**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 13, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP2654-CR** **Cir. Ct. No. 2009CF4218**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BURT TERRELL JOHNSON, JR.,**

**DEFENDANT-APPELLANT.**

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

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

¶1 CURLEY, P.J. Burt Terrell Johnson, Jr. appeals the judgment convicting him of burglary, contrary to WIS. STAT. § 943.10(1m)(a) (2009-10).[1]

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

He also appeals the order denying his postconviction motion. Johnson contends that we should grant him a new trial because his trial counsel was ineffective. In the alternative, he argues that the trial court erroneously exercised its discretion at sentencing. We disagree and affirm.

## I. BACKGROUND.

¶2 Franklin resident Kathleen Zeman was home alone at about 11:20 a.m. on a Thursday morning when the doorbell rang. Because she wasn't expecting anyone, Zeman decided not to come to the door. She then heard the doorbell ring several more times, "very slowly." Zeman looked out the window and observed a man whom she had never seen before walk from her porch to a vehicle in the driveway. She had never seen the car before, either—a small, older four-door model.

¶3 Zeman went to the first floor to grab her phone and then went back to the second floor. From her second floor window, she saw the same man knock on the sliding glass door on her back patio. He pressed his face against the door as though trying to see inside.

¶4 Zeman called 9-1-1. While on the phone with police, Zeman heard loud banging noises coming from her garage area, and her dog began to bark. Zeman then saw the man run down her driveway to the green car and flee down the street—eastbound on West Puetz Road.

¶5 Milwaukee police officer Jedd Miller responded to the dispatch relaying Zeman's call. He observed a man driving eastbound on the 4100 block of West Puetz Road in a green 1998 Plymouth Neon. Miller pulled the car over; Johnson was the only person inside.

¶6 Meanwhile, at Zeman's house, Franklin police officer Craig Liermann noticed that the service door to Zeman's garage had been broken with such force that it destroyed the molding on the inside of the door and sent the strike plate for the deadbolt flying into the inside of the garage. Zeman told police that she did not give anybody permission to enter her home, damage her service door, or attempt to take any items from her house.

¶7 The next day, Zeman identified Johnson in a lineup. She also identified the clothing that Johnson had been wearing when she saw him, including the logo on the jacket he had been wearing. She further identified Johnson's car, explaining to police that the green 1998 Plymouth Neon in the photograph they showed her was similar to the car she had seen in her driveway the previous day.

¶8 Johnson was charged with burglary and the case went before a jury. At trial, Johnson's attorney did not make an opening statement. The attorney explained that he was not going to give an opening statement because he did not plan to call any witnesses. Johnson himself did not testify at trial, and no witnesses testified on his behalf. In contrast, the prosecutor did give an opening statement, and several witnesses testified on the State's behalf, including Zeman, Miller, another officer who investigated the scene, a detective who monitored the lineup, and a crime lab technician.

¶9 During his closing argument, the prosecutor began by summing up the evidence that had come out at trial:

> On September 10 of this year, this defendant broke into Kathleen Zeman's home. We know that he did it because she saw him do it.
>
> We know that he did it because three minutes and 22 seconds later, Officer Miller has the defendant stopped, wearing the same jacket that Miss Zeman saw, driving the same car that Miss Zeman saw.
>
> We know the defendant did it because the next day she identified him…. The defendant is guilty of burglarizing Miss Zeman's home and you should find him guilty.

¶10 The prosecutor then went on to explain exactly what Zeman had seen and heard:

> What he doesn't know is that Miss Zeman saw the whole thing. She looks out that bathroom window when she first hears the doorbell ringing and she sees the defendant. Doesn't see his face at that point. Sees him walking back to the car. Doesn't recognize him. Doesn't recognize the car …. [S]tarts to get a little more concerned when he starts walking around to the back of her house. That's when she knows something's up. She goes downstairs and gets that cell phone quickly, and that's when she sees the defendant peering in through the back of her sliding glass door…. [S]he hears this bang at her side door. Hears the dog begin to bark. You can hear the fear in her voice.
>
> She immediately tells the police, ["]green car, white jacket, tried to break in. I can see him leaving.["]

¶11 After explaining what Zeman had seen and heard in detail, and going over the particulars of the lineup, the prosecutor summed up the facts a second time, saying:

> We know that the defendant broke into Miss Zeman's home because she saw him do it. We know the defendant broke into Miss Zeman's home because he's caught three minutes and 22 seconds later. We know that the defendant broke into her home because he's driving the car, because he's wearing the jacket, because he's identified the next day. The defendant is guilty of burglary.

¶12 Next, the prosecutor explained the elements of burglary to the jury, and then described in detail how the facts of the case fit the elements of the crime. He then summed up the case a third time, concluding:

> The defendant is guilty of burglary. He's guilty because each and every one of those elements is proven beyond a reasonable doubt. He's guilty because Miss Zeman saw him do it, because he was caught quick, and because he was identified. He's guilty of burglary, and you should find him guilty of burglary.

¶13 In response to the prosecutor's closing, Johnson's attorney stressed that mere suspicions were not enough to convict someone of burglary:

> I'm going to ask you to follow the law…. [H]onestly, I mean, probably one, some, all of you think [Johnson] was up to no good. Let's not kid ourselves, but that's not good enough under the law. It isn't. You got the instruction from the judge…. Just because you think somebody might be, yeah, I think he was up to no good, that's not a good enough reason to convict somebody after a jury trial of a charge. It's not enough to convict him of burglary.

¶14 Johnson's attorney went on to discuss the facts, as well as Johnson's alleged intent:

> What was he up to? Well, you gotta prove that beyond a reasonable doubt. Well, let's see. Franklin's out in the boondocks. He all of a sudden decided to show up at Kathleen Zeman's house after driving miles…. No burglary tools. Apparently it's the first stop of the day. No other stolen goods. Nothing stolen from anyplace. No tools to get into a place if the people are gone.
>
> And the [S]tate's trying to tell you, well, that's why he picked 10:00 in the morning because people aren't there. Well, then what are you ringing the doorbell for?....
>
> So now we've got this ambivalence. Well, he's ringing the doorbell to make sure she's not there. *Well, maybe he's ringing the doorbell to talk to her about something.*

(Emphasis added.)

¶15 Johnson's attorney also commented on the prosecutor's statement that Zeman "saw" Johnson break into her house:

> Kathleen Zeman saw the break-in, according to the prosecutor. *No, she didn't. She heard a bang and she saw the defendant leave. She didn't see the door get broken in.*...
>
> Then the prosecutor's telling you, well, you have to enter if you break a door. Well, look. It's a crime to break somebody's door but that's not necessarily a burglary. And that's what we're here for. [The prosecutor] says if you break in a door—if you break a door with that force, you have to enter. No you don't … if you're against a moveable force, you're going the opposite direction. The door breaks and you go *that* way. Anti-entering.
>
> Why was [the door] forced? Well, you all might have your suspicions…. But you're not here to be suspicious. You're here to follow the law and give this man a fair trial.

(Emphasis added.)

¶16 The jury found Johnson guilty of burglary. The trial court sentenced him to four years of initial confinement and four years of extended supervision. Johnson then filed a postconviction motion, arguing that his trial counsel was ineffective for several reasons. He also argued that his sentence was overly harsh and excessive. The trial court denied the motion, and Johnson now appeals.

## II. ANALYSIS.

¶17 On appeal, Johnson argues that his trial counsel was ineffective because he: (1) did not give an opening statement; (2) failed to object to the prosecutor's remarks in closing argument that Zeman "saw" Johnson break into her house; (3) conceded Johnson's guilt in his closing argument; and (4) failed to

hire an expert to explain the physics of the break-in. In the alternative, Johnson argues that the trial court erroneously exercised its discretion at sentencing because his sentence was overly harsh and excessive. We discuss each argument in turn.

*A. Johnson's trial counsel was not ineffective.*

¶18 In order to establish that he did not receive effective assistance of counsel, Johnson must prove two things: (1) that trial counsel's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Trial counsel's performance is not deficient unless he "made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***id.*** Even if Johnson can show that trial counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that trial counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *See* ***id.*** Stated another way, to satisfy the prejudice prong, Johnson "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." *See* ***id.*** at 694. In assessing Johnson's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***id.*** at 697.

¶19 The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see*

***id.***, and the questions of whether counsel's performance was deficient and prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

*1. Trial counsel was not ineffective for choosing not to make an opening statement.*

¶20 Johnson first argues that trial counsel was ineffective for failing to make an opening statement at trial. Johnson does not thoroughly explain why trial counsel's decision was deficient; rather, he argues that trial counsel's "performance was deficient in that he failed to give an opening statement," which he claims "cannot be the result of a reasoned trial strategy." Regarding prejudice, Johnson argues that the decision not to give an opening statement was prejudicial because it did not frame the facts in a way that would benefit the defense, and implied to the jury that Johnson did not have a case.

¶21 Johnson cannot prove that trial counsel's decision constituted deficient performance under the law. At the very least, Johnson needs to show that choosing not to make an opening statement was not the result of a reasoned defense strategy. *See* ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620 (reasonable trial strategy does not constitute ineffective assistance of counsel); ***State v. Snider***, 2003 WI App 172, ¶22, 266 Wis. 2d 830, 668 N.W.2d 784 ("Generally, trial strategy decisions reasonably based in law and fact do not constitute ineffective assistance of counsel."). As we have often stated, conclusory statements will not suffice. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (court of appeals "may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record"). In this instance, Johnson's discussion of deficiency is inadequately developed, *see* ***id.***, and is also contrary to the facts and the law. Trial counsel

explained that he would not make an opening statement because he did not plan to call any witnesses. As evidenced from this decision, as well as from trial counsel's closing argument—in which he repeatedly stressed the burden of proof and the inadequacy of relying on suspicions to convict—his strategy was to put the State to its proof. We conclude that this strategy was reasonable. *See, e.g.*, ***Snider***, 266 Wis. 2d 830, ¶22. Just because it was unsuccessful does not mean that it was deficient. *See* ***State v. Felton***, 110 Wis. 2d 485, 500, 329 N.W.2d 161 (1983) ("'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict.'") (citation omitted).

¶22 Nor can Johnson prove prejudice here. Johnson's was a short, uncomplicated trial, and we are not persuaded by the argument that a roadmap of the case from the defense perspective would have created a reasonable probability that the trial's outcome would have been different. *See* ***Strickland***, 466 U.S. at 694.

*2. Trial counsel was not ineffective for failing to object to the prosecutor's closing argument.*

¶23 Johnson next argues that trial counsel was ineffective for failing to object to the prosecutor's remarks in closing argument that Zeman "saw" Johnson break into her home. According to Johnson, the prosecutor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *see* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (citation and quotation marks omitted), and therefore, the decision not to object was both deficient and prejudicial.

¶24 As Johnson acknowledges, however, prejudice in this realm must be determined in the context of the total trial. *See* ***State v. Smith***, 2003 WI App 234,

¶23, 268 Wis. 2d 138, 671 N.W.2d 854. Wisconsin courts allow counsel considerable latitude in closing argument. *See* ***State v. Cockrell***, 2007 WI App 217, ¶41, 306 Wis. 2d 52, 741 N.W.2d 267. During a closing argument, the State may "comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). "The line of demarcation … 'is … drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.'" ***Smith***, 268 Wis. 2d 138, ¶23 (citation omitted).

¶25 As noted, the prosecutor stated that Zeman "saw [Johnson] do it" at three points in his closing argument: during the introduction, after the facts of the case were described in detail, and after the law was applied to the facts. At each point, the statement "saw him do it" occurred during a summation of the case as a whole. The prosecutor did not argue that Zeman literally "saw" Johnson break and enter into her house. Rather he recounted exactly which details constituted seeing "the whole thing":

> What [Johnson] doesn't know is that Miss Zeman saw the whole thing. She looks out that bathroom window when she first hears the doorbell ringing and she sees the defendant. Doesn't see his face at that point. Sees him walking back to the car. Doesn't recognize him. Doesn't recognize the car …. [S]tarts to get a little more concerned when he starts walking around to the back of her house. That's when she knows something's up. She goes downstairs and gets that cell phone quickly, and that's when she sees the defendant peering in through the back of her sliding glass door…. [S]he hears this bang at her side door. Hears the dog begin to bark. You can hear the fear in her voice.

¶26 In other words, the prosecutor emphasized that Zeman's eyewitness account, added to the inferences from on the sounds and actions she witnessed, implicated Johnson. This was not inappropriate. *See* ***Adams***, 221 Wis. 2d at 19; ***Smith***, 268 Wis. 2d 138, ¶23.

¶27 Moreover, we cannot conclude that prosecutor's statements prejudiced Johnson in context of the total trial. *See* ***Strickland***, 466 U.S. at 694; ***Smith***, 268 Wis. 2d 138, ¶23. While Johnson did not object to the prosecutor's characterization of the evidence, he did clarify for the jury exactly which facts were in evidence, saying: "Kathleen Zeman saw the break-in, according to the prosecutor. *No, she didn't. She heard a bang and she saw the defendant leave. She didn't see the door get broken in.*" (Emphasis added.) Trial counsel's decision not to object was neither deficient nor prejudicial. *See* ***Strickland***, 466 U.S. at 687.

*3. Trial counsel was not ineffective for making statements that arguably conceded inappropriate behavior in closing argument.*

¶28 Johnson also argues that trial counsel was ineffective for making statements that he claims conceded Johnson's guilt in his closing argument. He takes issue with the following comments:

> Honestly, I mean, probably one, some, all of you think he was up to no good. Let's not kid ourselves, but that's not good enough under the law. Just because you think somebody might be … up to no good, that's not a good enough reason to convict somebody after a jury trial.
>
> Franklin's out in the boondocks. He all of a sudden decided to show up at Kathleen Zeman's house after driving miles, for whatever reason. No burglary tools. Apparently it's the first stop of the day. No other stolen goods….

> And I'm stupid but it seems to me that if somebody's ringing your doorbell, you see who's there. It doesn't mean you open it. She could have saved us an awful lot of aggravation if she just looked out the window and, huh. And if he's a burglar, away he goes….
>
> Then the prosecutor's telling you, well, you have to enter if you break a door. Well, look. It's a crime to break somebody's door, but that's not necessarily a burglary. And that's what we're here for. [The prosecutor] says if you break in a door—if you break a door with that force, you have to enter. No you don't….
>
> Should the door have been forced? No. How is it forced? …. Why was it forced? Well, you all might have your suspicions…. But you're not here to be suspicious.

¶29 According to Johnson, these comments were deficient and prejudicial because they "implied over and over that [he] was guilty." We disagree. Trial counsel at no point conceded or implied guilt.

¶30 The only facts trial counsel "conceded" were those clearly not in dispute. For example, there was no dispute that Johnson was at Zeman's house, he repeatedly rang the doorbell, Zeman did not answer the door, and that Johnson eventually left. Trial counsel's decision to admit undisputed facts was a reasonable strategy likely made to gain credibility in front of the jury. *See* ***Underwood v. Clark***, 939 F.2d 473, 474 (7th Cir. 1991).

¶31 Moreover, trial counsel did not simply list all of the damning facts. He used the facts to argue that Johnson did not "enter" Zeman's house and that he did not intend to steal anything, *see* WIS. STAT. § 943.10(1m); WIS JI—CRIMINAL 1421, and also repeatedly stressed the necessity of proving each element beyond a reasonable doubt:

> What was he up to? *Well, you gotta prove that beyond a reasonable doubt.* Well, let's see. Franklin's out in the boondocks. He all of a sudden decided to show up at Kathleen Zeman's house after driving miles…. No burglary

> tools. Apparently it's the first stop of the day. No other stolen goods. Nothing stolen from anyplace. No tools to get into a place if the people are gone.
>
> *And the [S]tate's trying to tell you, well, that's why he picked 10:00 in the morning because people aren't there. Well, then what are you ringing the doorbell for?....*
>
> *So now we've got this ambivalence. Well, he's ringing the doorbell to make sure she's not there. Well, maybe he's ringing the doorbell to talk to her about something….*
>
> It's a crime to break somebody's door but that's not necessarily a burglary. And that's what we're here for. [The prosecutor] says if you break in a door—if you break a door with that force, you have to enter. *No you don't … if you're against a moveable force, you're going to go the opposite direction. The door breaks and you go that way. Anti-entering.*

(Emphasis added.)

¶32 In sum, trial counsel neither conceded nor implied guilt; he merely admitted the facts that were in evidence to gain credibility with the jury, and put the State to its proof regarding issues where there was no direct, only circumstantial, evidence. Given the facts of this case, we conclude that trial counsel's closing argument was neither deficient nor prejudicial. *See* ***Strickland***, 466 U.S. at 687.

*4. Trial counsel was not ineffective for not hiring an expert.*

¶33 Johnson also argues that trial counsel was ineffective for not hiring an expert to explain the physics of the break-in. Again, we disagree. Johnson has not shown that a physics expert was in fact required at trial. He merely argues that "physics is not something the average person has knowledge of." However, as noted, Johnson's was a short, uncomplicated trial. The question of whether Johnson would have necessarily "entered" Zeman's house upon breaking the door

was not something that the jury required "'scientific, technical, or other specialized knowledge'" of physics to answer. *See* ***Alt v. Cline***, 224 Wis. 2d 72, 83, 589 N.W.2d 21 (1999) (citing WIS. STAT. § 907.02). Common sense dictates that whether pushing on a door with a certain amount of force necessarily required entry past the door's threshold was well within the range of ordinary training or intelligence. *See* ***Alt***, 224 Wis. 2d at 83. Moreover, Johnson has not argued or shown that had a physics expert testified at trial, the expert would have testified that breaking Zeman's door would *not* have necessitated entry; in other words, Johnson has not shown that there is a reasonable probability that the outcome of trial would have been different. *See* ***Strickland***, 466 U.S. at 694.

*B. Johnson's sentence was neither overly harsh nor excessive.*

¶34 In the alternative, Johnson argues that the trial court erroneously exercised its discretion because his sentence of four years' initial confinement followed by four years' extended supervision was harsh and excessive.

¶35 As we have oft-repeated, sentencing lies within the trial court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We presume that the trial court acted reasonably. *See* ***Gallion***, 270 Wis. 2d 535, ¶18. "The defendant has the burden of showing that the 'sentence was based on clearly irrelevant or improper factors.'" ***Id.***, ¶72 (citations omitted).

¶36 The trial court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.

The trial court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 n.11. The trial court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶37 The trial court must also "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

¶38 Johnson takes issue not with the sentence itself, but with the following remarks the trial court made describing the sentence as "more than enough:"

> [T]he court believes that the [S]tate's recommending nine years. I think eight years is more appropriate. I agree with four years of confinement, but I think four years of extended supervision [as opposed to the recommended five] *is more than enough*.

(Emphasis added.)

¶39 According to Johnson, the phrase "more than enough" indicates that the sentence was overly harsh and more excessive than what was required here. We are not convinced. Johnson's analysis of this singular phrase is not only unrealistic and overly-technical, but also contrary to the context of the trial and sentencing hearing. Indeed, the sentencing court considered the range of sentences possible at the sentencing hearing, took into account recommendations from the State, the defense, and the presentence investigation report, and sentenced Johnson well within the confines of the sentence allowed by the statute.

*See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Furthermore, the trial court also noted that while Johnson apologized to the victim during the sentencing hearing, he did not accept responsibility for the crime. Because the court considered the proper factors and specified the objectives of the sentence on the record, the trial court did not erroneously exercise its discretion. *See*, *e.g.*, ***Stenzel***, 276 Wis. 2d 224, ¶7.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.