COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3386-CR **Cir. Ct. No. 2002CF2003**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN L. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: WILLIAM SOSNAY, VICTOR MANIAN and MICHAEL B. BRENNAN, Judges.[1] *Affirmed*.

[1] Judge William Sosnay presided over Steven L. Harris's trial and imposed the sentence in the judgment of conviction. Judge Victor Manian denied the first postconviction motion filed by Harris's postconviction counsel. Judge Michael B. Brennan denied Harris's pro se postconviction motion.

Before Brown and Nettesheim, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Steven L. Harris appeals pro se from a judgment of conviction for escape and for being a felon in possession of a firearm and from orders denying his motions for postconviction relief. He argues that the evidence was insufficient, that there was error in the escape jury instruction, and that he was denied the effective assistance of trial counsel because counsel did not object to the escape instruction and failed to impeach the arresting officer on whether he advised Harris that he was under arrest. We reject his claims and affirm the judgment and orders.

¶2 Harris was stopped for speeding. A pat-down search was conducted and Harris was placed in the back of the officer's squad car. After the officer discovered that Harris lied about his identity, Harris was removed from the car and handcuffed. While assisting officers were placing Harris in a transport vehicle, the arresting officer discovered a gun in the backseat of his squad car. Upon hearing the officer yell out about the gun, Harris broke free from the officers and ran a short distance across the street before slipping to the ground and being apprehended. It turned out that the gun recovered from the backseat of the squad car belonged to Harris's uncle, the owner of the car Harris was driving.[2]

[2] This is an appeal under WIS. STAT. RULE 809.30 (2003-04). Although Harris filed a pro se notice of appeal following the denial of the postconviction motion filed by postconviction counsel, the appeal was dismissed in favor of allowing Harris to pursue an additional pro se RULE 809.30 postconviction motion. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992). We must accept the reasonable inferences drawn from the evidence by the jury. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶4 Harris contends that the jury's finding that he possessed the gun was incredible as a matter of law. His contention rests on the fact that the officer did not discover the gun during the pat-down search. However, the officer indicated that there were no weapons in the backseat of his squad car when he started his shift that evening and Harris was the first person he placed in his car that shift. The officer described the pat-down search as confined to the outside of Harris's clothing. The gun was found in a holster. Another officer described the holster as one worn inside the waistband of a person's pants and secured by a clip. The officer indicated that the holster allowed the gun to be located in a natural recess between a person's leg and front crotch thereby making the gun highly concealable and difficult to detect. He also indicated that the holster would be easy to remove.

¶5 A reasonable jury could believe that Harris had the gun concealed on his person in such a manner that the officer's cursory pat-down search did not discover it. The gun was discovered after Harris was removed from the backseat of the car. There was no other source of the gun but Harris himself. There was sufficient evidence to support the conviction for being a felon in possession of a firearm.

¶6 Regarding the escape conviction, Harris argues that his short break from custody did not constitute escape. He believes his escape was incomplete because he only took a few steps. The third element of escape is that the defendant has left the officer's custody "in any manner without lawful permission or authority." WIS JI—CRIMINAL 1773. There is no requirement that the break from custody be for any minimum length of time or distance. Thus, that Harris did not manage to get very far before being recaptured does not mean he cannot be found guilty of escape. The jury was presented with sufficient evidence that Harris left custody without lawful permission or authority.

¶7 Harris challenges that portion of the escape jury instruction whereby the jury was informed that "obstructing an officer with false information is a crime." He argues that the instruction invaded the province of the jury and relieved the prosecution of the burden of proving every element of the crime because it was for the jury to decide if he had been arrested and for what crime. *See* ***id.*** (second element of escape is that the defendant was in custody as a result of legal arrest for a crime).

¶8 There was no objection to the jury instruction. The failure to object to an instruction is a waiver of the right to challenge the instruction on appeal, although review may be made under a claim of ineffective assistance of counsel. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992). Since Harris argues that trial counsel was ineffective for not objecting to the instruction, we review the issue on the merits.

¶9 The trial court's discretion in selecting jury instructions "should be exercised to 'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***State***

v. Sartin, 200 Wis. 2d 47, 52-53, 546 N.W.2d 449 (1996) (citation omitted). The question of whether the court correctly instructed the jury is one of law which this court reviews de novo. ***Id.*** at 53. An instruction which relieves the prosecution of its duty to prove a required element of the offense is improper because it denies the defendant due process. ***Id.***

¶10 Harris misconstrues the purpose and effect of instructing the jury that obstructing an officer with false information is a crime. The jury was not asked to decide if in fact Harris had committed the offense of obstructing by giving false information. The jury needed to decide if Harris was in custody as a result of a legal arrest. That in turn required the jury to find that the officer had reasonable grounds to believe that Harris had committed an offense. WIS JI—CRIMINAL 1773. The challenged portion of the instruction simply stated the law relevant to the officer's arrest. It told the jury what the officer knew to be the law—that it is a crime to obstruct an officer with false information. The instruction did not relieve the prosecution of any element of the offense and did not convey to the jury that Harris was in fact lawfully placed under arrest. It was not an erroneous exercise of discretion to instruct the jury that obstruction by giving false information is a crime.

¶11 Harris's claim that he was denied the effective assistance of trial counsel is twofold. He first complains that counsel failed to object to the escape instruction. We have rejected his contention that there was any error in the instruction. Counsel was not ineffective for not objecting. *See* ***State v. Ziebart***, 2003 WI App 258, ¶¶14, 17, 268 Wis. 2d 468, 673 N.W.2d 369 (a claim of ineffective assistance of counsel predicated on counsel's failure to challenge a correct jury instruction does not establish either deficient performance or prejudice), *review denied*, 2004 WI 20, 269 Wis. 2d 201, 675 N.W.2d 807.

¶12 Harris argues that trial counsel should have impeached the arresting officer's testimony that when Harris was handcuffed, the officer told Harris he was under arrest for obstructing. Harris contends that counsel should have used the officer's arrest report for impeachment purposes because the report did not mention that Harris was told he was under arrest. Harris's theory is that he was not aware he was under arrest and he believed he was being taken in only for fingerprinting. He explains that the arrest report corroborates his version that the officer said he was being taken in only for fingerprinting.

¶13 In order to establish ineffective assistance of counsel, the defendant must demonstrate both deficient performance of counsel and prejudice to his or her defense resulting from the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The prejudice test is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. ***Pitsch***, 124 Wis. 2d at 640-41. An error is prejudicial if it undermines confidence in the outcome. ***Id.*** at 642. Whether counsel's performance prejudiced the defendant is a question of law which we review de novo without deference to the trial court's conclusion. ***Moats***, 156 Wis. 2d at 101.

¶14 Our confidence in the outcome is not undermined by trial counsel's failure to attempt to impeach the officer on whether or not he informed Harris that he was under arrest. The only reasonable inference from the evidence was that Harris was placed under arrest and Harris knew he was under arrest. The officer told Harris that if he gave a false name, the officer would be forced to arrest him

for obstructing and he would be fingerprinted. The officer's testimony indicated that he had reason to believe that Harris was giving a false name and he confronted Harris with that belief. Harris stood by his false identification. The officer then removed Harris from the squad car and placed him in handcuffs. The jury could find that a reasonable person in Harris's position would conclude that being handcuffed meant he was under arrest. The arrest report would not have helped Harris establish that he was not in custody at the time he broke away from the officer and fled. Harris was not prejudiced by trial counsel's failure to cross-examine the officer with the contents of the arrest report. Therefore, he was not denied the effective assistance of trial counsel.

By the Court.—Judgment and orders affirmed.

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