COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP813 **Cir. Ct. No. 2007CF41**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN D. FLOWERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kevin Flowers, pro se, appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion. Flowers argues his

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

postconviction counsel was ineffective and the circuit court exhibited judicial bias when denying his postconviction motion. We reject Flowers' arguments and affirm.

BACKGROUND

¶2 After a jury trial in 2008, Flowers was convicted of five counts of burglary to a building or dwelling as a party to a crime, all as a repeater. After sentencing, Flowers filed a WIS. STAT. RULE 809.30 motion for postconviction relief alleging, among other things, that his trial counsel was constitutionally ineffective. The circuit court denied Flowers' postconviction motion after a ***Machner*** hearing.[2] Flowers appealed and we affirmed the judgment of conviction and the order denying Flowers postconviction relief. *See* ***State v. Flowers***, No. 2010AP1709-CR, unpublished slip op., ¶1 (WI App Oct. 18, 2011). The supreme court denied Flowers' petition for review.

¶3 In 2013, Flowers, pro se, filed a WIS. STAT. § 974.06 postconviction motion, alleging that his postconviction counsel was constitutionally ineffective. Following a ***Machner*** hearing, the circuit court denied Flowers' § 974.06 postconviction motion. Flowers now appeals. Further facts are discussed in the decision below.

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

DISCUSSION

¶4 Flowers argues his postconviction counsel was ineffective in seven different ways and that the circuit court exhibited judicial bias when denying his postconviction motion. We reject each of Flowers' arguments.

Ineffective Assistance of Counsel

¶5 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's conduct constituted deficient performance; and (2) the defendant was prejudiced as a result of counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must demonstrate that counsel's actions or inactions "were outside the wide range of professionally competent assistance." ***Id.*** at 690. To establish prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We need not address both prongs of the ***Strickland*** test if a defendant fails to make a sufficient showing on one prong. ***Id.*** at 697.

¶6 When a defendant alleges that postconviction counsel was ineffective for failing to challenge trial counsel's purportedly deficient performance, the defendant must first demonstrate "that trial counsel's performance was deficient and prejudicial." ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Ultimately, the question of whether counsel was constitutionally ineffective "involves mixed questions of law and fact." ***State v. Howard***, 2001 WI App 137, ¶23, 246 Wis. 2d 475, 630 N.W.2d 244. We will not set aside the circuit court's findings of fact regarding counsel's

actions and the reasons for them unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *See* ***id.***

¶7 Flowers first argues his postconviction counsel was ineffective when she failed to investigate potentially exculpatory evidence. We disagree. At the 2010 ***Machner*** hearing, police Lieutenant David Paral testified that on October 9, 2006, he made contact with Kenneth Mingus regarding a suspected burglary that occurred at a residence on Quincy Street. Mingus told Paral that "at about 1:45 p.m." on October 9, "a black male knocked on his door" claiming to "be looking for a house in the neighborhood to give a roof estimate."

¶8 Flowers argues that his postconviction counsel should have further investigated the suspected Quincy Street burglary because, if she had, she would have eventually discovered that a person who fit the description Mingus gave of the Quincy Street suspect was in custody and suspected of committing burglaries in the same general area of the city. Regardless of the claimed deficient performance, Flowers has failed to demonstrate that this failure prejudiced him. In Flowers' direct appeal, we held that, even if the jury heard testimony from Mingus that the Quincy Street burglary suspect was not Flowers, "[b]ecause of the cumulative nature of the evidence, and again because a second perpetrator is consistent with a party to the crime theory, the omission of [this evidence is] nonprejudicial." ***Flowers***, No. 2010AP1709-CR, unpublished slip op., ¶20. Likewise, we conclude the omission of evidence that a person other than Flowers fit the description Mingus gave of the Quincy Street burglary suspect, and was later in custody and suspected of committing burglaries in the same general area of

the city, is nonprejudicial because it is cumulative and consistent with a party to the crime theory. *See* ***id.*** Because Flowers has failed to demonstrate prejudice, we need not address deficient performance. *See* ***Strickland***, 466 U.S. at 697.

¶9 Second, Flowers contends his postconviction counsel was ineffective for failing to amend her postconviction motion to include a claimed ***Brady*** violation. ***Brady v. Maryland***, 373 U.S. 83 (1963). Flowers argues the State committed a ***Brady*** violation when it withheld police reports related to the suspected Quincy Street burglary.[3] Under ***Brady***, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Id.*** at 87. In order to establish a ***Brady*** violation, a defendant must demonstrate that the evidence withheld by the prosecution is material; that is, had the withheld evidence been given to the defendant, there is a reasonable probability that the result of the proceeding would have been different. ***State v. Harris***, 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737.

¶10 Flowers fails to demonstrate that his counsel's alleged deficient performance prejudiced him. Again, because we held in Flowers' direct appeal that the cumulative nature of the evidence and the possibility of a second perpetrator is consistent with a party to the crime theory, the omission of evidence

[3] In his WIS. STAT. § 974.06 postconviction motion and brief before the circuit court, Flowers also argued his postconviction counsel was constitutionally ineffective for failing to amend her postconviction motion to include a claimed ***Brady*** violation regarding fingerprint and shoeprint evidence. *See* ***Brady v. Maryland***, 373 U.S. 83 (1963). Flowers failed to raise that argument on appeal. Therefore, we do not address it. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (deeming issue not briefed or raised on appeal abandoned).

regarding the suspected Quincy Street burglary was not prejudicial. *See* ***Flowers***, No. 2010AP1709-CR, unpublished slip op., ¶20. We need not address deficient performance. *See* ***Strickland***, 466 U.S. at 697.

¶11 Third, Flowers claims his postconviction counsel was ineffective for failing to amend her postconviction motion to include a claim of newly discovered evidence. To prevail on a claim of newly discovered evidence, "a defendant must prove: '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (quoting ***State v. McCallum,*** 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)).

¶12 Flowers' claimed "newly discovered" evidence is "that a person other than Flowers fit the description Mingus gave of the Quincy Street burglary suspect" and that this person "was later in custody and suspected of committing burglaries in the same general area of the city." *Supra* ¶8. As we have previously concluded, this evidence was cumulative of other evidence presented at trial. *See supra* ¶¶8, 10. Because the "newly discovered" evidence is merely cumulative, Flowers' ineffective assistance of counsel claim fails based on his inability to establish prejudice. *See* ***Plude***, 310 Wis. 2d 28, ¶32 (recognizing that to prevail defendant must demonstrate that newly discovered evidence is not merely cumulative).

¶13 Fourth, Flowers argues his postconviction counsel was ineffective for failing to challenge his trial counsel's failure to present an expert witness to

explain the dangers of cross-racial identification.[4] Generally, the decision of whether to call a witness is left to the discretion of trial counsel—that is, the decision of counsel will not be disturbed if it is a strategic one "based upon a reasonable view of the facts." ***Whitmore v. State***, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973).

¶14 At trial, Flowers' trial counsel sought to discredit the testimony of witness Sharon Mauldin, who identified Flowers from a photo array, by eliciting testimony that, although Flowers had a mole underneath one of his eyes, Mauldin failed to mention this in her description of Flowers to police. Moreover, a stipulation between the parties at trial demonstrated that another witness, Kevin Debroux, *failed* to identify Flowers from a photo array. Based on a strategy of both highlighting the parties' stipulation regarding Debroux's failure to identify Flowers—and discrediting Mauldin's positive identification of Flowers, Flowers' trial counsel testified at the ***Machner*** hearing that he decided presenting an expert witness to explain the dangers of cross-racial identification was unnecessary.

¶15 We conclude that Flowers fails to establish his trial counsel performed deficiently by deciding to forgo calling an expert witness on cross-racial identification. That was a "strategic decision based upon a reasonable view of the facts." ***Id.*** On appeal, a circuit court's finding that counsel's trial strategy was reasonable is "virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. In addition,

[4] "A cross-racial identification occurs when an eyewitness is asked to identify a person of another race." ***State v. Cromedy***, 727 A.2d 457, 461 (N.J. 1999).

as the circuit court noted in its order denying Flowers' postconviction motion, calling an expert witness on cross-racial identification could have "prove[n] harmful" to Flowers' defense because Debroux failed to identify Flowers in a photo array. The jury may have concluded—based on the expert witness's testimony—that Debroux's failure to identify Flowers was the result of difficulty with cross-racial identification, thereby undermining the benefit of the proposed expert testimony. Thus, Flowers' postconviction counsel was not deficient in failing to challenge trial counsel's failure to present such an expert witness.

¶16 Fifth, Flowers argues that his postconviction counsel was ineffective when she failed to challenge his trial counsel's failure to object to the State's improper use of Flowers' post-arrest silence to impeach him, and the prosecutor's suggestion of facts to the jury that were not admitted into evidence. A defendant's post-arrest silence, after receiving ***Miranda***[5] warnings, may not be used at trial to impeach the defendant's testimony. ***Doyle v. Ohio***, 426 U.S. 610, 618-19 (1976).

¶17 At trial, Flowers testified the stolen items found in his possession were purchased by his wife. The State asked Flowers on cross-examination whether "you're telling" us "that [your wife purchased the stolen items] … today almost two years later?" Flowers' response established that Flowers told police, *on the day he was arrested*, that the items in question were his wife's—not his. Because the testimony elicited by the State's cross-examination did not relate to Flowers' post-arrest silence, but instead established that Flowers affirmatively told police that his wife owned the items in question, the State did not improperly use Flowers' post-arrest silence to impeach his testimony. *See* ***id.*** Therefore,

[5] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Flowers' postconviction counsel was not deficient when she failed to challenge Flowers' trial counsel's failure to object to this question.

¶18 On cross-examination, the State asked Flowers whether he was a "user of crack cocaine back in October of 2006" and whether he "committed these burglaries at a frantic pace to get money to buy crack cocaine because of your drug addiction[.]" As long as a prosecutor has a good-faith basis for asking a witness a question on cross-examination, the question is permissible. *See* ***State v. Yang***, 2006 WI App 48, ¶15, 290 Wis. 2d 235, 712 N.W.2d 400. The State argues that it had a good-faith basis to ask Flowers these questions because Flowers testified (1) his wife was engaged in selling and bartering crack cocaine for other goods and (2) he had used crack cocaine in the past. We disagree.

¶19 Contrary to the State's assertion, Flowers did not testify he had used crack cocaine in the past; rather, he testified that he was not a user of crack cocaine in October 2006. Although Flowers testified that his wife sold crack cocaine, this does not establish a good-faith basis to conclude Flowers was a crack cocaine user in October 2006. Thus, the State lacked a good-faith basis to ask Flowers these two questions. Nonetheless, Flowers fails to demonstrate that his trial counsel's failure to object to these two questions resulted in prejudice. The evidence adduced against Flowers at trial was overwhelming: stolen items from multiple burglaries were discovered in both Flowers' vehicle and home. *See* ***Flowers***, No. 2010AP1709-CR, unpublished slip op., ¶¶9-10. Thus, Flowers' postconviction counsel was not ineffective for failing to challenge trial counsel's lack of objection to the questions the State asked Flowers on cross-examination.

¶20 Flowers next contends the burglary and receiving stolen property charges were multiplicitous. He claims his postconviction counsel was ineffective

for failing to challenge his trial counsel's ineffective assistance in forgoing their challenge. We disagree.

¶21 Our state constitution prohibits multiple punishments "for charges that are identical in law and fact unless the legislature intended to impose such punishments." ***State v. Patterson***, 2010 WI 130, ¶15, 329 Wis. 2d 599, 790 N.W.2d 909; *see also* WIS. CONST. art. I, § 8(1) ("[N]o person for the same offense may twice be put in jeopardy of punishment …."). "Multiplicity claims are analyzed under a two-part test." ***Patterson***, 329 Wis. 2d 599, ¶12. First, we "examine[] whether the offenses are identical in law and fact." ***Id.*** Second, we determine "whether the legislature intended multiple punishments for the conduct and offenses at issue." ***Id.***

¶22 The burglary and receiving stolen property charges are not identical in law and fact. One of the elements of burglary is "[t]he defendant intentionally entered a building." WIS JI—CRIMINAL 1421 (2001) (burglary). In contrast, intentionally entering a building is not an element of receiving stolen property. *See* WIS JI—CRIMINAL 1481 (2012) (receiving stolen property). Therefore, we presume the legislature intended to permit multiple punishments for committing these offenses. *See* ***Patterson***, 329 Wis. 2d 599, ¶15. "The offenses are multiplicitous only if this presumption is rebutted by clear evidence of contrary legislative intent." ***Id.***, ¶17. Flowers fails to rebut this presumption by clear evidence of contrary legislative intent. Thus, Flowers' postconviction counsel was not deficient when she failed to challenge Flowers' trial counsel's failure to challenge the alleged multiplicitous charges contained in the amended information.

¶23 Finally, Flowers argues his postconviction counsel was ineffective because she did not question his trial counsel's failure to object to the admission of other acts evidence. Flowers appears to argue the other acts evidence consisted of (1) Flowers' use of a credit card that was stolen from one of the burglaries with which Flowers was charged; and (2) his possession of a television that was purchased with this same credit card. Once again, we disagree.

¶24 This evidence is not "other" acts evidence. Other acts evidence refers to "instances of a person's … conduct … not the subject of [the case being litigated]." RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 236 (5th ed. 2011). Here, the evidence Flowers points to is "direct" circumstantial evidence (without an impermissible propensity inference) that Flowers committed—or at least was a party to—a burglary of a dwelling. Therefore, Flowers' trial counsel was not ineffective in failing to object to the admission of the evidence. Accordingly, his postconviction counsel could not be ineffective for failing to raise this issue.

Judicial Bias

¶25 "When considering a claim of judicial bias, the reviewing court presumes that the judge was unbiased." ***State v. Pinno***, 2014 WI 74, ¶92, 356 Wis. 2d 106, 850 N.W.2d 207. "However, that presumption of impartiality is rebuttable." ***Id.***

¶26 Flowers argues the circuit court exhibited judicial bias when denying his postconviction motion because: (1) the State allegedly failed to refute several of his arguments before the circuit court; and (2) the circuit court impermissibly developed the State's arguments by rejecting Flowers' purportedly unrefuted arguments. We are unpersuaded. The State explicitly refuted six of Flowers'

seven arguments before the circuit court. The one argument the State did not explicitly refute was closely related to, and largely subsumed by, two of Flowers' other arguments, which the State *did* refute. Flowers' bias argument fails because the fundamental premise on which his argument relies is incorrect.

By the Court.—Order affirmed.

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