COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1100-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD L. RILEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

HOOVER, P.J. Edward Riley appeals a judgment convicting him of two counts of burglary, two counts of theft, and one count of obstructing. Riley maintains that: (1) his detention and subsequent arrest violated his right to be free of unlawful search and seizure; (2) the administrative regulations relating to custody and detention of parolees are unconstitutional; (3) the search of his car

was the result of an illegal arrest; (4) his statements were obtained in violation of his constitutional rights; (5) he was denied the right to exercise five peremptory challenges as required by law; and (6) the trial court erred by excluding as hearsay his statement to police regarding the purpose of his presence at the cabin the day of the burglary. We reject Riley's assertions and affirm the judgment.

I. FACTS

The trial court heard the following testimony and made the following findings of facts at a pretrial suppression motion hearing. On June 4, 1996, a citizen contacted the Oneida County Sheriff's Department to report that a seasonal hunting cabin located on McCord Road in the Town of Little Rice, Oneida County, Wisconsin, had burned down. Oneida County sheriff's detective John Sweeney and several other individuals owned the cabin, which was located in a remote area with only a few scattered seasonal residences. McCord Road had very little vehicular traffic, and it was unusual for anyone to be in the area in early June.[1]

Upon being notified of the fire, Sweeney immediately drove to the cabin. He suspected arson because the three structures on the property, a cabin, a storage shed and a woodshed, had all burned down despite the electricity being shut off and the cabin being unheated. Sweeney also noticed tire tracks on the property that had been made by a "smaller" vehicle. He observed that an electrical wire, which fell when one of the structures collapsed, lay over the tire track

[1] At the suppression hearing, Sweeney described McCord Road as an unpaved dirt road maintained for four-wheel-drive vehicles.

impressions. This indicated the car had been on the property before the fire, but Sweeney was unaware of anyone being lawfully on the property in the recent past.

While Sweeney was standing on the roadway, a compact car drove by. The car's back seat contained a number of large plastic bags. Sweeney immediately recognized the driver as Edward Riley. Riley did not acknowledge Sweeney, but "[l]ooked straight ahead and drove." Sweeney was aware of several facts about Riley. First, Riley was on parole for previous burglary convictions. In 1990, Riley was involved in burning down property he had burglarized in the Town of Hazelhurst in Oneida County. The property stolen included kitchen utensils and other insignificant items. Sweeney was also aware of another property that had been burned down; a gas can from that property was found at Riley's brother's house. Moreover, Riley was not known to reside in the area, although, unknown to Sweeney, he did currently reside several miles from the burned building. Sweeney had training in arson investigation and knew it is not unusual for an arsonist to return to the scene of the fire.

Sweeney followed Riley in an unmarked squad car. Riley turned down a dirt road with only a few year-round residences. Sweeney knew that Riley did not live on this road. While following Riley, Sweeney called Department of Corrections supervising parole agent Anne Meyer and informed her of the situation. Meyer informed Sweeney that she wanted Riley detained for possible parole violations. Sweeney continued to follow Riley and, because of concerns for his own safety, he radioed another Oneida County sheriff's deputy and a Lincoln County officer. Seven to ten miles from the burned cabin, Riley arrived at his destination and turned into a driveway. Sweeney placed Riley in custody on Meyer's apprehension request.

Sweeney read Riley his ***Miranda*** rights. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). Riley responded that he understood his rights and was willing to make a statement because he had "nothing to hide." Riley was not under the influence of drugs or alcohol when the ***Miranda*** rights were read to him. No threats, promises or coercion were employed, nor were any comforts withheld. Riley did not ask for an attorney or request that questioning be stopped. He consented orally and in writing to a search of his vehicle and a seizure of the cans. Sweeney asked Riley what was in the plastic bags. Riley stated that they contained aluminum cans he had collected along the roadside. Riley gave Sweeney permission to search the bags and consented to their removal from the vehicle. The plastic bags and aluminum cans were consistent with those that had been in the storage shed at the burned premises. Sweeney further found some coins and potpourri in Riley's vehicle.

After Riley was placed in custody, detective Glenn Schaepe arrived at the scene. Because Sweeney already informed him that Riley was given his ***Miranda*** rights, Schaepe began questioning Riley. He asked Riley about his whereabouts that morning, and Riley gave a detailed explanation. Schaepe asked Riley why he smelled like petroleum. Riley replied that he had attempted to start a lawn mower and a rototiller that had a broken hose attached to the carburetor. In response to Schaepe's inquiry about the aluminum cans, Riley stated that they had been given to him by a friend's mother. Riley acknowledged that he was under a "no drink" condition of parole and that in December 1995, he had been locked up for violating that condition. Initially, he told Schaepe that that was the last time he had alcohol, but later admitted drinking beer with a friend two days earlier. After approximately three hours of questioning, Riley told Schaepe to "Let me go or charge me." Riley was then transported to Rhinelander and placed on a parole

hold. A detective advised the jail staff that Riley was to have no phone calls. This prohibition, however, did not apply to calls to an attorney.

On June 5, Schaepe read Riley his ***Miranda*** rights and again interviewed him. Schaepe did not threaten or make any promises to Riley, and no comforts were denied. Riley indicated to Schaepe that he was interested in "getting this thing over with and going to prison." Schaepe told Riley that one of the cabin owners had identified the aluminum cans found in his car. Riley replied that he suffers from blackouts and had previously not been truthful regarding where he got the cans because he could not remember. Riley explained that he had a poor memory because he had been shot in the head when he was about five years old. Shortly after his admission, Riley became agitated and told Schaepe that he did not want to talk to him anymore. Schaepe terminated the interview.

On June 8, Riley submitted a written request to speak with one of the detectives. On June 9, Schaepe went to see Riley in the jail. He did not advise Riley of his ***Miranda*** rights. Riley explained that he had information about drugs, which he would provide if the charges were dropped. Schaepe indicated that he could not drop the charges because the charging decision was up to the district attorney. Schaepe also informed Riley that he was not interested in talking to him unless he was truthful.

During the interview, Riley admitted that he stole the cans because he owed his probation officer ten dollars per month. Riley stated that he knew of the hunting cabin as a result of logging work he had done in the past. He further admitted to stealing ten or twenty bags of aluminum cans from the property earlier. Riley stated that he arrived at the hunting cabin in his car and parked near a trout stream so that passersby would think he was fishing. Riley told Schaepe

that he believed the officers had already found his tire tracks and that the track measurements would match his car. After Schaepe confronted him with evidence that the coins found in his car were previously located in the cabin, he admitted to taking the cans from the shed. Riley also admitted going into the cabin. Riley informed Schaepe that he took a bag of aluminum cans, a container of coins and a bag of potpourri from the cabin. He denied setting the fire, but did indicate that he may have "dropped a cigarette" or "accidentally put one down."

Based on the information from the June 9 interview, Schaepe applied for a search warrant for property where Riley resided. Upon executing the warrant, the officers found a few marijuana plants and stolen property, including a television set, some videotapes and a 1984 Pontiac Firebird. Schaepe called Riley from the scene. No ***Miranda*** rights were given. Riley admitted to stealing the videotapes from Sweeney's burned hunting cabin.

Riley was in a holding cell at the jail from his arrest on June 4 to June 9. Inmates are customarily placed in a holding cell for the first twenty-four hours after arrest; however, this varies with jail populations and space availability. Riley admitted that he had tuberculosis, that the disease is contagious by air, and he was coughing heavily when he was initially booked. Riley was sent to the hospital for X-rays on June 6 or 7. He was released from the holding cell and placed in the general jail population on June 9. Riley made no phone calls to anyone, including an attorney.

Riley was ultimately charged with two counts of burglary, two counts of theft, one count of obstructing, and one count of arson. Riley pled not guilty and was bound over for trial. Riley filed a pretrial motion to suppress his statements and the evidence seized, claiming they were the products of an

unlawful arrest and that the statement was made involuntarily, without a knowing rights waiver. The trial court denied Riley's motion. It concluded that the arrest was the result of a valid probation hold pursuant to § 304.06(3), STATS., and WIS. ADM. CODE § DOC 328.22(2), the search of Riley's car was lawful as a contemporaneous search incident to a lawful custodial arrest, Riley's statements were voluntarily given and he knowingly waived his rights. The trial court also held that the statements made to Schaepe over the phone must be suppressed.

During voir dire, the trial court allowed only four peremptory challenges for each side, as opposed to the five to which the parties are entitled. During trial, the court did not allow the defense to elicit testimony from Sweeney as to Riley's explanation of why he was traveling on McCord Road on the day of the burglary, ruling that it was inadmissible hearsay. The jury found Riley guilty of two counts of burglary, two counts of theft, and one count of obstructing. It returned a not guilty verdict on the arson charge. Riley was sentenced to fifteen years in prison. The trial court denied Riley's motion for postconviction relief, which contended that he was denied his right to exercise peremptory challenges. Riley appeals the trial court's judgment of conviction and denial of his motion for postconviction relief.

II. ANALYSIS

In reviewing a denial of a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Young***, 212 Wis.2d 417, 424, 569 N.W.2d 84, 88 (Ct. App. 1997). Whether those facts satisfy the applicable constitutional requirement is a question of law we review de novo. ***Id***.

1. Was Riley's detention valid under the Fourth Amendment?

Riley first maintains that his detention and subsequent arrest was the result of an unlawful search and seizure. He argues that the regulation authorizing the DOC to take parolees into custody is invalid because it does not specify that a parole agent must first have "reasonable cause." Riley further contends that the parole agent, Meyer, lacked reasonable grounds to believe that he had violated a condition of his parole and that Sweeney's execution of the parole apprehension request was a pretext for a criminal investigation.

A parolee remains in the legal custody of the DOC and is serving the remainder of his sentence on the streets instead of in prison. ***State v. Pittman***, 159 Wis.2d 764, 770, 465 N.W.2d 245, 247 (Ct. App. 1990). Therefore, a parolee's liberty is conditional, and he has a diminished expectation of privacy under the Fourth Amendment. ***Id***. "A state's operation of its parole system like its operation of a prison presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." ***Id***. at 771, 465 N.W.2d at 248. Under WIS. ADM. CODE §§ DOC 328.22(2) and § 304.06(3), STATS., a parolee may be taken into custody and detained for an investigation of an alleged violation. ***State v. Goodrum***, 152 Wis.2d 540, 545, 449 N.W.2d 41, 44 (Ct. App. 1989). The Fourth Amendment requires, however, that the detention must be reasonable. ***Id***. Whether a detention is reasonable is determined by the facts and circumstances in each case. ***Id***. at 545-46, 449 N.W.2d at 44.

Under the circumstances of this case, we conclude that the detention was not pretextual, but was for a proper and efficient investigation of a possible parole violation, predicated on a reasonable cause. *See* ***id***. at 546, 449 N.W.2d at

44. Sweeney was investigating an arson at his cabin located in a remote area where there is very little traffic. He had observed tire tracks consistent with a small car at the scene. Sweeney then observed Riley drive by in a compact vehicle. Sweeney noticed large bags piled in the back seat of Riley's vehicle. Although Riley knew Sweeney, he continued to drive by and did not acknowledge his presence. Sweeney knew that Riley was on parole for prior burglaries that involved arson. He also believed that Riley did not live in the near vicinity of the cabin and would have no legitimate reason to travel on this road. Sweeney followed Riley and contacted the DOC supervisor, Meyer. Meyer informed Sweeney that based upon these facts, there was a good likelihood that Riley had violated his parole and therefore requested that Sweeney take him into custody. Under these circumstances, it was reasonable for Meyer to believe that Riley was involved in the burglary and arson of Sweeney's cabin and therefore had violated the conditions of his parole.

2. Are WIS. ADM. CODE § DOC 328.22(2) and § 304.06(3), STATS., unconstitutional?

Riley contends that WIS. ADM. CODE § DOC 328.22(2) and § 304.06(3), STATS., are unconstitutional because they do not contain a "reasonable cause" requirement for the search and seizure of those on department supervision. Neither the code nor statutory section at issue specifically refers to "reasonable cause." In ***Goodrum***, 152 Wis.2d at 547-48, 449 N.W.2d at 45, however, we interpreted § DOC 328.22 to require a supervising agent to have a reasonable basis for issuing an apprehension order. Sweeney's observations, together with Riley's diminished expectation of privacy, constitute a reasonable and sufficient basis to seize for investigation.

3. Was the search of Riley's car invalid under the Fourth Amendment?

Riley asserts that the search of his car was the result of an invalid arrest. Both the Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches." ***State v. Betterley***, 191 Wis.2d 407, 415, 529 N.W.2d 216, 219 (1995). Once the accused is lawfully arrested and in custody, however, the effects in his possession at the place of detention may lawfully be searched and seized without a warrant. ***United States v. Edwards***, 415 U.S. 800, 807 (1974). This rule applies to one who is taken into custody on a probation/parole hold. ***Betterley***, 191 Wis.2d at 420, 529 N.W.2d at 221.

> Although a search of a probationer may be done with less evidence of an alleged violation than is required to make an arrest, the search seems to serve the same purposes as a search incident to arrest. Both provide assurance that the probationer does not possess weapons and allow a search for contraband and evidence. Further, since a probation officer is entitled to search a probationer who is in custody, and probation officers are directed to rely on law enforcement officers to take a probationer into custody, we conclude that law enforcement officers may search a probationer when they have been asked by a probation officer to take the probationer into custody.

Id. at 422, 529 N.W.2d at 222 (citation omitted). Because the detention and arrest were proper, we conclude that the search of Riley's car was a valid search incident to arrest.

4. Were Riley's statements obtained in violation of his constitutional rights?

Riley next argues that his statements to investigators were obtained in violation of his constitutional rights. Riley asserts that his June 4 statements were the result of an illegal detention. If a statement is obtained through the

exploitation of an illegal arrest, the confession must be excluded. ***State v. Smith***, 131 Wis.2d 220, 241, 388 N.W.2d 601, 610 (1986). Because the statements were not the result of an illegal arrest, the trial court properly admitted them into evidence.

Riley maintains that his June 9 statement was made in violation of his Fifth Amendment right to remain silent. Specifically, Riley contends that the interview was conducted after he asserted his right to silence and thus violated his privilege against self-incrimination. ***Miranda***, 384 U.S. at 467, sets forth procedural safeguards designed to protect a suspect's rights under the Fifth Amendment from the "inherently compelling pressures" of custodial interrogation. ***State v. Ross***, 203 Wis.2d 66, 73, 552 N.W.2d 428, 431 (Ct. App. 1996). These procedural safeguards protect both a suspect's right to remain silent and his right to counsel. ***Id***. A suspect's right to remain silent is composed of two distinct protections. ***Id***. First, the suspect has a right to remain silent unless he voluntarily chooses to speak. ***Id***. at 73-74, 552 N.W.2d at 431. Second, the suspect has a right to discontinue questioning. ***Id***. at 74, 552 N.W.2d at 431.

> Through the exercise of [a suspect's] option to terminate questioning he [or she] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. [***Michigan v. Mosley***, 423 U.S. 96,] 103-04 [1975]. Hence, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under ***Miranda*** on whether his [or her] 'right to cut off questioning' was 'scrupulously honored.'" ***Id***. at 104 ….

Id.

The principal inquiry is whether the suspect, after being informed of his rights, invokes any of these rights during questioning. ***Id***. Once the suspect

asserts either his right to remain silent or his right to an attorney, all questioning must cease, unless the suspect later voluntarily initiates further communication with the police. ***Id***. In determining whether the suspect's right to terminate the interrogation was scrupulously honored, the following factors may be taken into consideration: (1) was the original interrogation promptly terminated; (2) was the interrogation resumed only after the passage of a significant amount of time; (3) was the suspect given complete ***Miranda*** warnings at the outset of the second interrogation; (4) did a different officer resume questioning; and (5) was the second interrogation limited to a crime that was not the subject of the earlier interrogation. ***Mosley***, 423 U.S. at 104-05. The factors provide a framework to aid in determining whether the defendant's right to silence was scrupulously honored and are not to be woodenly applied. ***State v. McNeil***, 155 Wis.2d 24, 45, 454 N.W.2d 742, 750 (1990).

First, we conclude that Riley's right to remain silent was scrupulously honored. On both June 4 and 5, ***Miranda*** warnings were read to Riley before he was questioned. On June 4, Riley indicated that he understood his rights and was willing to make a statement because he had "nothing to hide." Riley similarly waived his rights on June 5. He expressly indicated that he understood his rights and was willing to talk because he was interested in "getting this thing over with." During the interview on June 5, Riley demonstrated his appreciation of his rights by informing Schaepe that he was terminating the interview. Schaepe scrupulously honored Riley's request by promptly ending the questioning. Schaepe did not initiate any further contact with Riley.

Second, although Riley was not read his ***Miranda*** warnings on June 9, we conclude that his rights were voluntarily, knowingly, and intelligently waived. *See* ***Colorado v. Spring***, 479 U.S. 564 (1987). Whether a valid waiver

has occurred is determined by a totality of the circumstances surrounding the interrogation. ***State v. Lee***, 175 Wis.2d 348, 356, 499 N.W.2d 250, 253 (Ct. App. 1993).

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Id. (quoting ***Spring***, 479 U.S. at 573). On June 8, Riley submitted a written request to talk to one of the detectives he had spoken to earlier. When Schaepe met with Riley, he did not engage in any coercive conduct. Schaepe made it clear that he could not negotiate any deals with Riley and emphasized that he did not want to talk to him unless he was truthful. Riley decided to talk of his own free will. Furthermore, to conclude that Riley was not aware of his rights when he decided to speak on June 9 merely because he was not again "***Mirandized***" would be to disregard reality. Riley initiated the questioning on June 9. He had recently been read his rights twice. He earlier indicated that he had "nothing to hide" and was "interested in getting this thing over with and going to prison." He stated both times that he understood his rights and was willing to speak. He also demonstrated his awareness of his rights by invoking his right to silence during the June 5 interview and by reiterating them in substance at the suppression hearing. Riley admitted at the hearing that he had been advised of his ***Miranda*** rights at least "a few times" in the past. Finally, he testified that he knew his rights on June 9 and voluntarily spoke to Schaepe.

His testimony notwithstanding, Riley contends that his waiver was involuntary based on the conditions of his confinement. Riley asserts that he was

held in a holding cell until he confessed and was not permitted to make any phone calls. These conditions, however, in light of all the circumstances, do not demonstrate the coerciveness necessary to render Riley's statements involuntary. The record reveals that although Riley was prohibited from making phone calls to friends and family, he was not prohibited from calling an attorney.[2] He also could receive visitors. Moreover, the record reflects that when Riley was brought to the jail he was coughing and suffering from tuberculosis, which would require that he be separated from the rest of the jail population. The trial court thus correctly concluded that Riley's June 9 statement was voluntary.

5. Ineffective assistance of counsel.

Riley contends, and the State does not dispute, that he was not provided the number of peremptory challenges established by §§ 972.03 and 972.04(1), STATS. At the time of jury selection, the circuit court announced that each side would get four peremptory challenges. Section 972.03 provides each side with four peremptory challenges for the types of crimes with which Riley was charged. Moreover, under § 972.04(1), if more than twelve jurors are impaneled, each side receives an additional peremptory challenge. Here, fourteen jurors were impaneled, and therefore Riley and the State should each have received five peremptory challenges. Riley asserts that his counsel's failure to object to the circuit court's error constituted ineffective assistance of counsel.[3] He also

[2] Riley makes no claim that he did not call an attorney because he believed he was not permitted to use the phone. Therefore, there is no Sixth Amendment right-to-counsel issue before us.

[3] Riley contends that the circuit court's failure to provide the number of statutorily mandated peremptory challenges "constitutes reversible error" and prejudiced his substantial rights. He did not, however, object to the circuit court's error at trial. In order to preserve claimed error, a timely objection must be interposed. *See* ***State v. Jones***, 218 Wis.2d 599, 602-02, 581 N.W.2d 561, 562-63 (Ct. App. 1998). Riley has therefore waived these bases for appeal.

(continued)

contends that under ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997), such error was presumptively prejudicial.

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). The circuit court's findings of fact will not be reversed unless they are clearly erroneous. Section 805.17(2), STATS.; ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). Whether counsel's conduct violated Riley's right to effective assistance of counsel, however, is ultimately a question of law that this court decides without deference to the circuit court. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236-37, 548 N.W.2d 69, 76 (1996).

Subsumed within the Sixth Amendment[4] right to a fair trial is the right to effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 684-86 (1984); ***Sanchez***, 201 Wis.2d at 227-28, 548 N.W.2d at 72-73. The test for ineffective assistance of counsel requires a demonstration that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. A defendant has the burden of proof on both components. ***Id***.

Riley also claims that the foregoing issues were not waived because he was unaware that he was entitled to five peremptory strikes and a waiver is only effective if is an intentional relinquishment of a known right. This argument assumes that the decision to waive additional peremptory strikes is the defendant's to make. In ***State v. Brunette***, 220 Wis.2d 431, 443, 583 N.W.2d 174, 179 (Ct. App. 1998), we held that, with few exceptions, a defendant who accepts counsel delegates to counsel the decisions whether to assert or waive rights. We further held that waiver of preemptory challenges was a delegated right.

[4] *See also* WIS. CONST. art. I, § 7.

Although a defendant must prove both that his attorney's conduct was deficient and that the conduct prejudiced him, courts need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant. ***Id***. at 697; ***State v. Erickson***, No. 98-0273, slip op. at 10-11 n.7 (Wis. July 8, 1999).

Riley urges this court to presume prejudice. He argues that under ***Ramos***, any infringement on a defendant's right to receive the number of peremptory challenges established by statute requires a new trial without a showing of prejudice. The State, on the other hand, argues that we should affirm the circuit court's decision on Riley's ineffective assistance of counsel claim because no actual prejudice occurred.

Erickson addresses the circumstance when a defendant does not receive the number of peremptory strikes provided by statute. ***Erickson*** held that if a defendant fails to object to a circuit court's error, we analyze that claim under the ineffective assistance of counsel standard, rather than the automatic reversal afforded in ***Ramos***, 211 Wis.2d at 14, 564 N.W.2d at 329. However, the supreme court reasoned that even though a failure to object removes the obligation to presume prejudice with no further analysis, nevertheless, there are instances where a court will presume prejudice when considering a claim of ineffective assistance of counsel. ***Erickson***, slip op., at 11. In declining to presume prejudice under the facts present in ***Erickson***, the court focused upon two factors that it concluded rebutted a presumption of prejudice: (1) Erickson was judged by an impartial jury; and (2) the error complained of did not create an unlevel playing field between the prosecution and the defense. ***Id***. at 13-14.

Erickson controls this case. Riley tacitly concedes that he was judged by an impartial jury.[5] Furthermore, the circuit court's error equally affected both Riley and the State. Therefore, we conclude that Riley has not produced sufficient evidence for us to presume prejudice under the factors set forth in ***Erickson***.

Without a presumption of prejudice, in order to prevail on his ineffective assistance of counsel claim Riley must make a showing of actual prejudice. ***Id***. at 15. That is, he must show that but for counsel's error, there was a reasonable probability that the result of the trial would have been different. ***Strickland***, 466 U.S. at 694. Riley, however, does not advance an argument that he suffered actual prejudice. Rather, his argument that his attorney's performance was prejudicial is premised strictly upon this court presuming prejudice from counsel's failure to object. Because Riley has not demonstrated actual prejudice, we reject his claim of ineffective assistance of counsel.

6. Did the trial court misuse its discretion by not allowing in evidence under the doctrine of completeness?

Last, Riley argues that the trial court erroneously exercised its discretion by excluding as hearsay Riley's statement to Sweeney regarding the reason he was on McCord Road on the day of the burglary. Riley asserts that the evidence was admissible under the doctrine of completeness, § 901.07, STATS. The admissibility of evidence is within the discretion of the trial court. ***State v. Briggs***, 214 Wis.2d 281, 292, 571 N.W.2d 881, 886 (Ct. App. 1997). We will not

[5] In his brief, Riley states: "The issue in this case is not whether a fair and impartial jury was impaneled, but whether the defendant's statutory rights were violated."

disturb the trial court's decision to exclude evidence unless it erroneously exercised its discretion. ***Id***.

At trial, Sweeney testified that he observed Riley passing the scene of the fire. He testified that Riley informed him that he was taking some cans to the recycling company on Tannery Road near Tomahawk. On cross-examination, defense counsel sought to elicit from Sweeney Riley's explanation as to why he was taking this particular route past the cabin. The trial court ruled that this evidence was inadmissible hearsay. The trial court did, however, allow Sweeney to testify that Riley offered an explanation for traveling on this particular route.

The trial court properly excluded Riley's statement to Sweeney as hearsay. *See* § 908.01(3), STATS. The doctrine of completeness allows the admission of hearsay:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Section 901.07, STATS. "The rule 'require[s] that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact, or to ensure a 'fair and impartial understanding' of the admitted portion." ***Briggs***, 214 Wis.2d at 292, 571 N.W.2d at 886 (quoting § 901.07, STATS.). The trial court found that this evidence was not necessary to avoid misleading the jury or ensure an understanding of the admitted portion. Riley had offered many different explanations for why he was traveling past the cabin. The trial court felt that to allow questioning in regard to Riley's

explanation to Sweeney would result in the possibility of "mischief." We conclude that this was not a misuse of discretion.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.