COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 02-3410-CR

Cir. Ct. No. 01CM004707

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL O. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and JEFFREY A. WAGNER, Judges.[1] *Affirmed in part; reversed in part and cause remanded with directions.*

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[1] The Honorable Jeffrey A. Kremers presided over the trial and entered the judgment of conviction. The Honorable Jeffrey A. Wagner issued the order denying Thomas's postconviction motion.

¶1 FINE, J. Michael O. Thomas appeals from a judgment entered on jury verdicts convicting him of two counts of disorderly conduct, *see* WIS. STAT. § 947.01, and from the trial court's order dying his motion for postconviction relief. He claims that he is entitled to a new trial because, he argues, one of the State's witnesses committed perjury. He also claims that his trial lawyer was constitutionally ineffective. Although we affirm that part of the trial court's order denying Thomas a new trial because of the alleged perjury, we remand for a hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979), on his ineffective-assistance-of-counsel claim.

I.

¶2 According to the State, Thomas rammed a car driven by Marsha Pharr and broke one of the car's windows. Andre Anthony testified that he was a passenger in the car when Thomas rammed them with a car that Thomas was driving. He also testified that Thomas later threw a beer bottle at Pharr's car, breaking a window. According to Anthony, Thomas and Pharr had been "living together" as "boyfriend and girlfriend." On cross-examination, Anthony testified that he was with Pharr for most of the day. When asked whether he had "a boyfriend-girlfriend relationship" with Pharr "at that time," he responded: "No, we was just friends." He also denied having a romantic relationship with Pharr after the alleged ramming incident, repeating that although he saw her socially, they were "just friends."

¶3 Thomas testified and denied that he either rammed Pharr's car or broke the car's window. He also denied seeing either Pharr or Anthony that day. Rather, he claimed that he was with another friend, Doris Lloyd. He admitted that he had been in a relationship with Pharr for about five years, and claimed that he

was still in that relationship with her on the day of the alleged ramming. He told the jury, however, that Pharr and Anthony also "had some little relationship going on."

II.

A.

¶4 Thomas claims that Anthony perjured himself when he denied having a romantic relationship with Pharr, and that he is therefore entitled to a new trial. Whether to grant a new trial is vested in the trial court's discretion. ***State v. Carlson***, 2003 WI 40, ¶24, 261 Wis. 2d 97, 109, 661 N.W.2d 51, 57.

¶5 Anthony's alleged perjury is based on the apparent discrepancy between his characterization eight months after the alleged incidents, but two months before the trial, of Pharr as "my ex" on a handwritten statement he gave to the Department of Corrections in connection with proceedings to revoke his probation, and his trial testimony denying a romantic relationship with Pharr. *De minimis* contradictions in a witness's testimony that go to that witness's credibility, however, do not warrant a new trial. ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255, 258 (1968) ("Evidence which merely impeaches the credibility of a witness does not warrant a new trial on this ground alone."). The trial court did not erroneously exercise its discretion in ruling that the contended discrepancy—if, in fact, there *was* a discrepancy—between Anthony's trial testimony and his use of the words "my ex" to describe Pharr two months after the trial did not justify giving Thomas a new trial.

B.

¶6 Thomas also claims that his trial lawyer was constitutionally ineffective in three respects. We address Thomas's contentions in sequence.

¶7 Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel, ***Strickland v. Washington***, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, ***State v. Sanchez***, 201 Wis. 2d 219, 226–236, 548 N.W.2d 69, 72–76 (1996). In order to establish a violation of this right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; *see also* ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76. Whether a lawyer's performance was deficient and, if so, whether it was prejudicial, are legal issues we review *de novo*. ***Sanchez***, 201 Wis. 2d at 236–237, 548 N.W.2d at 76.

¶8 *a.* Thomas claims that his lawyer did not "conduct an adequate investigation." (Uppercasing omitted.) He contends that his trial lawyer should have further investigated Anthony's relationship with Pharr in order to buttress his theory that Anthony was lying when he testified that he and Pharr were "just friends." The only thing that Thomas can point to, however, is Anthony's characterization of Pharr as "my ex." The jury heard that Anthony and Pharr were together all day on the day when Thomas allegedly rammed them. The jury also heard Thomas testify that Anthony "liked Marsha" and that Pharr and Anthony "had some little relationship going on" for "a couple months maybe," but that it "[c]ould have been longer." At the very most, the "my ex" characterization and whatever cross-examination might have flowed from that would have been cumulative. Thomas has not satisfied his burden of showing prejudice—namely,

that the alleged failure of his lawyer to discover the "my ex" notation was so central to the trial so as to "undermine confidence in the [trial's] outcome." *See* ***Strickland***, 466 U.S. at 694.

¶9 *b.* Thomas also contends that his trial lawyer gave him constitutionally ineffective representation because he did not call Lloyd as a defense witness to corroborate Thomas's testimony that he was with her the day of the alleged incidents. Although it appears from the trial transcript that Lloyd attended the trial, she did not testify. Indeed, mid-trial, Thomas and the trial court had this exchange:

> THE COURT: Anything else we need to discuss before we break for lunch? Mr. Thomas?
>
> MR. THOMAS: I don't feel this man is representing me. When this lawyer here, I told him I had a witness. Last time my case was being handled, you personally had her go get a statement for her to be my witness. Now he's going to tell me he is not using her because she wasn't there when they arrested me. I was at her house.
>
> THE COURT: So.
>
> THE WITNESS (presumably Thomas): So, I mean, why was she not being able to be my witness?
>
> THE COURT: Maybe she doesn't have anything relevant to say.
>
> MR. THOMAS: Yes, she do. Because I was with her. That is where I was when I was arrested.
>
> THE COURT: That is not the question, where you were when you were arrested. The question is, where you were when the alleged incidents happened.
>
> MR. THOMAS: Well, how can she not be a witness?
>
> THE COURT: I don't know. But it is up to you and your lawyer to call witnesses.

The postconviction court ruled in a written decision that Thomas had not demonstrated prejudice because, it noted, "the jury did not believe the defendant's story." But the jury did not hear from Thomas's alibi witness, although the trial court instructed the jury on alibi.

¶10 A defendant is not entitled to an evidentiary hearing on a postconviction motion unless his motion alleges facts that, if proven true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308–311, 548 N.W.2d 50, 53 (1996). This is an issue of law that we review *de novo*. ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. Thomas has satisfied this burden, and, accordingly, is entitled to an evidentiary hearing. *See* ***Machner***, 92 Wis. 2d at 804, 285 N.W.2d at 908–909.

¶11 *c.* Thomas also claims that his lawyer gave him constitutionally ineffective representation by not calling Pharr. Pharr never testified at the trial. After the trial was over, Pharr came to court on the day of Thomas's sentencing and told the trial court that she had made up the story because she "was angry at him for something else." The trial court told Pharr that it did not believe her because it had "listened to Mr. Anthony's testimony and the officer [who testified about the damage to the car] and your story today just frankly doesn't make any sense." The postconviction court ruled that Pharr's testimony at trial would not have affected the trial's outcome and, therefore, Thomas did not establish prejudice under ***Strickland***.

¶12 If whether Thomas's trial lawyer was ineffective for not calling Pharr was the only alleged deficiency in the lawyer's representation of Thomas, it might very well be that it would not rise to the level of requiring an evidentiary hearing. But Pharr's potential testimony cannot be looked at in a vacuum. In light

of our conclusion that Thomas has satisfied the ***Bentley*** criteria for an evidentiary hearing in connection with Lloyd, we conclude that had Lloyd testified that she was with Thomas the day of the alleged incidents there would be significant incremental benefit to Thomas had Pharr also testified that she had made the whole thing up. Accordingly, Thomas is entitled to a ***Machner*** hearing on Pharr as well as on Lloyd.

III.

¶13 We affirm the trial court's order denying Thomas's motion for postconviction relief in connection with Anthony's alleged "perjury" at trial, but reverse that order in connection with Thomas's request for a ***Machner*** hearing on whether his trial lawyer gave him constitutionally ineffective representation by not calling Lloyd and Pharr as defense witnesses. If the trial court concludes that Thomas has satisfied both aspects of the ***Strickland*** analysis, it should grant him a new trial.

By the Court.—Order affirmed in part, reversed in part and cause remanded with directions.

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