

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2018

Sheila T. Reiff
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. 2017AP873-CR
2017AP874-CR**

**Cir. Ct. Nos. 2012CF96
2012CF97**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDEN L. RICHTER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Branden Richter appeals judgments convicting him of three felony and three misdemeanor counts, as well as an order denying his postconviction motion for a new trial. On appeal, Richter argues that he received ineffective assistance of trial counsel. For the reasons discussed below, we affirm the judgments and order of the circuit court.

BACKGROUND

¶2 Richter was charged with two counts of armed robbery, one count of armed burglary, and three counts of misdemeanor bail jumping. Richter pled guilty to the bail jumping charges, and the remaining charges were consolidated for trial. The jury returned guilty verdicts on all counts. Richter's appellate counsel filed no-merit notices of appeal in both cases. This court rejected counsel's no-merit report and dismissed the appeals. Richter then filed a postconviction motion for a new trial, arguing ineffective assistance of trial counsel. The court denied the motion after a *Machner*¹ hearing, and Richter now appeals. Richter argues in Appeal No. 2017AP873-CR that he is entitled to a new trial, and in Appeal No. 2017AP874-CR that he is entitled to resentencing. These cases have been consolidated for appeal.

STANDARD OF REVIEW

¶3 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. *State v. Pitsch*,

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination which this court decides de novo. *Id.*

DISCUSSION

¶4 Richter first argues that his trial counsel was ineffective for failing to oppose joinder of Marathon County Circuit Court Case Nos. 2012CF96 and 2012CF97. A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her attorney made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. *Id.* Richter fails to overcome that presumption here. The record shows that his trial counsel, Stephen Sawyer, did object to joinder of the two cases and provided a number of cogent arguments as to why joinder should be denied. Sawyer argued that the robberies in the two cases had several differences and that any similarities were generic in nature. Sawyer also argued that the evidence in 2012CF96 was weaker than the evidence in 2012CF97, and that Richter's right to a fair trial in both cases outweighed the convenience to witnesses and to the court that would be accomplished by joinder.

¶5 Richter argues on appeal that Sawyer should have included in his objection to the joinder motion an argument that Richter intended to testify in one of the cases but not the other. However, Sawyer testified at the *Machner* hearing that Richter reserved his final decision about whether to testify until just before

trial, which took place on December 17 through December 20, 2012, and the circuit court found that testimony credible. We do not conclude that this finding was clearly erroneous. Accordingly, we are satisfied that it was a reasonable, strategic decision not to argue at the November 26, 2012 pretrial hearing on the joinder motion that Richter intended to testify in one case and not the other. We also are satisfied that the arguments Sawyer did make in opposition to joinder were reasonable and within professional norms. The circuit court considered Sawyer's arguments but ultimately granted the State's motion for joinder. However, the fact that a strategy fails does not make the attorney's representation deficient. *See State v. Koller*, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979).

¶6 We next address Richter's argument that his trial counsel was ineffective for failing to request that the circuit court give a cautionary instruction directing the jury to consider each count separately and not allow the verdict on one count to influence the verdict on any other count. However, the record reflects that, notwithstanding the lack of a request by defense counsel, the court gave the following instruction shortly before the jury left for deliberation:

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the information. Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

¶7 The instruction given by the court properly stated the law and was consistent with the language in pattern jury instruction WIS JI—CRIMINAL 484. Richter fails to identify what other cautionary language his counsel could have submitted that would have instructed the jury more effectively of its obligation to consider each count separately. Therefore, Richter has failed to show that, in this respect, his counsel's performance was deficient or prejudicial.

¶8 Richter also argues that Sawyer provided ineffective assistance of counsel in his cross-examination of co-defendant Mariano Valera, who had named Richter to the police as his accomplice in the robberies at issue. Valera refused on his direct examination at trial to name his accomplice. The prosecutor then played a recorded police interview of Valera during which he identified Richter as his accomplice. Valera testified on cross-examination that he named Richter because he was “under the influence” and did not understand what was going on.

¶9 Richter argues that Sawyer should have asked Valera during cross-examination whether Richter was his accomplice. However, at the *Machner* hearing, Sawyer testified that he did not know how Valera would answer, since Valera had invoked his Fifth Amendment right against self-incrimination when he testified at a revocation hearing before trial, and because Valera’s attorney did not permit Sawyer to have access to Valera prior to trial. Sawyer testified that “rule number one in law school with respect to trial advocacy is you do not ask a question that you don’t know what the answer is going to be.” Sawyer further testified that he thought it was important to get the point across that Valera implicated Richter only because he felt pressured to do so, due to the length of his interrogation and the number of different officers who questioned him. In light of all of the above, we are satisfied that Sawyer’s decision not to ask Valera if Richter was his accomplice was a reasonable strategy and not deficient performance. *See State v. Hubanks*, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992) (a trial attorney may select a particular strategy from the available alternatives and need not undermine the chosen strategy by presenting inconsistent alternatives).

¶10 Finally, Richter argues that his counsel was ineffective for failing to investigate and present trial testimony from a potential defense witness, Matthew

Dupleasis. Richter testified at trial that he had an alibi for one of the robberies at issue because, at the time of the robbery, he was out buying marijuana from someone. Richter asserts that Sawyer was deficient for failing to call Richter's marijuana supplier, Dupleasis, as a witness to corroborate Richter's story. However, Sawyer testified at the *Machner* hearing that Richter never told him who his supplier was that night. Sawyer testified that Richter "wasn't naming names" about whom he had obtained marijuana from and did not want to "snitch" on anyone. Based on Sawyer's testimony, the circuit court found that Richter had failed to tell his trial counsel that he purchased the marijuana from Dupleasis. This finding of fact is not clearly erroneous and, therefore, must be upheld. *See Pitsch*, 124 Wis. 2d at 634 (we will not set aside the circuit court's factual findings unless they are clearly erroneous). Given that Richter did not provide Sawyer with Dupleasis's identity, we cannot conclude that Sawyer performed deficiently by failing to call Dupleasis to testify at trial.

¶11 Because Richter has failed to demonstrate that he received ineffective assistance of counsel, we conclude that he is not entitled to a new trial or resentencing on that basis.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

