COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2871

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARRISON FRANKLIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Harrison Franklin appeals from the order denying his motion under WIS. STAT. § 974.06 (1997-98).[1] The issue on appeal is whether

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Franklin was denied effective assistance of trial and appellate counsel. We agree with the circuit court's conclusion that Franklin was not denied effective assistance of trial counsel, and that consequently his claim for ineffective assistance of appellate counsel is rendered moot. We affirm.

¶2 In 1996, Franklin was charged with one count of armed robbery as a repeater, two counts of first-degree recklessly endangering safety with the use of a dangerous weapon as a repeater, and one count of bail jumping as a repeater. Prior to trial, the State made a plea offer to Franklin which would have reduced his potential exposure from eighty-five to thirty-five years. Franklin did not accept the offer within the time frame set by the State. At the start of trial, Franklin stated that he wanted to accept the plea offer. The State, however, refused to extend the offer, and the trial went forward.

¶3 During the trial, an officer reported to the court that Franklin had made threatening comments about another officer. The court noted that Franklin had previously made similar remarks about the same officer in a different proceeding. As a result, the court ordered that Franklin's leg be shackled during the remainder of the trial.

¶4 Franklin was convicted and sentenced to consecutive prison terms of fifty years on the first count, three years on the last count, and sixteen years on the remaining counts. However, the court stayed the sixteen-year sentence and placed Franklin on probation consecutive to the prison terms. He appealed and this court affirmed the conviction. *See* ***State v. Franklin***, No. 97-0858-CR, unpublished slip op. (Wis. Ct. App. Apr. 8, 1998).

¶5 Franklin subsequently brought a motion under WIS. STAT. § 974.06 in the trial court alleging ineffective assistance of trial and appellate counsel.

Although Franklin brought the motion pro se, at the time of the hearing he was represented by counsel. He alleged that appellate counsel was ineffective for failing to assert that trial counsel had been ineffective. After a hearing, the trial court denied the motion, finding that trial counsel had not been ineffective, and consequently appellate counsel was not ineffective for failing to challenge trial counsel's effectiveness. It is from this order that Franklin now appeals.

¶6 The issue presented for appeal is whether Franklin's trial counsel was ineffective.[2] To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. *See* ***id.*** at 697.

¶7 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***id.*** at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we independently review the two-pronged determination of trial counsel's performance as a question of law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). There is a strong presumption that counsel rendered adequate assistance. *See* ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance

[2] Franklin first discusses whether he followed the appropriate procedure to challenge the effectiveness of his trial and appellate counsel. We do not decide this issue, but rather address the appeal on its merits.

requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. To meet the prejudice test, Franklin must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 Franklin argues that his counsel was ineffective for failing to demand an "extreme need" hearing before Franklin was shackled in the courtroom, and for failing to demand a curative instruction on shackling. The decision of whether to keep a defendant restrained during trial is a matter of discretion for the trial court. *See* ***State v. Simplot***, 180 Wis. 2d 383, 409, 509 N.W.2d 338 (Ct. App. 1993). "The court must, however, set forth in the record its reasons for the restraints." ***Id.*** at 409-10. Although as a general rule, defendants should not be restrained, the safety of "the court, counsel, witnesses, jurors, and the public" may require that it be done. ***Id.*** at 410 (citation omitted). In ***Simplot***, defendants were shackled in the courtroom during their trial because they had been charged "with substantial, serious crimes which involved the use of weapons." ***Id.*** There was no evidence that the shackles were visible to the jury. *See* ***id.*** This court upheld the use of restraints because the trial court had stated its reasons and these reasons "did not exceed the bounds of its discretion." ***Id.***

¶9 Similarly, the trial court in this case stated its reasons for shackling Franklin. The court stated that it had received a report from one of the officers present that Franklin had threatened to hit another officer. The court also noted that Franklin had threatened this same officer in a different proceeding. Defense counsel asked that precautions be taken to ensure that the jury could not see the shackles. The court agreed to defense counsel's suggestions. We conclude that

the trial court properly exercised its discretion when it ordered Franklin to be shackled during the trial. Trial counsel, consequently, was not ineffective for failing to demand that the court hold a hearing on the matter. Trial counsel was also not ineffective when he failed to demand a curative instruction because the instruction would only have drawn the jury's attention to the fact that Franklin was shackled.

¶10 One of the charges against Franklin was bail jumping for violating bond pending the appeal of a conviction for misdemeanor battery. Franklin argues that his trial counsel was ineffective for failing to ask for a separate trial on this count, and for not objecting to the court's statement to the jury that Franklin was on bond pending appeal for a misdemeanor battery at the time he was alleged to have committed the robbery and stabbing.

¶11 Counsel was not ineffective for not asking to have the charges severed. The charges were properly joined under the law of joinder. *See* WIS. STAT. § 971.12. A motion for severance is addressed to the trial court's discretion. *See* ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). At the hearing on the postconviction motion, the trial court stated that the chance that a severance would have been granted was "next to none." Consequently, had counsel made the motion, it most likely would not have been granted. Therefore, to establish that counsel was ineffective, Franklin would need to establish that the trial court would have been wrong in not granting the motion.

¶12 To establish that the trial court erroneously exercised its discretion, Franklin needs to establish that the failure to sever the charges caused him "substantial prejudice." *See* ***id.*** Franklin never contended that he was not out on bond at the time this incident occurred. His defense at trial was that he was

committing robbery and not armed robbery. The bond issue had very little to do with his case. Franklin simply was not prejudiced by having these charges tried together. Since Franklin cannot establish that the charges should have been severed, he cannot establish that counsel was ineffective for failing to move for severance. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments).

¶13 Franklin also argues that his counsel was ineffective for failing to stipulate to the fact that he was out on bond pending appeal for a conviction for misdemeanor battery, and that counsel was ineffective for failing to object when the court told the jury the basis for his prior conviction. Franklin contends that allowing the jury to hear that he had been previously convicted of a battery served only to inflame the jury by convincing it that he was a bad person.

¶14 The State concedes that the better practice would have been for Franklin's counsel to stipulate to the fact that Franklin had been convicted of misdemeanor battery and the trial court could simply have told the jury that Franklin was on bond for a misdemeanor. Assuming arguendo that this would have been the better practice, Franklin was not prejudiced by counsel's failure to stipulate. By the very nature of the crime of bail jumping, the jury would have been aware that he had previously been convicted of a crime. The court explained to the jury that the underlying conviction was a misdemeanor, somewhat mitigating any potentially prejudicial aspects of the statement. Further, there was not any evidence of the battery case introduced at trial.

¶15 More importantly, however, the evidence supporting the convictions in this case was overwhelming. There were eyewitnesses to the robbery and stabbing, who saw Franklin commit the crimes with which he was charged. In

light of the strength of this evidence, Franklin was not prejudiced by the statements about his prior conviction for misdemeanor battery. Since Franklin was not prejudiced, his counsel was not ineffective for failing to stipulate to these facts.

¶16 Franklin next argues that his counsel was ineffective for failing to move to strike a juror for cause. The controlling law on whether counsel is ineffective for failing to request that a juror be stricken for cause is set forth in ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999). In that case, the supreme court determined that prejudice would not be presumed, but that the claimed error had to be reviewed within the context of the standard for determining ineffective assistance of counsel. *See* ***id.*** at 768-70. Absent a presumption of prejudice, Franklin must make a showing of actual prejudice. *See* ***id.*** at 773. Franklin has not established that he was actually prejudiced, and therefore, we cannot conclude that his counsel was ineffective.

¶17 Franklin also argues that his counsel was ineffective because he did not demand that Franklin be present when the court and counsel discussed how to respond to a question from the deliberating jury.[3] In ***State v. Burton***, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983), the supreme court stated that a court violates a defendant's right to be present at trial when it comments to a deliberating jury without the defendant or his or her attorney being present. And in ***State v. McMahon***, 186 Wis. 2d 68, 87, 519 N.W.2d 621 (Ct. App. 1994), this court stated that "[a] trial court's comments to the deliberating jury without the defendant and

[3] Franklin appears to believe that there is a question about whether he was actually absent during this discussion. The trial transcript indicates, however, that Franklin was not in the courtroom during the discussion.

his or her counsel being present (unless the defendant has waived that right) deny the defendant his constitutional right to be present at trial."

¶18 The State argues that the question remains unsettled of whether a defendant's right to be present is violated when his or her counsel is present but the defendant is not, and the question being discussed is one of a question of law. The State argues that ***May v. State***, 97 Wis. 2d 175, 187, 293 N.W.2d 478 (1980), and ***Burton*** stand for the proposition that a defendant need not be present when a question of law is asked by the jury, so long as the defendant's attorney is present. If the law is unsettled, then counsel is not ineffective for failing to challenge it. *See* ***McMahon***, 186 Wis. 2d at 84.

¶19 Even if it were error, however, we conclude that counsel was not ineffective. In ***McMahon***, we found that the judge's communications to the jury constituted error, but concluded that the error was harmless. *See* ***id.*** at 88. We concluded that the error was harmless because the communications "were not the product of some unilateral decision by the trial court about what to say to the jury," and that none of the communications considered substantive matters which would have been aided by the defendant's presence. ***Id.*** Assuming arguendo that it was error for the court to discuss a communication to the jury in court with only Franklin's counsel present, we conclude that this error was harmless.

¶20 The record establishes that the issue being discussed was the clarification of a jury instruction. All parties agreed that the instruction was self-explanatory and that clarification was not warranted. The court returned a note to the jury so stating. We conclude that to the extent it was error for this conversation to have taken place without Franklin being present in the courtroom,

the error was harmless. Counsel was not ineffective for failing to demand that Franklin be present.

¶21 Franklin next asserts that his counsel was ineffective because he did not understand the elements of armed robbery and did not explain to Franklin the benefits of accepting the State's plea offer. The testimony at the hearing established, however, that trial counsel repeatedly advised Franklin to accept the State's offer. As the trial court observed, Franklin had only himself to blame for his failure to accept the State's offer by the deadline set.

¶22 Franklin specifically argues that counsel did not understand the element of asportation. He makes this argument by quoting from portions of the hearing transcript. It is not obvious from these quotations exactly why Franklin believes that trial counsel did not understand the element of asportation. Moreover, implicit in this court's previous decision in Franklin's direct appeal, ***Franklin***, No. 97-0858-CR, is this court's conclusion that the element of asportation had been proven. The evidence which showed that Franklin removed the money from the cash register was sufficient to establish the element of asportation.

¶23 Further, the record establishes that counsel seized on the only possible defense to the overwhelming evidence of Franklin's guilt. That defense was that Franklin armed himself, not to commit robbery, but in an attempt to defend himself in the subsequent struggle. This defense was a reasonable trial strategy by defense counsel and did not constitute ineffective assistance of counsel. *See* ***State v. Adams***, 221 Wis. 2d 1, 11, 584 N.W.2d 695 (Ct. App. 1998).

¶24 Franklin also argues that he should have been allowed to accept the plea offer made by the State, and that his trial counsel was ineffective for failing to

contact him before the time to accept the offer had expired. The decision not to extend the offer beyond the deadline was a matter of prosecutorial discretion. Until Franklin had given up his "bargaining chip" by accepting a plea offer, he had no right "to call upon the prosecution to perform while the agreement is wholly executory." *See* ***State v. Wills***, 187 Wis. 2d 529, 537, 523 N.W.2d 569 (Ct. App. 1994) (citations omitted). Franklin was not entitled to accept the offer once the deadline had passed.

¶25 Franklin also argues that his counsel was ineffective for failing to contact him before the deadline to accept the offer had passed. The trial court rejected this argument. The court accepted trial counsel's statement that he had seen Franklin after the pretrial hearing and before the time to accept the offer had passed. The court further found that Franklin was at least as aware, if not more, of the difficulty he would have contacting his attorney during the time between the pretrial and the deadline, but that Franklin had "emphatically and persistently indicated an unwillingness to accept the offer." The court found that trial counsel could have reasonably concluded that the situation would not change. We agree with the trial court's conclusion that this was not ineffective assistance of counsel.

¶26 Finally, we decline to exercise our discretion to reverse this case in the interests of justice. Therefore, we affirm the order of the trial court.

By the Court.—Order affirmed.

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