COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2120-CR **Cir. Ct. No. 2006CF472**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIJAH ARLANDERS BROCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY and DAVID A. HANSHER, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Elijah Arlanders Brock appeals a judgment entered after a jury found him guilty of armed robbery with use of force, *see* WIS. STAT.

§ 943.32(2), and an order denying his motion for postconviction relief.[1] Brock argues that: (1) the trial court should have granted his motion to suppress his confession; (2) the trial court erred in not receiving certain evidence at trial; and (3) his lawyer gave him constitutionally deficient assistance. We affirm.

I.

¶2 On January 12, 2006, at approximately 8:15 p.m., an armed and masked robber walked into a grocery store owned by Muhannad Mustafa. The robber took all the money from the cash register and some cigarettes. After the robber left, Mustafa went outside and saw the robber leave in a white car. Mustafa got into his car, and when he found the white car, he noted its license plate number, which the police traced to Brock.

¶3 Brock was arrested the next day and was questioned by Milwaukee police detectives Ramona Ruud and William Beauchene. Brock told them that he was at the Potawatomi Casino with his girlfriend the night of the robbery. Surveillance tapes from the casino showed that Brock entered the casino at 9:56 p.m. and left with his girlfriend at 10:51 p.m. In a second interview, Milwaukee police detective Peter Panasiuk confronted Brock with the surveillance-tape information and told him that his girlfriend was in custody and wasn't "backing him up." Brock then told Panasiuk that after he dropped his girlfriend off at the casino, he picked up a "hooker," paid her for oral sex, and, when the "hooker" was

[1] The Honorable David A. Hansher decided the suppression motion. The case was then transferred to the Honorable William Sosnay. Brock's first trial ended when the jury could not agree on a verdict. Judge Sosnay presided over both trials and entered judgment after Brock was convicted in the second trial. The case was then transferred back to Judge Hansher for the postconviction proceedings and he entered the order denying Brock's motion for postconviction relief.

done, he went to his girlfriend's house for an hour before going back to the casino at 10:00 p.m. to pick her up.

¶4 Detective Panasiuk interviewed Brock again on January 15, 2006. According to Panasiuk, this time Brock confessed: "I wanted to tell you the truth about what happened." Brock asked if Panasiuk would "help his girlfriend with her charge." He then admitted that he had robbed the grocery store "to get some quick money" to help take care of his girlfriend's nine children. Brock said he used a toy gun, which he had modified to look like a real gun. Brock signed the confession after making one correction on the second page.

¶5 Brock sought to suppress the confession, claiming that it was the result of unlawful coercion because the detectives brought his girlfriend to his interrogation room in handcuffs and, he claimed, told him that she would be charged with robbery and would lose her kids if he did not confess. He also contended that he was kept in a cold cell for three days with no food, and that he asked for but did not get a lawyer. Brock claims that he signed the confession that the detective wrote just to help his girlfriend and did not read it.

¶6 Detective Panasiuk testified at the suppression hearing that:

- Brock initially denied robbing the store, claiming he was at the casino with his girlfriend.
- During Brock's second interview, he confessed orally and in writing that he lied during the first interview when he told the detective that he was with a prostitute and did not want his girlfriend to know.
- He told Brock that Brock's girlfriend "was also under arrest regarding this incident, and depending [on] what happened to her

that her children could be taken away," and that "depending [on] what he had to say it could either help her possibly either get out or it could hurt her."

- The cell Brock was kept in between interviews had a bed, bathroom and water, and when placed there, an interviewee is given three meals a day.

- Brock did not ask for a lawyer, and each time Brock was read his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), he waived them and was cooperative.

Brock testified at the suppression hearing that:

- He asked for a lawyer, but the police denied his request.

- The police brought his girlfriend into the interrogation room and told him that "she was saying that I did it."

- Ruud told him that he was "going to jail," and that his "girlfriend go to jail [*sic*] with me."

- Panasiuk told him that his girlfriend "was being charged with accessory to armed robbery," and if she stayed in jail, her kids would go to social services.

- He was kept in a cold cell with no blanket or food.

- When he asked to make a telephone call to a lawyer, Panasiuk refused, saying: "he don't want me to use the phone because I might get somebody to corroborate my story."

- He did not confess to the robbery but signed the confession without reading it "because I was getting my girlfriend out of jail and she was going to make sure our kids didn't get took by the government."

¶7 The trial court found the police version of events credible and Brock's version not credible:

> [T]he defense is saying the third statement, which is the key statement here, was made up - - what the defendant is saying is the third statement was made up from whole cloth, and he said he didn't confess, he didn't make up the statement, it was presented to him. He was told if I do not sign the confession his girlfriend was to be … charged as an accessory to armed robbery.
>
> It was presented to him. Some corrections were made. He doesn't know what was made. The State's pointing out the corrections. He initialed it. He signed it. He said he didn't read it. He said he was asked questions and the officer answered the questions himself. I just said it. So I'm starting at the end and working my way back which I find incredible, that part.
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> Some other parts of his testimony I find incredible…. Talks about the cold holding cell, being there for nine to ten hours, water in the cell, no food, cold cell without food.
>
> I've done this for nine and a half years. I've had defendants claim coercion, different ways, but no one has ever claimed during a Wisconsin winter that the holding cells were just cold, there were … no blankets and no food.
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> ….
>
> … I think he's poisoned his entire credibility with those statements.
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> ….
>
> Then we turn to whether or not the confession, the third one, was a product of his free will and his choice and was not coerced. There were no police pressures, and he gave three stories. He came up [with] one story he wasn't there, and then there's the prostitute story, and then we have the confession with the details. And, as the State

> pointed out, where did they get these details? Defense says well, they knew from other witnesses what happened; and … they knew what happened, they had to basically put the blame on someone, so they took the facts they know [*sic*], wrote up the statement and had him initial it and sign it and these facts never came from him and were just made up completely, and I just can't accept it based upon listening to the officers, ascertaining their credibility and the defendant's credibility.
>
> There has to be some affirmative evidence of improper police practice and tactics, not just his assertion which I find incredible.

¶8 As noted, a jury did not return a verdict in Brock's first trial. According to Brock, the police then showed Otis S., a juvenile who had been in the store during the robbery, a photo lineup. Otis S. identified someone other than Brock as the robber. Otis S. was not called as a witness during the second trial, but Brock's lawyer asked Detective Ruud: "Did you ever show any photos of Mr. Brock of any type to anybody that potentially may have been a witness in this case?" Before the detective could answer, the prosecutor asked for a sidebar, during which the trial court, according to its reconstruction of what was said during the sidebar conference, excluded this line of questioning because it was hearsay and: "would be more confusing to the jury than anything else or any probative value it might have." The trial court reasoned:

> [A]pparently some photos were shown to a witness, Otis S[.], who has been named as a possible witness. I believe I was told he was one of the individuals present during the alleged incident on January 12th, but he has not been located by anyone at this point and he apparently selected the photo of someone who is in jail that [wa]s in custody at the time of this incident and the court was not going to allow them to go into it for a number of reasons; hearsay, didn't identify the defendant, and he identified someone who was in custody at the time the offense occurred.
>
> I didn't know where that was going to or what it was going to lead to….

> If he was available to testify the court may have considered it but at this point he wasn't and I didn't want him going into it with a different witness because we wouldn't have had the circumstances as to why, what he did, … photo array that he saw and so on and so forth and that's why the court took the position that it did.

The jury found Brock guilty. We consider Brock's contentions in turn.

II.

A. Suppression Motion.

¶9 Brock claims that his confession should have been suppressed because it was coerced. A trial court's ruling on a motion to suppress evidence presents a mixed question of fact and law. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 668, 762 N.W.2d 385, 388. We will not overturn the trial court's findings of fact unless they are clearly erroneous. ***Ibid.***; WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). The trial court is thus the sole judge of the credibility of the witnesses testifying at the suppression hearing. We review *de novo* the trial court's application of constitutional principles. *See* ***Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 668, 762 N.W.2d 385, 388–389.

¶10 As we have seen, the trial court found that there was no police coercion, that Brock's testimony was not credible, and that the detective's version of events was credible. We defer to the trial court's credibility determinations.

¶11 Brock argues that ***Lynumn v. Illinois***, 372 U.S. 528 (1963), requires suppression of his statement. ***Lynumn*** held that threats that a mother's children would be taken away from her unless she "cooperated" "must be deemed not voluntary, but coerced." ***Id.***, 372 U.S. at 534. ***Lynumn*** is inapposite because in

that case the *defendant* was threatened with the loss of her children if she did not confess. ***Id.***, 372 U.S at 530–534, 544. Here, however, Panasiuk told Brock that *if* his girlfriend was charged, and *if* she stayed in jail, there was a possibility that social services could take her children away. Under established law, absent a showing that such a scenario was impossible or feigned, the explanation of what could happen to a third person does not make the defendant's confession coerced. *See* ***Rogers v. Richmond***, 365 U.S. 534, 535–536 (1961) (Pretense by police chief that he would take the defendant's wife into custody unless defendant confessed made confession involuntary.); ***United States v. Johnson***, 351 F.3d 254, 262 (6th Cir. 2003) ("[P]romises of leniency may be coercive if they are broken or illusory."); ***Thompson v. Haley***, 255 F.3d 1292, 1296–1297 (11th Cir. 2001) (no coercion when defendant claimed that he confessed to spare his girlfriend from being arrested because the police had probable cause to arrest her); ***Allen v. McCotter***, 804 F.2d 1362, 1364 (5th Cir. 1986) (defendant told by police that unless he confessed, his wife would be charged; no showing that such a charge was impossible) (detective "had probable cause to arrest the petitioner's wife for aiding in the commission of the robbery. The petitioner's confession was therefore not involuntary by reason of his desire to extricate his wife from a possible good faith arrest."). The trial court did not err in denying Brock's motion to suppress his confession.

B. Evidence.

¶12 Brock's second complaint is that the trial court erroneously exercised its discretion when it stopped him from questioning Detective Ruud about Otis S. A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in

accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted).

¶13 As we have seen, the trial court ruled that putting Otis S.'s observations into evidence through the detective would have been hearsay, *see* WIS. STAT. RULE 908.02 (hearsay generally not permitted), and both awkward and confusing to the jury, *see* WIS. STAT. RULE 904.03.[2] The trial court did not erroneously exercise its discretion; what Otis S. said or did not say was inadmissible.

C. Ineffective Assistance.

¶14 Brock's final claim is that his lawyer gave him constitutionally deficient representation by not calling Detectives Ruud and Beauchene to testify at the suppression hearing because both would have corroborated Brock's claim that his girlfriend was brought to the interrogation room in order to force him to confess. He also argues that his lawyer was ineffective for not calling Otis S. We reject each in turn.

¶15 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific "acts or omissions" by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice,

[2] Technically, of course, the trial court stopped the defense lawyer before a hearsay response was requested. But whether the police showed Otis S. a photograph would not be relevant without Otis S.'s response, which would have been hearsay if testified to by the detective.

a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Its legal conclusions—whether the lawyer's performance was deficient and, if so, prejudicial—present questions of law we review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

¶16 Here, the trial court ruled that the testimony of the detectives confirming that Brock's girlfriend was brought to the interrogation room "would not have altered its findings" "on coercion." The trial court explained:

> His girlfriend was taken to the interrogation room between the first and second statements. If the defendant felt coerced by this, it is more reasonable to believe that he would have confessed at that time with the facts given in his third statement. The fact that he presented another story about looking for a hooker renders the defendant's coercion claim much less compelling. At the suppression hearing, the court would not have found that the presence of his girlfriend caused him to admit guilt in this case.

Further, as we have seen, truthful representations about a third person's potential criminal liability does not make a defendant's confession involuntary. Therefore, Brock's lawyer's failure to call the detectives was not prejudicial under ***Strickland***.

¶17 Finally, Brock's contention that his lawyer should have called Otis S. to testify at the trial fails because Brock did not raise this issue in his postconviction motion. Accordingly, he has forfeited his right to raise it on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140, 145 (1980) ("It is the often repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal."); ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 670, 761 N.W.2d 612, 620 (failure to make the timely assertion of a right is a forfeiture). Moreover, as we have seen, the trial court indicated that Otis S. could not be found ("he has not been located by anyone at this point"). Brock has not shown that Otis S. *could have been called* as a witness at the second trial. Thus, his lawyer did not give him representation that was outside the professional norm. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (A defendant who complains that his or her lawyer did not do something at the trial must show what the lawyer should have done.).

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.