be reported, counsel's failure to do so is not deficient performance because SCR 71.01 (Lawyers Coop. 1994) requires reporting of the opening and closing only if a party requests it or the court orders it. Because the applicable rule makes reporting of these proceedings optional, counsel cannot be deemed to have performed deficiently in failing to request reporting. Harris does not offer any authority for the proposition that it is deficient performance per se to fail to request reporting of the voir dire, opening statements or closing arguments. Accordingly, we reject this claim. *See* ***State v. McMahon,*** 186 Wis.2d 68, 98, 519 N.W.2d 621, 633 (Ct. App. 1994).

We will address Harris' contention that counsel's failure to have the entire trial reported prejudiced him.[1] We conclude that Harris cannot establish prejudice. While there was testimony at the postconviction motion hearing that juror Parham was biased against Harris, the dispositive facts as found by the trial court are that trial counsel wanted to strike Parham but Harris insisted that he remain on the jury panel.

[1] Because we do so, we need not address Harris' claim that he did not knowingly and voluntarily waive his right to have the voir dire, opening statements and closing arguments reported.

At the postconviction motion hearing, trial counsel testified that he advised Harris that the juror should be stricken for having acknowledged past drug use, but Harris insisted that he remain on the jury in the belief that the juror would be sympathetic to him because they were of the same race. Harris testified that he wanted the juror stricken due to bias against drug dealers, but trial counsel refused to do so. The trial court found counsel more credible than Harris on this question. The credibility of the witnesses is for the trial court. *See* ***State v. Michelle A.D.,*** 181 Wis.2d 917, 926, 512 N.W.2d 248, 251 (Ct. App. 1994). On this record, the trial court's findings are not clearly erroneous and they are upheld on appeal.

Harris argues that it was trial counsel's responsibility to decide which venirepersons should be stricken and that he abdicated that responsibility to Harris when he did not overrule Harris' desire to retain Parham. We disagree. A defendant who insists on disregarding counsel's advice cannot subsequently complain that the attorney was ineffective for complying with the client's instructions. *See* ***State v. Divanovic***, 200 Wis.2d 210, 225, 546 N.W.2d 501, 507 (Ct. App. 1996). The reasonableness of counsel's actions may be substantially influenced by the defendant's statements and conduct. *See* ***State v. Pitsch,*** 124 Wis.2d 628, 637, 369 N.W.2d 711, 716 (1985).

Finally, Harris argues that he was denied a fair and impartial jury because Parham, an allegedly biased juror, was not stricken from the jury panel. As we have stated, that Parham remained on the jury resulted from Harris' refusal to heed counsel's advice to strike Parham from the panel. Harris cannot maintain an inconsistent position on appeal or benefit from any error he invited by insisting that Parham remain on the panel. *See* ***State v. Michels,*** 141 Wis.2d 81, 98, 414 N.W.2d 311, 317 (Ct. App. 1987). "An accused cannot follow one course of

strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial." ***Cross v. State,*** 45 Wis.2d 593, 605, 173 N.W.2d 589, 596 (1970). Moreover, "[t]he proper time to determine whether a juror is impartial is on voir dire examination." ***State v. Messelt,*** 185 Wis.2d 254, 267, 518 N.W.2d 232, 238 (1994). Because Harris did not challenge Parham's presence on the jury at that time, he has waived the right to argue on appeal that the jury was not impartial. *See* ***Buch v. State Highway Comm'n,*** 15 Wis.2d 140, 142, 112 N.W.2d 129, 130 (1961).

Harris also complains that improper statements by the prosecutor during opening statement and closing argument prejudiced him. As noted above, these proceedings were not reported. After taking testimony at the postconviction motion hearing, the trial court rejected Harris' specific allegations of prosecutorial misconduct because none of the credible witnesses identified any specific instances of improper remarks during opening or closing. The court found that if defense counsel had heard anything improper, he would have brought it to the court's attention. The court found Harris' version of what happened during opening and closing to be "basically incredible …." That credibility determination was for the trial court and its findings are not clearly erroneous. *See* ***Michelle A.D.,*** 181 Wis.2d at 926, 512 N.W.2d at 251. Therefore, Harris has not shown any prejudice or demonstrated a need for a new trial.

By the Court.—Judgments and orders affirmed.

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