COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1281-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THEODORE D. KRAIG

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Theodore Kraig appeals from a judgment convicting him of misdemeanor theft in violation of WIS. STAT. § 943.20(1)(a)

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

(1999-2000).[2] He contends that there was insufficient evidence for a jury's finding that he took property without the owner's consent; that permitting witnesses' testimony regarding the contents of a videotape was plain error when an original videotape of the theft was not in evidence; that permitting certain statements by the district attorney during closing arguments constituted plain error; that his counsel was ineffective because he failed to make timely objections; and that we should reverse as a matter of our discretion. We conclude that the circumstantial evidence showed a lack of consent to the theft; the trial court did not err by failing to *sua sponte* prohibit testimony about a videotape; the plain error doctrine does not apply to a prosecutor's statements during closing argument; Kraig's affidavit did not present a prima facie case of ineffective assistance of counsel; and there is no basis for discretionary reversal. We therefore affirm.

BACKGROUND

¶2 On February 23, 1999, a man came into the lobby of Beloit Memorial Hospital and sat down. Barbara Langoene was working that morning at the reception desk. Langoene left the desk momentarily, and when she returned, a binder containing names, addresses, and home phone numbers of hospital employees was missing. After discovering this, Langoene asked her supervisor if she had taken the binder and learned she had not. She and her supervisor contacted the security office to view the security video recording of the main lobby. The video showed the man in the lobby, who Langoene identified as Kraig, taking the binder. The theft was captured on videotape, and Langoene's

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

explanation of events was based on what she saw on the videotape. Detective Orville Kreitzmann met with Langoene to have her look at a photo line-up, and she identified Kraig from the photos. She also recognized him in person based on his height and his "clean-cut" look.

¶3 Kreitzmann also viewed the videotape at the hospital. He testified that the hospital security system used a multi-plex camera so the videotape could only be viewed clearly on special equipment in the hospital. The different speeds of a regular VCR and the hospital's surveillance camera resulted in a lower quality picture on copies of the video.

¶4 A jury found Kraig guilty of theft. Kraig moved for postconviction relief. The trial court denied the motion, including Kraig's request for a ***Machner*** hearing to support his allegation of ineffective assistance of counsel. Kraig appeals.

ANALYSIS

I. Lack of Consent

¶5 Kraig first contends that there was insufficient evidence to support the jury's finding that he took the binder without consent. This presents a question of statutory interpretation, as well as a question of sufficiency of the evidence, in which we review the evidence, and all reasonable inferences stemming therefrom, in a light most favorable to sustaining the jury's verdict. *See* ***State v. Edmunds***, 229 Wis. 2d 67, 73, 598 N.W.2d 290 (Ct. App. 1999). Under WIS. STAT. § 943.20(1)(a), the State must prove that the individual "[i]ntentionally takes and carries away … movable property of another without the other's consent and with

intent to deprive the owner permanently of possession of such property." The only element in question is whether there was lack of consent.

¶6 The supreme court has held that owner nonconsent, like other elements of criminal offenses, may be proven by circumstantial evidence. ***State v. Lund***, 99 Wis. 2d 152, 160, 298 N.W.2d 533 (1980), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). Langoene testified that she did not give anyone consent to take the binder.

> Q: Did you give anyone permission to remove that book from the hospital?
>
> A: No, I am not aware that anyone else ever uses that book except the receptionist, or the ones that fill in take that book. It's locked up at night so no one knows where it is.

As soon as she noticed the binder was missing, Langoene contacted her supervisor and security, which also indicates lack of consent. Furthermore, inferences from other circumstantial evidence, such as the defendant's job with a labor union attempting to organize the hospital employees, support the jury's verdict. A jury could reasonably infer from these facts and Langoene's testimony that Kraig probably wanted the binder for reasons having to do with his employment and that the hospital did not consent to Kraig's removal of the binder. The evidence supports the jury's finding that there was a lack of consent.

II. Testimony Regarding Events on Videotape

¶7 Kraig next claims that allowing the testimony of Langoene and Kreitzmann without admitting the original videotape into evidence violated the best evidence rule. Under WIS. STAT. §§ 910.01 and 910.02, the original photograph or recording is generally required to prove its contents. He concedes

that his trial counsel failed to object to Langoene's and Kreitzmann's testimony describing the contents of the videotape.[3] Nonetheless, Kraig claims that allowing the testimony as evidence without the original videotape was "plain error," obviating the need for an objection.

¶8 WISCONSIN STAT. § 901.03(4) allows us to take notice of "plain errors affecting substantial rights although they were not brought to the attention of the [trial] judge." *See also* ***State v. Schultz***, 152 Wis. 2d 408, 427, 448 N.W.2d 424 (1989). In order for an error to be "plain" within the meaning of the rule, the error must be so fundamental that a new trial or other relief must be granted; the error must be "obvious and substantial," or "grave." ***State v. Vinson***, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994). The plain-error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right. ***Id.*** Kraig terms the asserted error "obvious, grave and substantial" but does not identify which constitutional right the trial court denied him by failing to *sua sponte* prevent the State from presenting the testimony about the videotape.[4] Kraig has not convinced us that if the trial court erred, the error was plain within the meaning of § 901.03(4).

[3] Failure to make a timely objection to the admissibility of evidence normally waives that objection. WIS. STAT. § 901.03.

[4] Kraig asserts, without citation to authority, that the trial court's error denied him the right "to confront his accuser." This appears to refer to article I, section 7 of the Wisconsin Constitution or the Sixth Amendment to the United States Constitution. But Kraig offers no authority holding that either confrontation clause prohibits a witness from testifying about events shown on a videotape. We explained in ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980), that argument unsupported by authority was inadequate, and that in the future, we would refuse to consider it. We see no reason to depart from ***Shaffer*** now.

III. Prosecutor Comments

¶9 Kraig next argues that some of the district attorney's comments in his rebuttal closing argument violated Kraig's Fifth Amendment right to silence and implied that Kraig and his counsel deliberately tampered with the evidence. The prosecutor argued: "[T]he testimony is unrefuted that this defendant was the person in the hospital on February 23rd of this year when that binder vanished. There's no testimony to the contrary." Kraig argues that the comment was such that any jury would implicitly and necessarily have taken it to be a comment on Kraig's failure to testify, violating his Fifth Amendment right to remain silent at trial. The prosecutor also stated:

> The tape that you were shown here this afternoon isn't the tape that the witness viewed, Ms. Langoene viewed and that Detective Kreitzmann viewed at Beloit Memorial Hospital. Who has the tape in the meantime? The Defense. Detective Kreitzmann told you that's not the tape the way he made it. It's the darkest he has ever seen it. Where has it been in the meantime?

Kraig contends that this comment permitted the jury to find guilt based upon his character and his counsel's character, as opposed to the evidence actually presented. Kraig argues that even though defense counsel failed to object or to seek a mistrial, the district attorney's statements were plain error.

¶10 In ***State v. Seeley***, 212 Wis. 2d 75, 80-81, 567 N.W.2d 897 (Ct. App. 1997), the defendant failed to object to the prosecutor's statements and then argued that the improper statements should be reviewed under the plain error standard. We held that the plain error doctrine applied only to evidentiary errors and that prosecutor's comments were not evidentiary. *See* ***id.*** at 81 n.2. We apply

the ***Seeley*** rule here, and thus do not further consider the asserted impropriety of the district attorney's statements.

IV. Ineffective Assistance of Counsel

¶11 Kraig next contends that he should have received a ***Machner*** hearing. When trial counsel's representation is challenged, a hearing may be held on the effectiveness of counsel. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶14 n.6, 233 Wis. 2d 344, 607 N.W.2d 607; *see also* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). However, a ***Machner*** hearing is necessary only if a defendant can allege enough facts to raise a question of fact that trial counsel's performance was both deficient and prejudicial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-310, 548 N.W.2d 50 (1996). Whether a defendant alleges facts which, if true, would entitle him or her to relief is a question of law that we review de novo. *See* ***id.*** at 310. Even if all of a defendant's allegations are true, the facts may not necessarily satisfy the more stringent test of an ineffective counsel claim.

¶12 In determining whether or not counsel's services were ineffective, a defendant must satisfy a two-prong test. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under the ***Strickland*** test, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Id.*** The ultimate questions of whether counsel's performance was deficient and whether the deficient performance prejudiced the defendant, thereby violating his federal constitutional right to effective counsel, are questions of law. ***State v. Smith***, 207 Wis. 2d 258, 266-67, 558 N.W.2d 379 (1997). This court decides questions of law independently without deference to the trial court. ***Id.***

¶13 To constitute deficient performance, counsel's representation must fall below the representation that a reasonably effective attorney would provide. ***Strickland***, 466 U.S. at 688. Reviewing courts must be highly deferential and should start with a presumption that counsel's actions were reasonable. ***Id.*** at 689. As to prejudice, a defendant must prove that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.***

¶14 In this case, Attorney Thomas Basting submitted an affidavit giving his opinion that trial counsel's performance was deficient in several respects: (1) trial counsel failed to make arrangements to view the surveillance videotape at the hospital and wrongly assumed the quality of a copy would be the same as an original; (2) trial counsel failed to object to the admission of Langoene's and Kreitzmann's testimony describing contents of the videotape; (3) trial counsel failed to object to the prosecutor's comments in closing arguments and to request a mistrial based on the comments; and (4) trial counsel failed to move for dismissal at the close of the State's evidence on grounds that the State failed to prove "lack of consent."

¶15 There may have been deficient performance by trial counsel, however, Kraig has not met his burden of showing that but for trial counsel's mistakes, the result would probably have been different. Kraig did not show why trial counsel needed to see the original tape. Langoene identified Kraig from a photo line-up, and, had a "best evidence" objection been sustained, the prosecutor could have had the jury view the videotape at the hospital. The district attorney's comments were not nearly as egregious as Kraig has portrayed them and were but a moment in the trial. And defense counsel did move to dismiss at the end of the

State's case. Though counsel did not mention lack of consent as a ground for his motion, the trial court considered all the evidence and concluded that the evidence was sufficient to sustain a guilty verdict. A defendant is not entitled to a perfect trial but to a fair trial. ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278. He or she is entitled to adequate counsel, not the best counsel. ***Id.*** Even taking Attorney Basting's affidavit as true, Kraig was not prejudiced by his attorney's performance. We are not convinced that there was a reasonable probability of a different outcome, even assuming the deficient performance Kraig alleges. Therefore, the trial court did not err by denying a ***Machner*** hearing.

V. Discretionary Reversal

¶16 Finally, Kraig argues that we should exercise our power of discretionary reversal and order a new trial because the real controversy was not tried. *See* WIS. STAT. § 752.35. We have broad power of discretionary reversal, which provides us with power to achieve justice in our discretion in the individual case. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). However, we will only exercise our power of discretionary reversal in exceptional cases. *See* ***id.*** at 11.

¶17 We can order a discretionary reversal of a conviction and grant a new trial on either of two grounds, regardless of whether the proper motion or objection appears on record: (1) if the real controversy has not been fully tried or (2) if justice has miscarried. WIS. STAT. § 752.35. Discretionary reversal when the real controversy has not been fully tried does not require a conclusion that there was a probability of a different result on retrial. *See* ***Vollmer***, 156 Wis. 2d at 6.

¶18 Cases ordering a new trial because the real controversy has not been fully tried include, but are not limited to, these situations: (1) the jury was erroneously not given the opportunity to hear important testimony; (2) the jury had before it evidence that should not have been admitted; (3) there was an error in the jury instructions or verdict questions on a significant issue; and (4) due to error of counsel or the trial court, a significant legal issue was not properly tried. ***Vollmer***, 156 Wis. 2d at 19-20.

¶19 Kraig argues that the jury heard inadmissible evidence about the videotape and that the district attorney's comments led to his conviction. But these asserted errors did not affect the real controversy, which was whether Kraig stole the notebook. The reason Kraig was convicted was most likely because a witness testified he was pictured on the hospital's videotape, saw Kraig in the hospital's waiting room, and identified him in a photo line-up. The real controversy was as fully tried as it could have been, albeit not to Kraig's satisfaction. This is not one of the exceptional cases where we should reverse pursuant to WIS. STAT. § 752.35.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.