COURT OF APPEALS DECISION DATED AND FILED

November 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP331-CR

Cir. Ct. No. 2013CM229

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL SCOTT KLINKENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: J. DAVID RICE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Daniel Klinkenberg appeals the circuit court's judgment convicting him, after a jury trial, of retail theft. He also appeals the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2013-14 version.

circuit court's order denying his motion for postconviction relief. Klinkenberg argues that the evidence was insufficient to support the jury's guilty verdict. Klinkenberg also argues that he received ineffective assistance of trial counsel. I conclude that the evidence was sufficient and that Klinkenberg fails to show that trial counsel was ineffective. Accordingly, I affirm the judgment and order.

Discussion

A. Sufficiency Of The Evidence

¶2 Although Klinkenberg's sufficiency of the evidence argument comes at the end of his briefing, I begin with that issue. *See* ***State v. Ivy***, 119 Wis. 2d 591, 610, 350 N.W.2d 622 (1984) ("[W]here a defendant claims on appeal … that the evidence is insufficient to sustain the conviction, the appellate court is required to decide the sufficiency issue even though there may be other grounds for reversing the conviction that would not preclude retrial.").

¶3 The test for sufficiency of the evidence is well established:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶4 Here, consistent with statutory requirements, the jury was instructed that, in order to find Klinkenberg guilty of the retail theft charge, it had to find that Klinkenberg intentionally took and carried away store merchandise without the store's consent. *See* WIS. STAT. § 943.50(1m) (2011-12). Put more simply, the jury had to find that Klinkenberg stole store merchandise.

¶5 The centerpiece of the State's case against Klinkenberg was security camera footage from the store where the alleged theft occurred. As discussed further below, Klinkenberg's sufficiency-of-the-evidence argument arises because the footage did *not* show Klinkenberg actually concealing merchandise or visibly leaving the store with unpurchased merchandise. Rather, if such conduct occurred, it had to be inferred from what the footage *did* show. I conclude for the reasons that follow that the evidence was sufficient.[2]

¶6 The security camera footage shown to the jury consisted of sequential video clips from different store security cameras. There are brief time gaps between clips, ranging from several seconds to a few minutes. An "asset protection" employee from the store testified that there were gaps because some areas of the store lack security camera coverage.

¶7 The security camera footage clips show Klinkenberg wearing a bulky winter coat that was large enough to conceal relatively large items. In addition, with one exception, they show him wearing a baseball cap that partly

[2] At trial, Klinkenberg also argued that the State failed to prove that Klinkenberg was the suspect shown on the security camera footage. On appeal, however, Klinkenberg makes no sufficiency-of-the-evidence argument relating to this identity issue. I therefore refer to the suspect as Klinkenberg throughout my sufficiency-of-the-evidence discussion.

hides identifying features. The exception is a clip in which Klinkenberg is seen from an overhead view and briefly removes his hat.

¶8 In an early clip in the sequence, Klinkenberg can be seen placing a boxed item in his cart that the store employee testified was a small, portable video camera. The next pertinent clip in the sequence lasts a few minutes. In it, Klinkenberg is seen in an area containing a display table with several unboxed, display model laptops. After minimal examination of the laptops, Klinkenberg places one of the laptops in his cart. He briefly leaves the area and returns with what appears to be a laptop bag or similar bag, and he places that bag in his cart as well. Klinkenberg then places a second display laptop in his cart. During the two or so minutes that Klinkenberg is near the display table and remains in the same place, he looks up and around the area numerous times. The clip then shows Klinkenberg leave that area. The next clip shows Klinkenberg in a nearby part of the store with what appear to be the same four items still in his cart.

¶9 The store employee testified that, although the display model laptops were for sale, their power cords and other items included with purchase were stored in a back room, and that a customer would need to request those items. She further testified that these items for the laptops in question remained in that back room. In addition, she testified that boxed, non-display laptops for sale were in locked cases.

¶10 The next pertinent clip from the security camera footage, taken a short time later, shows Klinkenberg near a counter in the sporting goods section of the store, now with a different combination of items in his cart. His cart now contains new items that the store employee identified as small propane bottles. The laptops are absent from the cart. Klinkenberg still has the video camera (or at

least its box) and the bag, but, while looking around once or twice, he quickly removes those two items from his cart, leaves them on the counter, and leaves the area.[3]

¶11 The final pertinent clip, occurring about two minutes later, is the one showing Klinkenberg from an overhead view. In that clip, he is seen checking out and paying for the small propane bottles, in cash.

¶12 Considering the above evidence, I conclude that there was a reasonable inference that Klinkenberg concealed the laptops in his coat and took them from the store. To review, Klinkenberg's behaviors and the reasonable inferences therefrom included that Klinkenberg:

- Wore a bulky coat that was large enough to conceal the laptops.[4]
- Wore a baseball cap, an easy and inconspicuous means of attempting to reduce the risk of being identified later.
- Put *two* laptops in his cart instead of one laptop, which would have been a more typical purchase.
- Selected *display* model laptops, the only laptops that were not in locked cases and that could be accessed without assistance from a store employee, rather than laptops in original packaging, as would be far more typical.
- Selected the laptops after spending a very brief time examining them.

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[3] The State's theory at trial was that Klinkenberg stole the video camera as well as the laptops. However, the jury was instructed that theft of a laptop "and/or" a video camera would suffice to find him guilty of retail theft. It is therefore enough to conclude that there was sufficient evidence of stealing the laptops.

[4] Based on the time of year of the alleged theft, late December, the bulky nature of Klinkenberg's coat was not by itself suspicious.

- Failed to seek and obtain the power cords and other accessories for the laptops, items that likely would have been normal for someone intending to purchase the laptops but not for someone stealing the laptops.
- Looked around an unusual number of times during the brief period he was near the laptop display table, suggesting that he was checking to see if he was being watched.
- Removed the laptops from the cart while in a portion of the store where he was not visible on a security camera.
- Left the video camera (or at least its box) and the bag, but not the laptops, on a counter in the sporting goods section, while again looking around, as if to see if he was being watched.
- Proceeded quickly from the counter to a checkout line to pay for the small propane bottles, a relatively low-cost item compared to the laptops.
- Paid in cash, thereby leaving no identity trail in that regard.

¶13 I observe that, based on the security camera footage, the only possibility apart from Klinkenberg's having stolen the laptops is that Klinkenberg oddly removed them from the cart and left them somewhere else in the store when he happened to be out of camera range. But this latter scenario was plainly unlikely, especially given that Klinkenberg was captured on camera leaving other items on the sporting goods counter. If Klinkenberg had innocently decided not to buy the laptops, why not also leave them on the same counter? It is true that innocent shoppers sometimes pick up items and leave them in different store locations, but here, given the totality of Klinkenberg's behaviors and the nature of the items (laptops), the jury could reasonably infer that that was highly unlikely.

¶14 Klinkenberg seems to argue that there is no evidence that the laptops shown in the video were actually missing from the store, rather than simply misplaced somewhere inside the store. I disagree. The security camera footage

itself provides evidence that Klinkenberg took the laptops. In addition, the store employee gave testimony supporting a finding that the store had a process to determine, and had used that process to determine, that the laptops Klinkenberg had handled were missing from the store.

¶15 More generally, Klinkenberg argues that the State's case was "too full of holes" to support a finding that Klinkenberg stole the laptops. Klinkenberg asserts that there was a lack of evidence on a number of topics. He points out that there was no evidence explaining why it took the store more than a month to fully investigate and report the stolen laptops; no evidence showing when the store first discovered the laptops were missing; no evidence that any stolen laptops were recovered; no evidence that Klinkenberg resold the laptops; no evidence of the store's laptop inventory numbers or serial numbers; no testimony from the checkout clerk regarding Klinkenberg's demeanor or appearance; and no evidence showing exactly how Klinkenberg would have managed to keep laptops concealed in his coat in a non-obvious way. While such evidence may have made the State's case stronger, I fail to see why any of it was necessary to supply sufficient evidence to support Klinkenberg's conviction. In effect, these are arguments properly directed at a fact finder as part of an effort to persuade the fact finder that it should not find guilt. They are not arguments that show that the evidence supporting guilt is insufficient.

¶16 Klinkenberg appears to argue that the evidence was insufficient because no time line or other time evidence was presented to the jury, particularly with regard to the crucial gap in the security camera coverage during which Klinkenberg would have needed to conceal the laptops. Klinkenberg supports this argument by asserting that "time markers" on the security camera footage do not, in Klinkenberg's words, "correspond to any natural, coherent time system." These

time-related arguments are not persuasive because, contrary to Klinkenberg's argument, the security camera footage clips shown to the jury include time counters appearing to demonstrate the actual time and sequence of events as described above. And, Klinkenberg fails to develop a sufficiency-of-the-evidence argument based on these time counters. Thus, I could stop my analysis of the time question here, but I choose to note that the time counters show a sufficient gap of nearly three minutes during which Klinkenberg would have had time to move to a different part the store, obtain the small propane bottles, and conceal the laptops on his person.[5]

¶17 Klinkenberg correctly points out that the State's theory of the case required Klinkenberg to have removed alarm security devices called "spider wrap" or "spider wire" from the laptops. He argues, as I understand it, that the State offered no specific explanation as to *how* he could have removed those devices without setting off their alarms. I disagree that evidence of "how" was necessary. To support the State's theory, it was enough to show that Klinkenberg could have removed, and did remove, the devices. The State made this showing with testimony suggesting that the devices could sometimes be defeated and that store personnel found two devices in a part of the store that Klinkenberg would have passed through.

[5] When Klinkenberg refers to "time markers," he apparently means times that relate only to the length of the computerized video files that contain the security camera footage as shown to the jury. Those time markers plainly relate to the time length of the footage, not to the actual time and sequence of events.

¶18 To sum up so far, I reject Klinkenberg's challenge to the sufficiency of the evidence for the reasons stated above. I turn next to Klinkenberg's ineffective-assistance-of-counsel claim.

B. Ineffective Assistance Of Counsel

¶19 To state a claim for ineffective assistance of counsel, the defendant must demonstrate both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. ***State v. Romero-Georgana***, 2014 WI 83, ¶39, 360 Wis. 2d 522, 849 N.W.2d 668. "To prove deficiency, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" ***Id.***, ¶40 (quoted source omitted). "The defendant must overcome the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" ***Id.*** (quoted source omitted). "The prejudice inquiry asks whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.***, ¶41 (quoted source omitted).

¶20 The standard of review is mixed. I uphold the circuit court's findings of fact unless those findings are clearly erroneous. ***State v. Lombard***, 2004 WI 95, ¶46, 273 Wis. 2d 538, 684 N.W.2d 103. Whether counsel was ineffective is a question of law for de novo review. ***Id.***

¶21 Klinkenberg makes four ineffective-assistance-of-counsel arguments. Before summarizing those arguments, I set forth additional facts that will make them easier to understand. It is enough to say for now that all of the arguments broadly relate to identification evidence. Klinkenberg's identity as the suspect was subject to reasonable debate going into trial because of the low quality and resolution of the security camera footage. Although the footage reveals

several potentially identifying characteristics—such as the suspect's hairline, approximate hair color and skin color, the presence of eyeglasses, and approximate height and weight—it does not reveal detailed facial features such as nose shape and size or eye color.

¶22 At trial, the State sought to bolster the identification value of the security camera footage by using the testimony of a detective named Meyers. Meyers testified that he identified Klinkenberg as the man in the footage and that he recognized Klinkenberg based on "prior law enforcement contacts" with Klinkenberg.

¶23 I pause here to note that Klinkenberg does *not* argue that counsel was ineffective by failing to object to this testimony. However, as we will see, Klinkenberg's ineffective assistance arguments all relate to the Meyers identification.

¶24 Klinkenberg took the stand in his defense and denied having any prior contact with Meyers. This denial opened the door to additional damaging evidence of Klinkenberg's prior contact with Meyers, which was part of a separate criminal investigation of Klinkenberg.

¶25 Turning to summarize Klinkenberg's arguments, his first three are closely related. Klinkenberg argues that counsel was deficient by:

> (1) failing to conduct an adequate pretrial investigation into Detective Meyers' identification of Klinkenberg, and, in particular, failing to resolve *before trial* the apparent discrepancy in Klinkenberg's and Meyers' claims about prior contact;
>
> (2) failing to adequately prepare Klinkenberg to testify; and

> (3) eliciting Klinkenberg's testimony denying prior contact with Meyers, while knowing that this would open the door to prejudicial evidence.

¶26 As to prejudice, Klinkenberg's arguments are somewhat unclear. He argues that these three claimed deficiencies all resulted in prejudice for the "same set of reasons." As I understand it, he means to argue that, but for counsel's alleged deficiencies, Klinkenberg would have avoided testifying about Meyers, and the jury would not have heard damaging evidence about the separate criminal investigation; instead, because of counsel's claimed errors, Klinkenberg's "story" fell apart on the witness stand and the jurors heard evidence suggesting that Klinkenberg was a criminal and, therefore, untrustworthy.

¶27 I explain in the following three sections why I reject Klinkenberg's first three ineffective assistance arguments, adding additional facts as needed. In a final section, I explain why I reject his remaining argument.

1. Pretrial Investigation Into Meyers' Identification

¶28 Counsel's testimony at the ***Machner***[6] hearing suggested that counsel was aware, before trial, of a police report showing that Detective Meyers was able to spontaneously identify Klinkenberg as the suspect in the security camera footage because Meyers recognized Klinkenberg from a separate criminal investigation. According to trial counsel, Klinkenberg repeatedly and unequivocally denied prior contact with Meyers. Counsel chose not to investigate this apparent discrepancy further.

[6] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶29 As indicated above, Klinkenberg argues that a reasonable attorney would have conducted further pretrial investigation in order to resolve this apparent discrepancy. I disagree that this was the only reasonable course and, therefore, conclude that Klinkenberg's first argument fails on the deficiency prong.

¶30 It is of course true, as Klinkenberg asserts, that counsel has a duty to investigate and cannot always take a client's assertions or recollections at face value. *See, e.g.*, ***State v. Pitsch***, 124 Wis. 2d 628, 637-39, 369 N.W.2d 711 (1985). But counsel need not waste efforts on investigations that are virtually certain to yield no useful results. Given the circumstances here, a reasonable attorney could have assumed that Klinkenberg must have been lying or mistaken when he denied having prior contact with Meyers. Otherwise, Meyers' spontaneous identification of Klinkenberg as the suspect in the security camera footage made no sense. And, as to whether Klinkenberg was in fact lying or instead mistaken, a reasonable attorney could have concluded that it did not matter. Either way, Meyers' identification had the same evidentiary value and nothing was to be gained by putting Klinkenberg on the stand to deny prior contact with Meyers. Accordingly, I conclude that counsel's decision *not to investigate further* fell within the "'wide range'" of what was reasonable. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶40 (quoted source omitted).

¶31 I acknowledge that some of counsel's ***Machner*** hearing testimony suggested that counsel *believed* Klinkenberg's denial of prior contact with Meyers. But counsel's subjective belief is not the standard. "[R]egardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient

performance." ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461.

2. Preparation Of Klinkenberg To Testify

¶32 I turn to Klinkenberg's argument that counsel was ineffective in failing to adequately prepare him to testify. To begin, I note that, although counsel's testimony on this topic at the ***Machner*** hearing was mixed, counsel gave ample testimony to support a reasonable finding that he adequately prepared Klinkenberg to testify.[7] The fact that counsel did not have specific recollections about some aspects of preparation does not defeat such a finding. Thus, Klinkenberg fails to show that counsel was deficient in preparing him to testify.

¶33 Further, Klinkenberg fails to persuasively make a causal connection between any particular alleged failure in counsel's preparation of Klinkenberg and any particular piece of damaging evidence. Thus, Klinkenberg fails to persuade me on the prejudice prong as well. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶41 ("The prejudice inquiry asks whether 'there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different.'" (quoted source omitted; emphasis added)).

¶34 That might seem to be the end of Klinkenberg's inadequate-preparation argument. However, part of what Klinkenberg really seems to be arguing is that counsel failed to adequately *advise* Klinkenberg not to testify that he had no prior contact with Meyers because such testimony would open the door

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[7] *See* ***State v. Leutenegger***, 2004 WI App 127, ¶30 n.7, 275 Wis. 2d 512, 685 N.W.2d 536 ("Appellate courts may assume facts, reasonably inferable from the record, in a manner that supports the trial judge's decision.").

to highly damaging evidence, and that, but for counsel's failure of advice, Klinkenberg would not have testified on that topic, the door would not have been opened, and the jury would not have heard damaging testimony.

¶35 If that is Klinkenberg's argument, I reject it on the prejudice prong because Klinkenberg again fails to show a causal connection. That is, Klinkenberg fails to show that, but for counsel's alleged lack of advice, Klinkenberg would have refrained from testifying that he had no prior contact with Meyers. On the contrary, all indications in the record are that Klinkenberg was determined to give that testimony *regardless* of counsel's advice. Counsel's testimony at the ***Machner*** hearing indicated that he and Klinkenberg specifically discussed the topic of contradicting Meyers, but that Klinkenberg was "adamant" in wanting to testify to contradict both Meyers and other aspects of the State's case. Similarly, the circuit court found, based on counsel's testimony and its own observations of Klinkenberg, that Klinkenberg "insist[ed]" on testifying in order to contradict several aspects of the State's identification evidence.

3. Elicitation Of Klinkenberg's Testimony

¶36 Klinkenberg's third ineffective assistance argument, that counsel was ineffective by eliciting Klinkenberg's testimony denying prior contact with Meyers, is easily resolved based on my analysis above. Counsel could not prevent Klinkenberg from testifying on this topic when Klinkenberg insisted on giving the testimony regardless of counsel's advice. The questioning was no longer than necessary to allow Klinkenberg to deny having prior contact with Meyers.

4. Klinkenberg's Remaining Ineffective Assistance Argument

¶37 Klinkenberg's last argument relates again to Detective Meyers' identification, some evidence of which was admitted through the testimony of a different officer involved in investigating the theft. Pertinent to Klinkenberg's argument, that officer, unlike Meyers, testified regarding the identification *before* the jury viewed the security camera footage.

¶38 Klinkenberg argues that counsel was deficient for failing to object to the officer's testimony on various grounds. He argues that the testimony was prejudicial because of a phenomenon known as "confirmation bias" that, Klinkenberg argues, would have tainted the jury's ability to objectively evaluate the footage after they had already heard about Meyers' identification. Assuming, without deciding, that counsel performed deficiently in failing to object, I conclude that Klinkenberg fails to show prejudice. Klinkenberg's explanation of the confirmation bias phenomenon is too general and undeveloped to persuade me that it could play a significant role in a jury's verdict under circumstances like those here.

Conclusion

¶39 For the reasons stated above, I affirm the judgment of conviction and the order denying Klinkenberg's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.