COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP790-CR **Cir. Ct. No. 2009CF1146**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SIDNEY CLARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 BRENNAN, J. Sidney Clark appeals from a judgment of conviction, entered after a jury found him guilty of armed robbery, and from an order denying his postconviction motion. Clark asks us to: (1) remand this case

for a ***Machner*** hearing[1] because he alleges that his postconviction motion raised sufficient questions of fact to demonstrate that his trial counsel was ineffective; or (2) reverse his conviction and grant him a new trial because the trial court allegedly erred when it denied Clark's motion for a mistrial. We affirm.

BACKGROUND

¶2 In March 2009, the State filed a criminal complaint charging Clark with armed robbery for robbing the Sogal Mini Mart in Milwaukee on February 25, 2009. A four-day jury trial commenced.

¶3 Salado Noor, a Somalian national who had been in the United States for only three years, was the store clerk at the time of the robbery. She testified that on February 25, Clark, whom she immediately recognized as a regular customer, entered the mini-mart and asked her if Aziz Ahmed, Noor's boyfriend and the mini-mart's owner, was there. Noor told him Ahmed was not there. Clark then pointed a handgun at Noor and told her to give him the money in the cash register. He then reached over the store counter and was only inches away from Noor. Clark grabbed approximately $400 from the cash register before fleeing on foot.

¶4 Noor testified that she had a direct view of Clark when he was walking toward her and that she immediately recognized him as a regular customer. Noor testified that since she began working at the mini-mart in

[1] "Under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), a hearing may be held when a criminal defendant's trial counsel is challenged for allegedly providing ineffective assistance. At the hearing, trial counsel testifies as to his or her reasoning on [the] challenged action or inaction." ***State v. Thiel***, 2003 WI 111, ¶2 n.3, 264 Wis. 2d 571, 665 N.W.2d 305.

November 2008 Clark came in regularly, once or twice a day, and that she had once overheard Clark telling Ahmed that he had been fired from his job at State Farm a block away from the mini-mart. Noor said that when Clark came into the mini-mart he was usually wearing a hat or a hooded sweatshirt, but that she had seen his hair pulled back like it was in court during the trial. At the time of the robbery, Noor said Clark was wearing a hooded sweatshirt and dark glasses. Noor further testified that she was unsure of the robber's race, that he was "white or mixed," but that he was not Caucasian.

¶5 Immediately after the robbery, Noor telephoned Ahmed. Ahmed called the police, and Milwaukee Police Officer Mark Kubicek arrived at the mini-mart shortly thereafter. Officer Kubicek testified that Noor told him the robber was male, in his 60s or 70s, wearing a grey hooded sweatshirt with the hood up, and dark sunglasses. She also told Officer Kubicek that the robber was familiar to her, and that he was "white" or "mixed race[]." Officer Kubicek later testified that he believed Noor may have actually said "light" or "mixed race[]" and that he had misheard her due to her accent.

¶6 Officer Kubicek also testified that Ahmed was standing nearby when Officer Kubicek was interviewing Noor and "interrupt[ed] … trying to contribute to the description of this known customer."

¶7 Later that night, police showed Noor a photo line-up of suspects. Noor selected Clark as the robber, stating that she was "100 percent sure" of her identification.

¶8 The State also introduced the testimony of Carolyn Riccobono, Clark's supervisor at his job at McDonalds. Riccobono testified that Clark had

told her that he was aware that police had come to McDonalds looking for him, and that Clark told Riccobono "not to tell anyone any of his business."

¶9 Next, the State asked Riccobono if Clark "sa[id] anything in addition to that" and Riccobono stated that Clark "was giving me a schedule to fax over to a homeless shelter." Clark's counsel immediately objected because the court had previously ruled that the jury should not hear any evidence about Clark's homelessness. After a sidebar, the court instructed the jury to disregard the question and Riccobono's response. Clark's counsel later moved for a mistrial, arguing that the State's question was intentionally designed to elicit a response about Clark's homelessness and that the jury would unfairly assume that because Clark was staying at a homeless shelter, he committed the robbery. The trial court denied Clark's motion, concluding that the State's question had not been in bad faith and there were not sufficient grounds for granting a mistrial.

¶10 Clark was the only witness to testify for the defense. He testified that on the day of the robbery he picked up his paycheck from McDonalds between 9:00 a.m. and 11:00 a.m., took a bus to a bank on Wisconsin Avenue to cash his check, then took a bus to the Grand Avenue Mall, then took another bus to the Bayshore Mall where he stayed for one and one-half to two hours, and then finally took a third bus to Brookfield.

¶11 Clark also testified that he had been employed by the State Farm insurance agency one block from the mini-mart and had been fired in August 2008. He stated that after he was fired he did not "hang out" on Martin Luther King Drive, where the Sogal Mini Mart and the State Farm were located, but that until he was fired he had gone to the mini-mart "different times in different months … [u]p until August 24th or 25th." Clark also testified that "[t]here was

no woman that worked [at the Sogal Mini Mart]" when he visited, and that he had "never seen" Noor.

¶12 Clark's counsel did not ask him whether he robbed the mini-mart. Nor did Clark's counsel ask if he was at the mini-mart at any time the day of the robbery.

¶13 The jury found Clark guilty of armed robbery, and judgment was entered accordingly.[2]

¶14 Clark filed a motion for postconviction relief arguing that his trial counsel was ineffective for not asking him whether he committed the robbery. Attached to his motion was an affidavit signed by his appellate counsel, averring that Clark's trial counsel stated that he did not ask Clark whether he committed the robbery because "it was not his focus at trial" and that his focus was "on trying to show the identification by Noor was mistaken, and on showing what Clark normally did with his time." The affidavit further asserted that Clark's trial counsel stated that Clark "consistently maintained his innocence" and that trial counsel did not omit the question because he believed it would encourage Clark to perjure himself. The trial court denied Clark's postconviction motion without a hearing, concluding that "any failure on the part of trial counsel to submit this question to the defendant during the trial did not prejudice the defendant's case." This appeal follows.

[2] The jury also heard from several other witnesses whose testimony is irrelevant to this appeal.

DISCUSSION

¶15 Clark now asks us to: (1) remand this case back to the trial court for a ***Machner*** hearing because he alleges his trial counsel was ineffective for failing to ask Clark whether he robbed the mini-mart; or (2) remand this case back to the trial court for a new trial because the trial court erred in not granting a mistrial when Riccobono made reference to the homeless shelter where Clark was staying. We will address each in turn.

A. Ineffective Assistance of Counsel

¶16 Clark first argues that his postconviction motion raised sufficient questions of fact to entitle him to a ***Machner*** hearing on whether his trial counsel was ineffective.[3] Because we conclude that the facts he raises in his postconviction motion demonstrate that even if his counsel was deficient, the outcome of the trial was not prejudiced by that deficiency, we affirm.

¶17 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

[3] In his brief-in-chief, Clark argues that the ineffectiveness of his trial counsel entitles him to a new trial. Thereafter, in his reply brief, he admits that "when a defendant claims ineffective assistance of trial counsel in a postconviction motion, the [trial] court must hold an evidentiary hearing if the defendant alleges facts that, if true, would entitle the defendant to relief." (Citing ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433; ***Machner***, 92 Wis. 2d at 804.) However, in his reply brief, Clark still asks this court to grant him a new trial, although he also asks, in the alternative, that we remand the case for a ***Machner*** hearing. Even if we were persuaded by Clark's ineffective assistance of counsel claim, and we are not, he is not entitled to a new trial. Absent unusual circumstances, we cannot grant an ineffective assistance of counsel claim without an evidentiary hearing. *See* ***id.***, 92 Wis. 2d at 804 ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.").

Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶18 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

¶19 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious so as to deprive him or her of a fair trial and a reliable outcome, ***Johnson***, 153 Wis. 2d at 127, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶20 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

¶21 A postconviction hearing is necessary to sustain a claim of ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A defendant's claim that counsel provided ineffective assistance does not, however, automatically trigger a right to a ***Machner*** hearing. *See* ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A trial court may deny a postconviction motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion was sufficiently supported to warrant an evidentiary hearing is a legal issue that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

¶22 Clark argues that had his trial counsel asked him whether he committed the robbery at the mini-mart he would have expressly denied committing the crime, and that his denial would have rebutted Noor's testimony to the contrary. Clark further contends that these are sufficient facts to entitle him to relief and that the trial court should have granted him a ***Machner*** hearing. In short, we conclude that Clark does not set forth sufficient facts to entitle him to relief. Clark implicitly denied committing the robbery, and there is not a reasonable probability that expressly denying that he committed the robbery would have resulted in a different verdict given the strength of Noor's identification.

¶23 First, that Clark denied committing the robbery was implicit in his testimony. Clark testified that he had not been in Sogal's mini-mart since he was fired from State Farm in August 2008, six months before the robbery was

committed. Clark also denied ever having met or seen Noor.[4] And he testified that the day of the robbery he picked up his paycheck from McDonalds between 9:00 a.m. and 11:00 a.m., took a bus to a bank on Wisconsin Avenue to cash his check, then took a bus to the Grand Avenue Mall, then took another bus to the Bayshore Mall where he stayed for one and one-half to two hours, and then finally took a third bus to Brookfield. At no time did he state or otherwise suggest that he had gone to the mini-mart the day of the robbery—in fact, he testified that he had not been there in six months.[5] Even without an explicit denial that he robbed the mini-mart, it is evident from his testimony that he did in fact deny it.

¶24 Second, Clark's credibility was questionable. Even if Clark had explicitly testified that he did not rob the mini-mart, he concedes that "a defendant's denial that he did not commit the crime must be viewed with some degree of caution, [because] it is in his self-interest." Moreover, the jury had been informed that Clark had been convicted of seven prior crimes, and his testimony

[4] The State asked Clark: "[I]t's your testimony today that you have never before [s]een Salado Noor; is that correct?" To which, Clark replied: "To my knowledge, no ma'am." Clark argues that the jury could not have inferred from that testimony that he did not rob the mini-mart because his testimony could have been mistaken. He later testified that he could not identify every single person whom he had ever seen in the mini-mart and that it was "quite possible" that he had seen Noor. However, in light of Clark's testimony that he had not been to the mini-mart since August 2008, and Noor's testimony that she did not start working at the mini-mart until November 2008, it is impossible that Clark misremembered not seeing Noor in the mini-mart because, according to Clark's testimony, they had never been in the mini-mart at the same time. The only logical conclusion the jury could have drawn from Clark's testimony was that he was denying robbing the mini-mart.

[5] Clark argues that because he could not say with certainty that he did not complete picking up his paycheck and riding the bus the day of the robbery before 3:30 p.m., the time of the robbery, the jury could not infer from that testimony that he did not rob the mini-mart. Again, however, Clark ignores the fact that he also testified that he had not been to the mini-mart since August 2008, and therefore otherwise implicitly testified that he did not commit the robbery. And further, that he did not mention going to the mini-mart when describing his activities that day amounted to a tacit denial.

was at odds with Noor's, who had no apparent motive to lie. In other words, it is unlikely that Clark's express testimony that "it wasn't him" would have been persuasive.

¶25 Third, the State had built a strong case against Clark based upon Noor's identification. While Clark entered the mini-mart wearing a hooded sweatshirt with the hood up and dark sunglasses, Noor testified that she immediately recognized Clark because he had come into the mini-mart once or twice a day since she began working there in November 2008, and he was merely inches away from her when he reached over the counter. Moreover, Noor recognized Clark's voice from his previous visits to the mini-mart and conversations with Ahmed. From the beginning, Noor was "100 percent sure" that Clark was the robber and she identified him as such in the photo line-up.

¶26 We reject Clark's argument that Noor's identification was "problematic" because "[t]he entire incident took a short amount of time, and the robber was covered by a hood and wearing dark sunglasses. [And] Noor described the robber as white, although Clark is black."[6] Based on Noor's numerous contacts with Clark, as described above, it is not surprising that she would recognize him even though he was wearing a hood and sunglasses. And Officer Kubicek explained that although he initially believed that Noor said the robber was "white" or "mixed race[]" he later believed she said "light" or "mixed race[]."

[6] As the State points out in its brief, none of the trial exhibits, including the photo array from which Noor identified Clark, appear in the record. The only evidence in the record cited to verify Clark's race is the police report on which the police marked Clark's race as "B." Nevertheless, the trial court, which observed Clark throughout the trial, concluded that Noor's description of the robber "fit [Clark's] age bracket, appearance, and demeanor." Clark does not challenge this finding.

Officer Kubicek explained that the "language barrier" resulting from Noor's accent led him to believe that Noor said "white" or "mixed race[]" when in fact she likely said "light" or "mixed race[]." However, Noor testified that she was "unsure" of Clark's race. And regardless of how Noor identifies Clark's race, she recognized him as a regular customer of the mini-mart who was fired from State Farm, and identified him in a photo line-up.

¶27 Nor do we find Noor's identification "problematic" because Ahmed "interrupted" when Noor was attempting to describe Clark to the police. Noor had told Ahmed that the robber was a customer who visited the mini-mart often, and who had been fired from State Farm. Ahmed surmised that the robber was Clark because "there's nobody else" other than Clark "who said he got fired from State Farm that we know." But this fact does not "impeach" Noor or otherwise make her identification unreliable as Clark suggests. Ahmed had learned the robber's identity from Noor. His interruption does not make Noor less credible.

¶28 In summary, we reject Clark's assertion that his trial counsel's failure to ask him outright whether he robbed the mini-mart sets forth a claim for ineffective assistance of counsel. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Even without the question, it was clear from Clark's other testimony that he was denying committing the robbery. There is not a reasonable probability that Clark's self-serving testimony that he did not do it could have overcome the strength of Noor's identification. *See* ***Strickland***, 466 U.S. at 694.

B. Mistrial

¶29 Next, Clark argues that the trial court erroneously exercised its discretion when it denied his motion for a mistrial after the jury heard testimony that may have indicated Clark was homeless.[7] Because the trial court directed the jury to disregard the reference, and regardless, because the reference was not sufficiently prejudicial to warrant a mistrial, we affirm.

¶30 A motion for a mistrial is addressed to the sound discretion of the trial court, and its decision will be reversed only upon a clear showing of an erroneous exercise of discretion. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). In considering a motion for a mistrial, the "trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894.

¶31 Not all errors warrant a mistrial, and "the law prefers less drastic alternatives, if available and practical." ***State v. Bunch***, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995). For instance, there is no erroneous exercise of discretion when, in lieu of a mistrial, the court cures potential prejudicial effect by instructing the jury to disregard an improper statement. ***Haskins***, 97 Wis. 2d at 420.

[7] Before the trial court, Clark argued that the State engaged in misconduct by asking Riccobono a question it knew would lead to an answer referencing Clark's homelessness. Clark does not raise the issue of prosecutorial misconduct before this court, and therefore, we deem the claim abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

¶32 Here, during a sidebar immediately prior to her testimony, the trial court instructed the State not to elicit answers from Riccobono that would reference Clark's homelessness. After she took the stand, the State asked Riccobono a question calling for an answer about what Clark *said* to her—"Did he [Clark] say anything in addition to that?" Riccobono then answered about what he *did*—"He at the time of the conversation he was giving me a schedule to fax over to a homeless shelter." Clark's counsel immediately objected, and the court called another sidebar. Afterwards, back on the record and in the presence of the jury, the trial court properly exercised its discretion by instructing the jury to disregard both the State's question and Riccobono's answer. We presume that juries follow the instructions given to them. ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994). And therefore we conclude that the jury disregarded Riccobono's reference to the homeless shelter.

¶33 Moreover, Riccobono's offhanded reference to a homeless shelter is not sufficiently prejudicial to warrant a mistrial. Clark argues "that the jury would unfairly assume that because Clark was staying at a homeless shelter, he committed the robbery in this case." That argument is conclusory. First, it is not clear from Riccobono's answer that the jury would necessarily conclude that Clark lived at the homeless shelter—perhaps he worked at the shelter or there was some other reason for Riccobono to fax his schedule there. Second, even if the jurors inferred that Clark was homeless, while Clark's apparent homelessness may have led some jurors to have a negative view of him or impute a motive for theft, it is equally plausible that knowledge of his homelessness invoked empathy from the jurors. Given Noor's eyewitness identification, Clark's admission that he frequented the mini-mart, and Clark's failure to corroborate his alibi, the strength of the State's case was unaffected by any negative inference from an indirect

reference to the homeless shelter. In sum, the prejudicial effect of the statement, if any, was minimal at best and is not sufficient to warrant a new trial.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.