COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2015AP2230-CR
2015AP2231-CR
2015AP2232-CR

Cir. Ct. Nos. 2012CF3987
2012CF4515
2013CF2292

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY DEMOND COOPER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: MEL FLANAGAN and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Brennan and Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. A jury found Billy Demond Cooper guilty of five crimes related to three separate incidents involving his ex-girlfriend, including: one count of battery to a domestic abuse injunction petitioner, as a repeater; one count of violating a domestic abuse injunction; and three counts of felony bail jumping, two of which were charged as a repeater.[1] *See* WIS. STAT. §§ 940.20(1m)(a), 939.62(1)(b), 813.12(8)(a), and 946.49(1)(b) (2011-12, 2013-14).[2] All of the crimes were also designated acts of domestic violence. *See* WIS. STAT. § 968.075(1)(a). In these three consolidated appeals, Cooper appeals from the judgments of conviction for those five crimes and from an order denying his postconviction motion seeking a new trial. Cooper argues that he is entitled to a new trial for two reasons: (1) the trial court wrongfully denied Cooper's request to represent himself at trial; and (2) Cooper's trial counsel provided ineffective assistance by not presenting a better argument to support the admission of a letter in which the victim recanted the battery allegation. We reject Cooper's arguments and affirm the judgments and order.

BACKGROUND

¶2 The crimes in this case relate to incidents that occurred on August 5, 2012; August 31, 2012; and May 22, 2013. The complaint for the August 5, 2012 incident—the incident related to the second issue raised on appeal—alleged that G.W., who is Cooper's ex-girlfriend and the mother of his children, had a

[1] The jury found Cooper not guilty of one act of disorderly conduct related to the second incident.

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

domestic abuse injunction against Cooper. The complaint further alleged that Cooper showed up at G.W.'s house intoxicated and that she "let him in to sober up and sleep because she did not want him to drive home drunk." In the morning, Cooper became angry with G.W. and "punched her several times." G.W. telephoned her friend for help. G.W.'s friend and the friend's sister arrived at the home. They later told police that they saw Cooper push and try "to attack" G.W., and that they were present when G.W. placed a call to 911. Based on this incident, Cooper was charged with one count of battery to a domestic abuse injunction petitioner, as a repeater.

¶3 The complaint for the second incident alleged that on August 31, 2012, Cooper appeared at G.W.'s residence, yelled and swung a board at children who were sitting outside, and "drove away at a high rate of speed." Cooper was charged with violating a domestic abuse injunction, felony bail jumping, and disorderly conduct.

¶4 Cooper pled not guilty to all of the August 2012 charges. On May 13, 2013, the day that a jury trial on the August 2012 charges was scheduled to begin, trial counsel moved to withdraw on grounds that there had been a breakdown in the attorney-client relationship because Cooper did not agree with trial counsel's legal strategy. Trial counsel told the trial court that Cooper "would like to proceed with a different attorney or on his own." The trial court engaged Cooper in a discussion about his concerns with trial counsel and whether he wanted to represent himself. Ultimately, when asked whether he wanted to try the case himself, Cooper told the trial court: "I would rather have another attorney review this with me." The trial court agreed to allow new counsel to be appointed for Cooper, and the case was continued to another date.

¶5 Cooper was subsequently charged with two additional counts of felony bail jumping after a third incident. The complaint concerning that incident alleged that on May 22, 2013, police officers found Cooper and G.W. together in Cooper's home, which was a violation of Cooper's bond in the prior felony cases.

¶6 The parties appeared for trial on August 26, 2013. Trial counsel raised several issues with the trial court, including a legal challenge to one of the complaints.[3] Trial counsel asked to defer one issue until the next day because Cooper was talking to trial counsel while the trial court was talking. The trial court told Cooper: "You need to be quiet, sir, [trial counsel] has to talk to me not to you…. I want you to be quiet, you are disturbing me now; I can't make a record, your attorney can't represent you when all he hears is buzz, buzz, buzz, buzz." Cooper apologized and the legal arguments continued.

¶7 Shortly thereafter, while the parties were waiting for the potential jurors to be led into the courtroom, trial counsel said that Cooper wanted "to make a motion" pertaining to trial counsel. Cooper then personally told the trial court that he wanted to represent himself. The trial court responded: "The jury is on their way up to the courtroom at this time, you are not ready to pick a jury, you don't know what the rules are. I will address this with you after we pick the jury."

¶8 Before the potential jurors arrived, the trial court and Cooper began discussing Cooper's experience with the legal process and his desire to represent

[3] The Honorable Mel Flanagan presided over the pretrial proceedings, jury trial, and sentencing hearing.

himself. The potential jurors then entered the room and the trial court proceeded with voir dire, with trial counsel speaking for the defense.

¶9 Later that afternoon, the trial court spoke with Cooper at length about self-representation. The trial court expressed concern about Cooper's ability to represent himself, noting that Cooper's request came just as the trial was starting. The trial court said it would consider Cooper's request overnight.

¶10 The next day, the parties discussed a motion in limine and other matters. During the discussion, the trial court told Cooper to stop "throwing [his] hands up." When Cooper said he was doing so because "[i]t doesn't go the way I want it to go," the trial court said: "Nothing is going to go the way you want it to go all the time, you can't start throwing your hands up and demonstrating your displeasure with everything I say…. You are not showing that you have the composure to sit in the courtroom with your attorney, let alone without one."

¶11 Shortly thereafter, the trial court indicated that it had decided to deny Cooper's request to proceed *pro se*. The trial court explained:

> The problem is this, that your behavior yesterday and today is inappropriate; you have been disrupting the [c]ourt and counsel, gesticulating, talking loudly, and this is not the behavior of an attorney and you are asking to be an attorney in this case. You have not shown any ability to sit there removed from your case and be able to objectively look at the case, that is what an attorney has to do….
>
> But you are so out of control in this courtroom that it is impossible for me to say I am going to allow you to run the show from that table, it is not going to happen. We have twelve plus witnesses, we have 29 exhibits, we have six counts, more than 20 years that you are looking at over three different dates, at least, that have to be examined in this case; and you threw out this request too late, the moment the jury is walking into the room, you decide you want to represent yourself.

> … [I]f you had prepared a month ago and if you had prepared—you throwing papers in the air is not helping, put them down and quietly listen. If you had prepared and come to the court a month ago and said I'm going to work through this, I'm going to go through all these documents, I'm going to know who all the witnesses are, I know what I am going to ask, you would be in a different position. But you did it as the jury was walking in the door and you have made it very difficult for your attorney to function in this courtroom…. I have given it full consideration; and I am not going to let you represent yourself in this matter, it's too late that you came to this decision, it is not nearly enough time to adequately prepare for a case of this magnitude.

Cooper expressed his displeasure with the decision, which prompted the trial court to warn Cooper that he was "close to getting [him]self removed from the court."

¶12 The jury trial was conducted over five days. Although G.W. appeared for trial on the first day, she did not return to court again, despite the issuance of a warrant on the second day to try to secure her attendance. The case proceeded without her testimony, with the State attempting to prove what happened on August 5, 2012, through the testimony of the friends who came to G.W.'s home to assist her, by playing G.W.'s call to 911, and by introducing the testimony of a police officer who interviewed G.W. at her home six minutes after the 911 call was placed.[4] Cooper testified in his own defense, telling the jury that he was not at G.W.'s home on either August 5 or 31, 2012.

¶13 On the third day of trial, trial counsel sought the introduction of a recantation letter from G.W. that was given to the district attorney's office. Trial

[4] The recording of the 911 call is not in the record, but Cooper acknowledged in his postconviction motion that "[i]n the call, G.W. tells the operator that the father of her children, Cooper, was hurting her again and while on the phone he had just hit her another time."

counsel explained that he had intended to use it to impeach G.W., but because she did not testify, he was seeking to admit it as an exception to the rule against hearsay. Trial counsel argued that the letter was "a statement against penal interests," but the trial court rejected that argument and denied Cooper's motion.

¶14 After the jury found Cooper guilty of five charges, he was convicted and sentenced to a total of four years of initial confinement and four years of extended supervision. After postconviction counsel was appointed, Cooper filed a postconviction motion seeking a new trial on grounds that his trial counsel had provided constitutionally deficient representation by failing to offer a valid legal basis to admit the recantation letter at trial.

¶15 In response, the State denied that trial counsel had performed deficiently but asserted that in any event, Cooper was not prejudiced because "the admission of the note would not have resulted in a different outcome than the guilty verdict returned by the jury." The trial court denied the motion, concluding: "[E]ven if [trial] counsel was deficient, the defendant was not prejudiced by the omission of the recantation evidence."[5] This appeal follows.

DISCUSSION

¶16 Cooper argues that he is entitled to a new trial on two bases: (1) the trial court wrongfully denied Cooper's request to represent himself; and (2) Cooper's trial counsel provided ineffective assistance by not presenting a

[5] The Honorable Jeffrey A. Wagner decided the postconviction motion.

better argument to support the admission of the recantation letter. We consider each issue in turn.

I. Denial of Cooper's request to represent himself.

¶17 In ***Faretta v. California***, 422 U.S. 806 (1975), the United States Supreme Court recognized that defendants have a constitutional right to represent themselves in trial court criminal proceedings. *See* ***id.*** at 819. In ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), our supreme court held that "the right to represent oneself" is "identical under the Wisconsin and United States Constitutions." ***Id.*** at 203.

¶18 More recently, the Wisconsin Supreme Court in 2010 considered whether a particular defendant had been denied his constitutional right of self-representation. *See* ***State v. Imani***, 2010 WI 66, ¶¶2-3, 326 Wis. 2d 179, 786 N.W.2d 40. ***Imani*** acknowledged the applicable standard of review: "Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact, which this court determines independently." ***Id.***, ¶19. The court concluded that the trial court had "properly denied Imani's motion to represent himself" because he did not did not knowingly, intelligently, and voluntarily waive the right to counsel and because facts in the record supported the trial court's "determination that Imani was not competent to proceed *pro se*." ***Id.***, ¶3 (italics added).

¶19 In the instant appeal, the parties' briefs discuss ***Imani***'s holdings. After briefing was concluded in this case, the United States Court of Appeals for the Seventh Circuit concluded that Imani was entitled to a writ of *habeas corpus* because he was prevented from exercising his right of self-representation. *See*

Imani v. Pollard, 826 F.3d 939, 942 (7th Cir. 2016) ("***Pollard***").[6] It ordered that Imani be released or given a new trial. ***Id.*** In the course of reaching its decision, the Seventh Circuit explicitly concluded that the Wisconsin Supreme Court had erred when it affirmed Imani's conviction. ***Id.***

¶20 After ***Pollard*** was released, Cooper notified this court about the decision and asserted that it supported Cooper's arguments. *See* WIS. STAT. § 809.19(10) (citation of supplemental authorities). The State did not file a response. *See* § 809.19(11).

¶21 We recognize that as a result of the Seventh Circuit's decision in ***Pollard***, our Wisconsin Supreme Court may someday again address the issues discussed in ***Imani***. However, we are not convinced that the case before us requires analysis of the continued viability of the holdings in ***Imani*** and the effect of ***Pollard*** on that case. The trial court denied Cooper's request to represent himself on two bases: (1) his request was made on the day of trial, as the potential jurors were being brought to the courtroom; and (2) he exhibited disruptive behavior in the courtroom. As the Seventh Circuit noted in ***Pollard***—the case Cooper asks this court to follow—United States Supreme Court precedent provides that both of these reasons can justify denying a defendant's request to proceed *pro se*. *See* ***id.***, 826 F.3d at 947.

¶22 First, we consider the timing issue. In ***Pollard***, the Seventh Circuit recognized that "[w]here a defendant invokes his right so late as to delay a trial …

[6] In this decision we refer to the Seventh Circuit decision as ***Pollard*** to avoid confusion with the Supreme Court of Wisconsin's decision in ***State v. Imani***, 2010 WI 66, 326 Wis. 2d 179, 786 N.W.2d 40.

a judge may deny the exercise of the right of self-representation." ***Id.*** ***Pollard*** noted that in ***Faretta***, the United States Supreme Court "held it was a constitutional error to deny [a] request made 'weeks before trial.'" ***Pollard***, 826 F.3d at 947 (quoting ***Faretta***, 422 U.S. at 835). ***Pollard*** held that it was likewise improper to deny Imani's request, which was made four weeks before trial. *See* ***id.*** at 942, 947.

¶23 In contrast to the requests for self-representation that were made weeks before trial in ***Faretta*** and ***Pollard***, defendants in other cases have made their requests on the day of trial or even during trial. Commentators have observed that ***Faretta***'s reference to the defendant's request to represent himself being made "'[w]ell before the date of trial' … suggests that, at some point, a request might be so disruptive of the orderly schedule of proceedings as to justify rejection on that ground alone." *See* WAYNE R. LAFAVE, ET AL., 3 CRIM. PROC. § 11.5(d) (4th ed. 2015) (quoting ***Faretta***, 422 U.S. at 807). Those same commentators continued:

> Provided [the] defendant does not demand additional time to prepare, many lower courts deem *pro se* motions to be timely as long as they are made before trial. Other courts, however, hold that a request made shortly before the scheduled trial is untimely, as a shift at that point makes it impossible (without a continuance) to explain to the defendant his responsibilities and give him enough time to prepare in light of those responsibilities. On the other hand, appellate courts uniformly accept a trial court's broad discretion to treat as untimely a request made during the course of the trial.

LAFAVE, ET AL., 3 CRIM. PROC. § 11.5(d) (italics added; footnotes omitted).

¶24 United States Supreme Court precedent also recognizes that there are times when a request for self-representation may be untimely. In ***Martinez v. Court of Appeal of Cal., Fourth App. Dist.***, 528 U.S. 152 (2000), the Court held:

> ***Faretta*** … recognized, [that] the right to self-representation is not absolute. The defendant must voluntarily and intelligently elect to conduct his own defense, and most courts require him to do so in a timely manner…. [T]he trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal "chores" for the defendant that counsel would normally carry out. Even at the trial level, therefore, *the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.*

Martinez, 528 U.S. at 161-62 (emphasis and bolding added; quotation marks, citations, and footnotes omitted).

¶25 In this case, it is undisputed that Cooper first raised the issue of proceeding *pro se* in May 2013—on the day the jury trial was scheduled to begin. The trial court listened to Cooper's concerns and talked with him about his options. Ultimately, Cooper told the trial court that he preferred to have new counsel appointed. In light of that request, the trial was postponed for Cooper to obtain new counsel. Cooper never contacted the trial court or raised the issue of self-representation again—until the first day of the rescheduled trial, as the potential jurors were being brought to the courtroom. The trial court determined that this request was untimely.

¶26 On appeal, Cooper argues that "there are many flaws with allowing the timing of [his] request" to proceed *pro se* to be deemed untimely. First, he notes that after new counsel was appointed, Cooper was only in court with his new lawyer once before the day of trial. Second, Cooper argues that the trial court

"gave too much weight to the timing of [his] request." Third, Cooper argues that it was not his intent to delay the proceedings, noting that he "never asked for another attorney or [said] that he needed more time."

¶27 These arguments do not convince us that Cooper was wrongfully denied his right to self-representation. The trial court was permitted to deny Cooper's request to proceed *pro se* to "ensur[e] the integrity and efficiency of the trial." *See* ***id.*** at 162. Even if Cooper did not explicitly ask to delay the trial, there is no indication in the record that Cooper could have immediately proceeded with voir dire, opening statements, and cross-examination of the witnesses. Further, although the trial court did not cite the following facts in its oral decision, it is undisputed that at the time the trial court denied Cooper's request, the trial had already been postponed once for him to obtain new counsel. Further, the State had experienced difficulty securing G.W.'s attendance at trial, and G.W. had finally appeared for trial. Immediately stopping the proceedings so that Cooper could begin self-representation would have threatened "the integrity and efficiency of the trial." *See* ***id.***

¶28 The second reason the trial court offered in support of its decision to deny Cooper's request to proceed *pro se* was the fact that he had been disruptive in court. ***Faretta*** recognized that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." ***Id.***, 422 U.S. at 834-35 n.46. Commentators have recognized that "[o]rdinarily, this authority would be exercised only after the defendant has begun to represent himself," but "in exceptional situations, the defendant's behavior in the course of seeking to obtain self-representation may in itself be disruptive and thereby justify denying his *pro se* motion." *See* LAFAVE, ET AL., 3 CRIM. PROC.

§ 11.5(d) (italics added; footnotes omitted). These comments are consistent with ***McKaskle v. Wiggins***, 465 U.S. 168 (1984), which acknowledged "that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and *that he is able and willing to abide by rules of procedure and courtroom protocol*." *See* ***id.*** at 173 (emphasis added).

¶29 In this case, the trial court stated in its decision that Cooper's behavior in court had been "inappropriate" and that he had been "disrupting the [c]ourt and counsel, gesticulating, [and] talking loudly." The trial court also characterized Cooper as "out of control in this courtroom" and noted that while the trial court was speaking, Cooper was throwing his papers in the air. On appeal, Cooper argues that "the record shows that [his] frustrations were not simply because the court was ruling against him or that [it] would in the future, but that Cooper was frustrated in the way that his counsel was representing him." In other words, Cooper does not appear to dispute the trial court's on-the-record observations, but instead suggests his conduct was understandable because he was frustrated and was "being forced to accept a defense that is not [his] own," which "***Faretta*** warned against." (Bolding added.)

¶30 We are not convinced that the trial court erred when it denied Cooper's request to proceed *pro se*, based on Cooper's disruptive behavior. As ***McKaskle*** noted, a defendant must be "able and willing to abide by rules of procedure and courtroom protocol." *See* ***id.***, 465 U.S. at 173. The trial court's observations indicate that Cooper was not able and willing to do that.

¶31 Cooper suggests that his behavior did not rise to the level of misbehavior that has been cited in other cases where trial courts have denied the defendant's request for self-representation. While Cooper may not have been as disruptive as defendants in other cases, the record supports the trial court's determination that Cooper's behavior was sufficiently disruptive to justify denying his request to proceed *pro se*.

¶32 For the foregoing reasons, we conclude Cooper was not wrongfully denied his right to self-representation at trial. He is not entitled to a new trial.

II. Cooper's ineffective assistance claim.

¶33 In his postconviction motion, Cooper argued that he was entitled to a new trial based on ineffective assistance of trial counsel because counsel did not present an effective argument that would have allowed the introduction of a recantation letter from G.W. To prove ineffective assistance, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Id.*** at 697. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant 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." ***Id.*** (citations and internal quotation marks omitted).

¶34 An evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A motion for a ***Machner*** hearing may, at the discretion of the trial court, be denied "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

¶35 The trial court denied Cooper's motion without a hearing after concluding that even if trial counsel's performance was deficient, Cooper "was not prejudiced by the omission of the recantation evidence." The recantation evidence Cooper wanted admitted was a typed letter dated July 3, 2013, that was signed by G.W. and submitted to the District Attorney's office. The letter stated:

> In regards to Case Number 12CF3987[,] on August 05, 2012 … I made a statement to a Milwaukee Police Officer while under the influence of alcohol (while still h[u]ngover from the night before). I can't remember what I said or why I said it, and don't have any knowledge of the incident. I do know that I was upset [at Cooper] … for not picking his children up. Billy D. Cooper wasn't at [my home] on the morning of August 05, 2012.

¶36 In its written decision, the trial court explained why Cooper was not prejudiced by Cooper's failure to secure the admission of this letter. First, the trial court said that the letter "is not particularly credible evidence because of its timing and internal inconsistencies." The trial court explained:

> The note is dated July 3, 2013, nearly a year after the August 5, 2012 incident and less than two months prior to the trial. The obvious implication of this timing is that the victim drafted the note in a last ditch effort to exculpate the defendant for his actions. Furthermore, the victim states in

> the note that she has no knowledge of the incident but then states that she *does* know that the defendant was not at her residence on the morning of August 5, 2012. Is there any reasonable probability that a jury would believe that the defendant was not at the victim's residence on August 5, 2012 based on this evidence when the victim's statements to the 9-1-1 operator made at that time and the testimony of two other eyewitnesses put him there? No. Is there any reasonable probability that a jury would believe that the defendant did not cause the victim's injuries when the victim told the 9-1-1 operator that he was hitting her, when two witnesses *actually saw him strike her* and when the State introduced corroborating photographs taken shortly after the incident? No.

¶37 We agree with the trial court's analysis. The letter is internally inconsistent because it states that G.W. was hungover and therefore does not remember what she told the police, but it also asserts that G.W. is sure that Cooper was not at G.W.'s home. Moreover, there was significant evidence that Cooper was present at G.W.'s home on August 5, 2012, including testimony from two women who observed Cooper striking G.W., a 911 call made during the incident, and testimony from an officer who spoke with G.W. immediately after the incident. We conclude that "'the record conclusively demonstrates that the defendant is not entitled to relief.'" *See* ***id.*** (citation and emphasis omitted). There is no reasonable probability that but for trial counsel's failure to successfully introduce the letter at trial, the result of the proceeding would have been different. *See* ***Love***, 284 Wis. 2d 111, ¶30. Cooper is not entitled to a hearing or relief based on his postconviction motion.

By the Court.—Judgments and order affirmed.

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