COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP230 **Cir. Ct. No. 2013CI1**

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

IN RE THE COMMITMENT OF PRESLEY HUBANKS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PRESLEY HUBANKS,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Presley Hubanks appeals a judgment, entered upon a jury's verdict, finding him a sexually violent person and committing him to the Department of Health Services for control, care, and treatment. *See* WIS. STAT.

§ 980.06 (2015-16).[1] He also appeals a postdisposition order denying him a new trial. Hubanks claims his trial counsel was ineffective for failing to object at trial when the State referred to "Supermax" to identify a Wisconsin prison where he was at one time confined. The circuit court concluded that Hubanks failed to demonstrate that he was prejudiced by trial counsel's alleged errors. We agree and affirm.

Background

¶2 In January 2013, while Hubanks was completing a prison sentence, the State petitioned to commit him as a sexually violent person. The matter proceeded to trial. The State presented evidence of his criminal history and called an expert witness who testified that Hubanks was more likely than not to engage in future acts of sexual violence. In his defense, Hubanks called three expert witnesses who opined that Hubanks's risk to reoffend was below the threshold required for commitment. The jury found for the State.

¶3 Hubanks moved for postdisposition relief on the ground that his trial counsel was ineffective in regard to allegedly improper comments by the prosecutor. Specifically, Hubanks identified four occasions during the evidentiary portion of the trial and two occasions during closing argument when the prosecutor used the word "Supermax" as the name for the Wisconsin Secure Detention Facility (WSDF) in Boscobel, Wisconsin where Hubanks served a portion of his sentences. Hubanks argued that his trial counsel should have objected to these references on the ground that they "painted Hubanks as a

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

dangerous criminal who should not be released." In support of his position, Hubanks showed that in 2002 the Wisconsin Department of Corrections settled a federal lawsuit brought by inmates imprisoned in Boscobel and, as a component of the settlement, agreed not to refer to the Boscobel institution in DOC literature as a "Supermax prison."[2] Hubanks suggested that the settlement terms demonstrated that use of the term "Supermax" at trial was unfairly prejudicial. The circuit court denied Hubanks's postdisposition motion without an evidentiary hearing, and he appeals.

Discussion

¶4 Respondents in WIS. STAT. ch. 980 proceedings have a right to effective assistance of counsel. *See* WIS. STAT. § 980.03(2)(a); ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). We review claims of ineffective assistance of counsel arising in such proceedings using the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Thayer***, 2001 WI App 51, ¶¶1, 14, 241 Wis. 2d 417, 626 N.W.2d 811. Under that test, a person who claims that trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland***, 466 U.S. at 687. To demonstrate deficient performance, the person must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, the person "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether

[2] The copy of the settlement agreement in the record is undated, but each party describes the agreement as a 2002 document and the circuit court so found.

counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a respondent fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

¶5 Hubanks alleges his trial counsel was ineffective for failing to object when the prosecutor referred to "Supermax" because use of that term unfairly prejudiced him.[3] He seeks a hearing on the claim.

¶6 Preliminarily, we must reject Hubanks's contention that "whenever it is alleged [in a postdisposition motion] that a trial attorney has failed to object to objectionable evidence, it is mandatory that the circuit court conduct a hearing at which trial counsel must testify as to his reasons for failing to object." Although a person claiming ineffective assistance of counsel must seek to preserve counsel's testimony at an evidentiary hearing, *see* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998), a person who makes such a claim is not automatically entitled to a hearing. The circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the movant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 13, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the allegations necessitate a hearing presents a question of law for our independent review. *See* ***id.***, ¶9. If the movant is not entitled to a hearing—either because the movant does not make sufficient allegations that, if

[3] In the circuit court, Hubanks also claimed that: (1) use of the term "Supermax" during the trial violated the terms of the 2002 federal settlement agreement; and (2) he was entitled to a new trial in the interest of justice. He does not renew either claim on appeal. We deem the claims abandoned, and we do not discuss them further. *See* ***Cosio v. Medical Coll. of Wis., Inc.***, 139 Wis. 2d 241, 242-43, 407 N.W.2d 302 (Ct. App. 1987).

true, entitle him or her to relief, or the allegations are merely conclusory, or the record conclusively shows that the movant is not entitled to relief—the circuit court has discretion to deny a postdisposition motion without a hearing. *See* ***id.*** We review a circuit court's discretionary decisions with deference. *See* ***id.***

¶7 We turn, then, to whether Hubanks made a sufficient showing of both deficiency and prejudice to earn a hearing on his claim. According to Hubanks, trial counsel performed deficiently by not objecting when the State referred to "Supermax" because use of the word "appealed to the bias and prejudice of the jury." Hubanks asserts he was prejudiced by the references because the term "Supermax" carried a pejorative suggestion that Hubanks was exceedingly dangerous, and therefore the term was improperly inflammatory.

¶8 We are not confident that Hubanks has identified a legal basis on which his trial counsel should have objected to the term "Supermax." He cites WIS. STAT. § 904.03, which permits a circuit court to exclude evidence that is more prejudicial than probative, but the remarks of counsel are not evidence. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 257, 426 N.W.2d 91 (Ct. App. 1988). Assuming without deciding, however, that trial counsel performed deficiently by not objecting to the term "Supermax," the determinative question is whether Hubanks suffered prejudice from the deficiency. We conclude he did not.

¶9 "A showing of prejudice requires more than speculation. The '***Strickland*** Court placed the burden on the [claimant] to *affirmatively* prove prejudice.'" ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation and brackets omitted). Here, Hubanks failed to offer any affirmative proof that the word "Supermax" inflamed the jury, let alone any proof that the jury attached negative connotations to the word. Instead, he showed that

the Wisconsin DOC agreed that its literature would not refer to the Boscobel institution as a "Supermax prison." The agreement reveals nothing about the effect of the word "Supermax" when used in a jury trial. The existence of the agreement wholly fails as affirmative proof of prejudice.

¶10 Moreover, Hubanks complains he was prejudiced because the prosecutor's use of the term "Supermax" suggested to the jury he was dangerous, but the prosecutor told the jury from the outset that the State "believes Mr. Hubanks is a sexually violent person," and that the evidence would show his "extensive and extremely serious criminal record." The State then offered substantial evidence to support the position that Hubanks was exceptionally violent and dangerous. Specifically:

- In 1979, Hubanks was adjudicated delinquent for attacking and stealing from an elderly woman.
- In 1981, a jury found Hubanks guilty of attempted first-degree murder based on an incident during which he and his accomplices robbed a gas station and shot a clerk.
- While in prison for the 1981 attempted murder conviction, Hubanks hit another inmate with a tire iron, leading to another felony conviction.
- In 1989, while on parole for attempted murder, Hubanks struck a woman in the face, threatened her, and forced her to have sex with him. He was convicted of second-degree sexual assault as a result.
- In 1997, after Hubanks was released from prison, he was convicted of fourth-degree sexual assault because he grabbed a woman's buttocks in a grocery store.

- In 1998, Hubanks pled guilty to two counts of second-degree sexual assault by use of force. The crimes occurred when he invited a woman to his home, punched her in the face, knocked her to the floor, grabbed her vaginal area, and forced his penis into her vagina.

- In 1999, while imprisoned in Tennessee pursuant to a DOC transfer agreement, Hubanks planned and participated in a riot during which he took hostages, robbed them, beat one, stabbed another, and ordered fellow inmates to "stick and gut" the hostages. As a result, Hubanks was convicted in Tennessee of five counts of aggravated riot and kidnapping.

¶11 The State also offered evidence that the DOC viewed Hubanks as a particularly violent and dangerous prisoner. First, the State showed that when Hubanks returned from Tennessee in 2000 to continue serving his sentences in Wisconsin, DOC personnel recommended placing him in administrative confinement, which involves "remov[al] from general population for protection of self or staff or the institution in general." According to the recommendation, Hubanks required administrative confinement due to his "numerous dangerous acts that threatened the overall safety and security of both the staff and inmates within the institution. Hubanks has proven ... that he is capable of both premeditated and spontaneous violence."

¶12 Second, the State's expert witness was a psychologist employed by the DOC, Dr. Anthony Jurek. According to Jurek, an assortment of risk assessment tools revealed that Hubanks was more likely than not to commit future acts of sexual violence and that he qualified for commitment as a sexually violent person.

¶13 The jury was thus fully aware from the properly admitted evidence that the State and the DOC viewed Hubanks as violent and dangerous. Assuming the truth of Hubanks's claim that the prosecutor used the term "Supermax" strategically, "to paint Hubanks as a dangerous criminal who should not be released," the term added nothing significant to the lurid picture that emerged from the testimony about his extensive criminal activity and the precautions deemed necessary by the State and the DOC to protect those around him.

¶14 Moreover, at the close of the evidence, the circuit court instructed the jury to decide the case "solely on the evidence." The circuit court further instructed the jury that the remarks of counsel are not evidence and to disregard remarks that suggested facts not in evidence. We assume that a jury follows the instructions it receives. *See* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

¶15 Prejudice within the meaning of ***Strickland*** requires proof that, viewed in the context of the trial as a whole, "'counsel's errors were so serious as to deprive the [respondent] of a fair trial, a trial whose result is reliable.'" ***State v. Mayo***, 2007 WI 78, ¶64, 301 Wis. 2d 642, 734 N.W.2d 115 (citing ***Strickland***, 466 U.S. at 687). In light of the totality of the proceedings here—including the evidence of Hubanks's long history of violent conduct, the evidence showing the DOC's view that Hubanks was an exceptionally dangerous prisoner, and the proper and careful jury instructions—we conclude that Hubanks fails to show any possibility that the outcome of the trial would have been different if his counsel had prevented the State from referring to "Supermax" as one of Hubanks's institutional placements. Accordingly, the circuit court properly denied him postdisposition relief without a hearing.

By the Court—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).