COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2054-CR **Cir. Ct. No. 2011CF400**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH R. JACKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Joseph R. Jackowski appeals from a judgment of conviction for operating while intoxicated (fifth offense), contrary to WIS. STAT. § 346.63(1)(a) (2011-12), and from an order denying his postconviction motion

for a new trial based on the alleged ineffective assistance of trial counsel.[1] Jackowski argues that the trial court erroneously exercised its discretion when it denied his motion without a hearing. We affirm.

BACKGROUND

¶2 Jackowski was charged with operating while intoxicated (fifth offense) and operating with a prohibited alcohol concentration (fifth offense). Four different attorneys represented Jackowski during the pretrial and jury trial proceedings. Jackowski's second attorney filed a motion *in limine* offering to stipulate that Jackowski had four prior convictions for operating-while-intoxicated-related offenses. However, when the case went to trial ten months later, neither the parties nor the trial court addressed the motion *in limine*.

¶3 When the arresting officer testified, trial counsel cross-examined him about the blood drawn from Jackowski at a hospital. Then trial counsel asked: "So it is not your Department's practice to do a breath test?" The officer responded: "No. This was a——that's an option that he can have at the station if he wants, but the primary test—this was a potential fifth offense. The primary test is a blood draw." Trial counsel moved for a mistrial, arguing that the officer should not have volunteered the information that this was Jackowski's fifth offense.

¶4 While the trial court at first questioned whether the trial could continue, it later denied the mistrial motion after the State asserted that at the time

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the testimony was given, there had not yet been a stipulation as to prior convictions, so the burden was on the State to demonstrate that Jackowski had prior convictions, which was one of the elements of the charged crimes. *See* WIS JI—CRIMINAL 2600C cmt. 9 (2007) (explaining that if a defendant does not admit the "status element" of having three or more prior convictions as counted under WIS. STAT. § 343.307(1), the jury should be instructed that it must determine whether that element was proven).

¶5 We note that as the trial court was considering the motion to strike, Jackowski agreed to stipulate to having four prior offenses. The trial court accepted the stipulation and said that because Jackowski "has now … given up his right to have this element proven before the jury … there will be no further evidence of prior convictions." The trial court suggested that the jury should be instructed "to disregard the reference to the prior offenses." Trial counsel disagreed, stating that she believed the curative instruction would "make it worse." Based on trial counsel's preference, no curative instruction was given. Further, given Jackowski's midtrial stipulation, the jury was not asked to make a finding that Jackowski had three or more prior convictions.

¶6 The jury found Jackowski guilty of both charges.[2] The trial court sentenced Jackowski to three years of initial confinement and three years of extended supervision, but it stayed that sentence and placed him on probation for three years.

[2] Pursuant to WIS. STAT. § 346.63(2)(am), when a person is found guilty of both operating while intoxicated and operating with a prohibited alcohol concentration, as was the case here, "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under [WIS. STAT. §§] 343.30(1q) and 343.305." In this case, the judgment of conviction states that Jackowski was convicted of operating while intoxicated.

¶7 After new counsel was appointed for Jackowski, he filed a motion seeking a new trial on grounds that his trial counsel had provided ineffective assistance. Jackowski alleged that his trial counsel acted deficiently when she "failed to address the issue of stipulating to his prior OWI convictions before the start of trial." (Some capitalization omitted.) Jackowski argued that he was prejudiced by trial counsel's deficient performance because "any mention of the OWI priors would certainly 'undermine confidence in the outcome'" of the trial. (Quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).) Jackowski explained: "If not for counsel's error of not attempting to stipulate as to Mr. Jackowski's prior OWI convictions, there is a reasonable probability that the result of her mistrial motion would be different, namely that it would have been granted."

¶8 The trial court denied Jackowski's motion in a written order, without a hearing. It said that "[w]ithout determining if trial counsel's actions were deficient," it had concluded "that the failure to address the possibility of a stipulation at the commencement of the trial was not prejudicial to [Jackowski's] case." The trial court explained:

> The court heard the trial and observed the witnesses as well as the video that was presented. All of the evidence overwhelmingly supported a finding beyond a reasonable doubt of the defendant's guilt of intoxication and operating while intoxicated. There was also evidence of a blood test that registered .18, which was nine times more than the .02% concentration level permitted…. There is simply not a reasonable probability that a reasonable jury would have acquitted the defendant on the evidence presented independent of [the officer's] statement about it being a potential fifth offense.

This appeal follows.

LEGAL STANDARDS

¶9 This appeal concerns the denial of Jackowski's postconviction motion. Our supreme court has summarized the applicable standard of review:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. However, 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, the [trial] court has the discretion to grant or deny a hearing. We require the [trial] court to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion. We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations and internal quotation marks omitted).

¶10 ***Allen*** also outlined the legal standards that apply to allegations of ineffective assistance of counsel:

> We follow a two-part test for ineffective assistance of counsel claims. A defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial. We have determined that an attorney's performance is deficient if the attorney made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. The defendant must also show the performance was prejudicial, which is defined as a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A movant must prevail on both parts of the test to be afforded relief.

Id., ¶26 (citations and internal quotation marks omitted).

DISCUSSION

¶11 Jackowski argues that the trial court erred when it denied his postconviction motion without a hearing because his "motion alleged facts which, if true, would show" that his trial counsel performed deficiently when she "failed to address the issue of stipulating to his prior OWI convictions before the start of the trial." (Some capitalization omitted.) Jackowski asserts that he was prejudiced by his trial counsel's allegedly deficient performance because the lack of a stipulation was the basis for the trial court's decision to deny Jackowski's motion for a mistrial. Jackowski also notes that if the stipulation had been made, the officer might not have volunteered that this was Jackowski's fifth offense. The trial court chose not to determine whether trial counsel's performance was deficient, and we will likewise take that approach. *See* ***Strickland***, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to … address both components of the inquiry if the defendant makes an insufficient showing on one."). We turn, then, to whether the record conclusively demonstrated that Jackowski was not prejudiced by his trial counsel's alleged deficient performance.

¶12 As noted, Jackowski's postconviction motion asserted that the prejudice prong of the ineffective-assistance-of-counsel test was satisfied because "any mention of the OWI priors would certainly 'undermine confidence in the outcome.'" *See* ***Strickland***, 466 U.S. at 694. In support, Jackowski cited ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), where the court considered whether a trial court had:

> erroneously exercised its discretion when it allowed the introduction of evidence of two or more prior convictions, suspensions or revocations as counted under [WIS. STAT.] § 343.307(1), and further submitted that element to the jury when the defendant fully admitted to the element and the purpose of the evidence was solely to prove that element.

Alexander, 214 Wis. 2d at 664-65. ***Alexander*** held "that when the sole purpose of introducing any evidence of a defendant's prior convictions, suspensions or revocations under … § 343.307(1) is to prove the status element and the defendant admits to that element, its probative value is far outweighed by the danger of unfair prejudice to the defendant." ***Alexander***, 214 Wis. 2d at 651.

¶13 Although ***Alexander*** did not involve an ineffective-assistance-of-counsel challenge, Jackowski argued in his motion and again in this appeal that the case "at least stands for the proposition that any mention of the defendant's OWI convictions [poses] a great risk of the jury determining the defendant's guilt or innocence on his propensity to drink and drive rather than on the facts of the case at hand."

¶14 In response, the State notes that after the court in ***Alexander*** "concluded that the trial court had erred in allowing the State to present evidence of the number of priors the defendant had," it went on to conclude "that the error was harmless." The State asserts that just as the court in ***Alexander*** considered whether the error was harmless, it was proper for the trial court in this case to consider "whether it is reasonably probable that the error made any difference."

¶15 To the extent Jackowski is suggesting that ***Alexander*** stands for the proposition that a defendant has been prejudiced *per se* where trial counsel fails to stipulate to the number of convictions and that leads to the denial of a mistrial motion when a witness volunteers information about prior OWI convictions, we

reject his argument. ***Alexander*** did not address ineffective assistance of counsel. Further, ***Alexander*** applied the harmless error test to its factual situation and concluded "that because of the overwhelming nature of the evidence as to the defendant's guilt, admitting any evidence regarding his prior convictions, suspensions or revocations, and submitting the status element to the jury was harmless error." *See* ***id.*** at 652. We are not convinced that ***Alexander*** supports Jackowski's argument, and Jackowski has not provided any other authority for the proposition that the prejudice prong of the ineffective-assistance-of-counsel analysis is automatically satisfied where a witness testifies about the number of prior OWI convictions and a mistrial is not granted due to trial counsel's alleged ineffectiveness.

¶16 We turn next to Jackowski's argument that "the evidence was not so overwhelming that the court can definitively say the [officer's] comment would not undermine confidence in the outcome." We disagree.

¶17 First, Jackowski does not dispute that he drove the vehicle, and the trial evidence supports the jury's finding that Jackowski was driving. The jury heard testimony from a gas station clerk who said that she saw a vehicle enter the gas station parking lot and then saw a man—whom she later identified as Jackowski—get out of the vehicle and pump gas. The clerk said that she did not see anyone else get out of the vehicle. After pumping the gas, Jackowski came into the gas station and spoke with the clerk. The jury saw video surveillance of the vehicle entering the gas station parking lot and Jackowski pumping gas, entering the store, and speaking with the clerk.

¶18 The arresting officer also interpreted the video, testifying that it shows that Jackowski entered the parking lot, made a U-turn, and pulled up to the

gas pump. Next, Jackowski pumped gas and, when he was finished, walked into the store. The officer testified that the man on the video was "clearly" Jackowski. The officer also said that he had reviewed the entire video recording and that it did not show anyone else ever exiting the vehicle. Jackowski did not testify at trial and the defense offered no witnesses. We agree with the State that "[n]o evidence at trial even hinted that Jackowski did not drive the vehicle."

¶19 The second factual finding that the jury had to make was whether Jackowski was intoxicated when he drove the vehicle. It is this element that Jackowski suggests was not proven by overwhelming evidence.

¶20 The State presented evidence that within two hours of driving, Jackowski's blood was drawn and the test results indicated that his blood alcohol content was .18 percent, which was nine times the legal limit for Jackowski because of his prior convictions. Nonetheless, Jackowski asserts that although the clerk testified that Jackowski appeared to be drunk when he first entered the store, "she also admitted that in the 40 minutes to an hour he was at the store, he went to the bathroom and outside by the dumpsters, where there are no cameras, and where he is out of sight of the clerk." Jackowski continues:

> The clerk also admitted she does not know what Mr. Jackowski might have been doing outside her vision or in the bathroom. In a case where the State must prove beyond a reasonable doubt that the defendant was intoxicated before he walked into the gas station, that particular testimony raises significant doubt as to the defendant's guilt.

(Record citation omitted.)

¶21 The trial court rejected this argument and so do we. The clerk testified that Jackowski "smelled of alcohol" and "was tipsy." She said that

Jackowski "kept walking around the store not really knowing what he was doing." The clerk said that at one point, "[h]e kind of fell into a chip rack." The clerk also testified that no alcohol is sold at the gas station, and the officer testified that no beverage containers were found on Jackowski or in his car. Further, the jury did not hear any testimony suggesting that Jackowski consumed alcohol after arriving at the gas station.

¶22 We agree with the trial court that "[t]here is simply not a reasonable probability that a reasonable jury would have acquitted the defendant on the evidence presented independent of [the officer's] statement about it being a potential fifth offense." Jackowski has not demonstrated that he was prejudiced by his trial counsel's alleged ineffectiveness.

¶23 Finally, we briefly address Jackowski's argument "that the result of the proceeding would have been different in another way if his counsel had stipulated to his prior convictions before the beginning of trial." He explains:

> [E]ven if the stipulation had been in place before [the officer] took the stand, it is very possible [the officer] still would have made the damaging comment. For one, the comment was not in response to the State attempting to prove the defendant's prior convictions, but was an unresponsive answer to one of Mr. Jackowski's attorney's questions on cross examination. The record also seems to indicate that the State did not prepare its witness to not mention the defendant's prior OWI convictions, as the prosecutor seemed at first to be unaware that it needed to prove the number of Mr. Jackowski's prior OWI convictions to the jury….
>
> If it is the case that the [officer] would have made the comment anyway, then there is a reasonable probability that the motion for a mistrial would have been granted.

(Record citations omitted.)

¶24 We decline to speculate what might have happened at trial if trial counsel had, in fact, entered the stipulation prior to trial. The theory Jackowski presented to the trial court in his postconviction motion was that his trial counsel's failure to stipulate to Jackowski's prior convictions led the trial court to deny Jackowski's mistrial motion. Speculation over what might have happened without the allegedly deficient conduct is not relevant to the issue currently before this court: whether Jackowski was denied the effective assistance of counsel such that he should receive a new trial.

¶25 We have concluded that the officer's reference to Jackowski's prior convictions did not undermine confidence in the outcome of the trial, because of the overwhelming evidence of Jackowski's guilt. Thus, Jackowski was not prejudiced by the lack of a pretrial stipulation to prior convictions, which led to the denial of the mistrial motion. We agree with the trial court that "the record conclusively demonstrates that [Jackowski] is not entitled to relief," and that it was therefore within the trial court's discretion whether to grant a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. The trial court did not erroneously exercise its discretion when it denied the motion without a hearing. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

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