COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2383-CR **Cir. Ct. No. 2004CF47**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL M. VOLKAITIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Daniel Volkaitis appeals pro se from a judgment of conviction of party to the crime attempted armed robbery and disorderly conduct and from an order denying his postconviction motion for a new trial. He argues that he was denied the effective assistance of counsel because trial counsel failed

to object to a detective's testimony that Volkaitis invoked his right to remain silent and counsel failed to review the presentence investigation report (PSI) with Volkaitis in advance of the sentencing hearing. He also claims the trial court interfered with cross-examination of trial counsel during the ***Machner***[1] hearing. We reject his claims and affirm the judgment and order.

¶2 Employees of a Whitewater bank reported an attempted armed robbery by two men. The bank employees reported that a white male wearing a black leather jacket with fringe, a red bandana, and ski goggles attempted to come into the bank with a gun. A second man was seen in the same vehicle as and seen standing some distance from the gunman. Volkaitis was charged as the gunman. He was also charged with disorderly conduct for conduct in a tavern a short time after the attempted robbery at the bank.

¶3 During the jury trial,[2] Detective Robert Craig was questioned about his interview of Volkaitis at the Whitewater Police Department. Detective Craig informed Volkaitis that he was under arrest for disorderly conduct because he had been yelling in the bar that he was going to "shoot some niggers." Volkaitis was read his ***Miranda***[3] rights and asked if he would speak with Detective Craig about what he had done earlier in the day. Volkaitis said he would talk about it. When Volkaitis said he had been in Palmyra during the day, Detective Craig said he

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] Volkaitis was tried with his co-actor, Anthony Wendel. Wendel's conviction was affirmed on appeal. ***State v. Wendel***, No. 2006AP1656-CR, unpublished slip op. (Wis. Ct. App. June 6, 2007).

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

could place Volkaitis in Whitewater earlier. Detective Craig testified: "I told him we had video. He said that he didn't do anything and he also asked if we were looking at him for something else. I told him yes. He said he didn't want to talk at that time. Game over."

¶4 Volkaitis's appointed postconviction counsel filed a motion for a new trial arguing that trial counsel was ineffective for not filing a motion in limine to exclude Detective Craig's testimony that Volkaitis invoked his right to remain silent and for not objecting to that testimony. Trial counsel testified that because Volkaitis later talked to the detective,[4] counsel determined that a motion to suppress statements would not have been successful. Although trial counsel did not recall Detective Craig's testimony that Volkaitis had said "game over," the only possible reason counsel had for not objecting to the testimony was to not draw attention to it.[5] The trial court found that trial counsel was not required to anticipate that the prosecution would elicit testimony that Volkaitis invoked his

[4] Detective Craig explained that when he took Volkaitis out for a cigarette an hour or so later, Volkaitis asked what they were honestly looking at him for. After Detective Craig indicated they were considering him for possibly attempted robbery, Volkaitis commented "fair enough," that he was going to lose his job, and that his life was over. Sometime later Volkaitis commented that "I walked away, nobody got shot." There was no further conversation about the attempted robbery until the next day.

[5] Volkaitis argues that trial counsel's testimony was not credible because counsel gave inconsistent answers when questioned about the basis of the disorderly conduct charge. When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony and an appellate court must give due regard to the trial court's opportunity to make an assessment of that credibility. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Trial counsel did not give inconsistent answers about his failure to object to testimony that Volkaitis invoked his right to silence. Volkaitis's credibility argument also misstates that it was trial counsel's burden to provide clear and convincing evidence that counsel was effective. The defendant has the burden of proof on both components of an ineffective assistance of counsel claim. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

right to remain silent and there was no reason to file a motion in limine on that point. It also found that the prosecution did not ask a question that called for the answer given and that Detective Craig just blurted out that Volkaitis elected not to talk further. It determined that trial counsel did the right thing by not objecting and calling attention to the invocation of the right to remain silent, especially in light of Volkaitis's later election to talk and the statements that were properly admitted. It concluded that reference to Volkaitis's invocation of the right to remain silent was not of major significance and it was unlikely it had any real effect on the jury. The court denied Volkaitis's claim that trial counsel was ineffective.

¶5 The two-part test for determining whether trial counsel was constitutionally ineffective requires the defendant to demonstrate that counsel's performance was deficient and that the deficient performance was prejudicial to the defense. ***State v. Mayo***, 2007 WI 78, ¶33, __ Wis. 2d __, 734 N.W.2d 115. When we address a claim of ineffective assistance of counsel, we determine whether trial counsel's performance fell below objective standards of reasonableness and apply a presumption that counsel's performance was satisfactory. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). When a defendant fails to prove either prong of the test, the reviewing court need not consider the remaining prong. ***Mayo***, 2007 WI 78, ¶61.

¶6 The ineffective assistance of counsel analysis presents a mixed question of law and fact. ***Id.***, ¶32. The trial court's findings of fact regarding what happened will be upheld unless they are clearly erroneous. ***Id.*** Whether

counsel's performance was deficient and prejudicial to the defendant is a question of law that we review de novo. ***Id.***

¶7 It is well-established that it is improper to comment upon a defendant's choice to remain silent at or before trial. ***State v. Fencl***, 109 Wis. 2d 224, 236, 325 N.W.2d 703 (1982). Therefore, Detective Craig's testimony that Volkaitis invoked his right to silence was objectionable. However, the trial court found that Detective Craig's testimony was not responsive to the question asked and that the testimony was elicited by accident. Trial counsel could not have anticipated the revelation at trial and was not deficient for not filing a motion in limine.

¶8 Trial counsel indicated that it was best to let the improper reference pass quietly and to not draw attention to it by making an objection. This is a strategy decision that was reasonable under the circumstances. The desire not to call the jury's attention to a potentially prejudicial circumstance of trial procedure is reasonable. *Cf.* ***Watson v. State***, 64 Wis. 2d 264, 279, 219 N.W.2d 398 (1974) (recognizing that defense counsel faces a difficult choice when considering a corrective instruction which again calls to the jury's attention a potentially prejudicial circumstance). Counsel's failure to object was not deficient performance.

¶9 We also conclude that the isolated reference to Volkaitis's "game over" comment did not prejudice the defense. After invoking his right to remain silent, Volkaitis started up a conversation about what the police were really holding him for and he resumed speaking with Detective Craig. Volkaitis's voluntary statements admitting his involvement in the attempted robbery were admitted into evidence thus negating any inference the jury may have made that

Volkaitis had something to hide in refusing to talk. There was strong evidence of Volkaitis's involvement in the crime. Both bank tellers identified him as a participant. Volkaitis's clothing matched that worn by the gunman. Volkaitis's car matched the vehicle used in the attempted robbery. The ski goggles used in the robbery were in the back seat. Volkaitis's girlfriend saw him bring guns into her home on the night of the attempted robbery and Volkaitis told her he had "been bad" and talked about being at a bank with a gun. Volkaitis's own statement was that he walked away and no one got shot. He also said there had not been a plan. The strength of this evidence demonstrates that the isolated reference to Volkaitis's momentary election to remain silent did not influence the jury. Our confidence in the outcome is not undermined even if trial counsel should have objected.

¶10 The additional claim of ineffective assistance of trial counsel is that counsel did not review the PSI with Volkaitis until the day of sentencing. Volkaitis argues that the very short amount of time he had to review the PSI tainted the sentencing proceeding by not insuring that the sentence is based on true and accurate information.

¶11 The allegation that trial counsel did not adequately review the PSI with Volkaitis was not raised in the postconviction motion. Trial counsel was not questioned about the circumstances surrounding review of the PSI. The claim of ineffective assistance of counsel is waived. ***State v. Waites***, 158 Wis. 2d 376, 392-93, 462 N.W.2d 206 (1990); ***State v. Krieger***, 163 Wis. 2d 241, 253, 471 N.W.2d 599 (Ct. App. 1991).

¶12 Even absent waiver, the claim that Volkaitis did not have sufficient time to review the PSI with trial counsel fails as a claim of ineffective assistance

of counsel. At the commencement of the sentencing hearing, Volkaitis acknowledged that counsel had given him a copy of the PSI. Then there was delay of about twenty minutes before trial counsel was available to start the hearing. Corrections were made to five or six statements in the PSI that Volkaitis believed were untrue. Indeed Volkaitis himself spoke up about the particular sentences in the PSI that he thought were objectionable. Just before sentencing arguments got under way, there was a pause during which Volkaitis and trial counsel conferred and then advised the court that there were no further corrections. The record establishes that Volkaitis was provided the opportunity to review the PSI and make corrections. *See* ***State v. Skaff***, 152 Wis. 2d 48, 53, 447 N.W.2d 84 (Ct. App. 1989) (recognizing that a defendant has a federal due process right to timely read his PSI to ensure its accuracy).

¶13 Volkaitis's suggestion that access and review of the PSI more in advance of the sentencing hearing "may have exposed other errors that Volkaitis may have over looked at the sentencing hearing" falls far short of establishing prejudice in the context of an ineffective assistance of counsel claim. Volkaitis has not in fact identified any additional errors in the PSI or any inaccurate information the sentencing court relied on. A defendant who requests resentencing must show that specific information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). "Might haves" are not sufficient to support a claim that trial counsel should have done more. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

¶14 Volkaitis argues that the trial court judge improperly interfered with his appointed postconviction counsel's examination of trial counsel during the ***Machner*** hearing. The alleged interference occurred during the examination of

trial counsel about the motion to exclude Volkaitis's statements about "niggers" in the bar and whether the denial of that motion should have prompted trial counsel to move to sever the disorderly conduct charge for trial or advise Volkaitis to enter a guilty plea to that charge so those statements would not be repeated in front of the jury. Trial counsel testified that the basis for the disorderly conduct charge could have been either the conduct at the bar or the conduct at the bank since it tended to cause or provoke a disturbance. The trial court interjected during the examination: "Let me interrupt here. Couldn't it also have been the fact that he was swearing and loud?" When trial counsel replied, "In the bar, yes," postconviction counsel was allowed to continue the examination.[6]

¶15 Volkaitis argues that trial counsel was struggling with the particular line of questioning and the trial judge's interference prompted a certain leading response that deprived postconviction counsel of the upper hand at that point of the examination. We first question the significance of Volkaitis's claim that the trial court interfered. Volkaitis does not raise on appeal the postconviction claim that trial counsel was ineffective in allowing the disorderly conduct charge to be tried with the attempted robbery charge. The trial court's "interference" did not travel to the issues raised on appeal.

¶16 The trial court is permitted to interrogate a witness. WIS. STAT. § 906.14(2) (2005-06).[7] Such questioning is allowed to clarify received testimony and to aid in the discovery of truth so long as the judge does not function as a

[6] The trial court interjected again later in the examination but Volkaitis does not refer to that point in his argument.

[7] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

partisan. ***State v. Bowie***, 92 Wis. 2d 192, 208, 284 N.W.2d 613 (1979). That is the function the trial judge's interjection served here—to clarify trial counsel's testimony.[8] The trial judge's inquiry was neutral in tone. Further, this was an evidentiary hearing before the court and there was no risk of showing partiality to a jury. To the extent that Volkaitis claims the trial judge's conduct demonstrated bias, he fails to overcome the presumption that a judge is free of bias and prejudice. *See* ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994).

By the Court.—Judgment and order affirmed.

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

[8] The same is true of the later instances in which the trial court interjected to clarify trial counsel's testimony and to prevent the examination from running far afield.