

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 11, 1997

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

NOTICE

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

No. 96-0017-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WARREN A. GOODMAN,

Defendant-Appellant.

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

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Warren A. Goodman appeals from a judgment of conviction after a jury found him guilty of armed robbery as a party to a crime and possession of a firearm by a felon. He also appeals from an order denying his motion for postconviction relief. He asks this court to review whether the trial court erroneously exercised its discretion when it: (1) denied without an evidentiary hearing his postconviction motion premised on an ineffective

assistance of counsel claim; and (2) refused to order sanctions for an alleged violation of its witness sequestration order at trial. We reject his arguments on these issues and affirm.

I. BACKGROUND.

Goodman received two trials; the first ended with a mistrial because of a hung jury. Although Goodman had different attorneys, the same judge presided over both trials and both sides presented essentially the same evidence during both trials. During the second trial, however, two of Goodman's alleged accomplices testified for the State and identified Goodman as the alleged armed robber. Additionally, in the second trial the following exchange took place during Goodman's direct examination by his counsel:

Q.I ask you again did you do any armed robberies?

A.No.

The State argued that counsel had opened the door for the State to impeach Goodman's testimony by introducing evidence of Goodman's two prior convictions for armed robbery. Counsel contended that his "inartful" question was meant to question Goodman whether he had committed the armed robbery for which he was on trial. The trial court ruled that counsel had opened the door, and the State was allowed to introduce the judgment of convictions for the two prior armed robberies.

At the end of the first day of trial, Goodman was returned to jail and noticed his two alleged accomplices, neither of whom had testified, talking in the adjoining "pod." Eventually Goodman was moved and the two witnesses were separated. The next day Goodman moved for either a mistrial or the exclusion of the witnesses' testimony, arguing that the witness sequestration order had been violated. The trial court denied the motion, concluding that the purpose of the sequestration order was to keep witnesses from discussing any testimony that was already received at trial. The trial court reasoned that there was no way the witnesses could have talked about the testimony given on the first day of trial because they had not heard that

testimony. Further, the court reiterated that the witnesses should be kept separate and that Goodman could cross-examine the witnesses about any collaboration that might have occurred the previous day. After the presentation of evidence was complete, the jury convicted Goodman of both armed robbery and felon in possession of a firearm.

Later, Goodman filed a postconviction motion alleging, among other things, that he had not received effective assistance of trial counsel. His moving papers alleged that his second trial counsel “did not act pursuant to a reasoned strategic decision and did not act in a way that an ordinarily prudent criminal defense attorney would have.” He alleged four instances of deficient performance by his second counsel that deprived him of a fair trial.

First, Goodman alleged that his counsel “through inappropriate and imprecise questioning of the defendant on direct, allowed the State to bring out the fact that Mr. Goodman had been convicted twice previously of armed robberies.” He alleged that the State had attempted to bring out these convictions in his first trial but was unsuccessful – “[t]he jury in the second trial therefore, learned not just that Mr. Goodman had prior convictions but that two of them were for the same type of offense for which he was on trial.”

Second, Goodman alleged that his counsel “failed to procure, prior to trial, a certified transcript of the defendant’s parole revocation hearing at which a number of key state trial witnesses testified.” He alleged that “[a]t this hearing these witnesses testified differently from their subsequent trial testimony, and [his counsel] was unable, given his failure to obtain a proper transcript and the trial court’s subsequent rulings, to use that sworn revocation testimony to properly impeach one or more of these witnesses at trial.”

Third, Goodman alleged that his counsel failed to subpoena a victim of the robbery, who was unable to identify Goodman in a lineup “a few days after the crime.” This witness did testify in the first trial, but not the second. Goodman alleged that “[a]pparently [counsel] assumed the State would call her.” He also alleged that “[i]dentification was the essential issue in both trials and was the key to the defense theory of the case, and such testimony would have been unusually valuable to the defense.”

Finally, Goodman alleged that his counsel's direct and cross-examination of witnesses "indicate[d] that [his counsel] was not sufficiently prepared for trial." He alleged that "[t]here were instances where [his counsel] appeared surprised by answers that he should have anticipated with proper preparation and others where he, in general, appeared unsure how to proceed."

At the request of the trial court, Goodman later supplemented his postconviction motion with further factual allegations that, in detail, supported the instances of alleged deficient performance. After reviewing both these submissions and then reviewing the entire trial transcript, the trial court denied Goodman's motion without holding an evidentiary hearing. The trial court concluded that a hearing was not necessary because even assuming that counsel's performance was deficient, this deficiency did not constitutionally prejudice Goodman.

II. ANALYSIS.

Goodman argues that the trial court should have granted him an evidentiary hearing on his ineffective assistance of counsel claim. We disagree because we conclude that the trial court could properly conclude from the record and postconviction submissions that Goodman was not entitled to the relief he sought.

The standard for reviewing this issue was recently stated in *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.

However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing.

Id. at 310-11, 548 N.W.2d at 53 (citations omitted). Further, “if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.” *Id.* at 309-10, 548 N.W.2d at 53 (citation omitted).

For a defendant to succeed in an ineffective assistance of counsel claim, the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), must be satisfied. A defendant “must show that counsel’s performance was both deficient and prejudicial.” *Bentley*, 201 Wis.2d at 312, 548 N.W.2d at 54. Further, if a defendant fails to show the prejudice prong, this court need not address the deficient performance prong. See *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Because we, like the trial court, conclude that the record conclusively establishes that Goodman was not prejudiced within the meaning of *Strickland*, we do not address whether his second trial counsel’s alleged actions constituted deficient performance.

“In order to show prejudice, [t]he 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.* “The *Strickland* test is not an outcome-determinative test. In decisions following *Strickland*, the Supreme Court has reaffirmed that the touchstone of the prejudice component is ‘whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.’” *State v. Smith*, Nos. 94-3364-CR, 94-3365-CR, 94-3366-CR, 94-3367-CR, slip op. at 16-17 (Wis. S. Ct. Feb. 6, 1997) (citations omitted).

Here, the trial court made lengthy determinations on Goodman’s failure to establish the necessary prejudice in his postconviction submissions. The trial court reached these conclusions after not only reviewing Goodman’s original and supplemental submissions, but also the entire trial transcript. Moreover, the trial court presided over both trials and could therefore more fully appreciate the impact of Goodman’s second counsel’s actions on the result of the trial. After our independent review of the relevant materials, we agree

with and adopt the trial court's reasons for rejecting Goodman's claim. Based on the following reasons, the trial court could properly reject Goodman's motion without an evidentiary hearing, because "the record conclusively demonstrates that the defendant is not entitled to relief." *Bentley*, 201 Wis.2d at 310, 548 N.W.2d at 53 (citation omitted).

The trial court properly concluded that none of Goodman's counsel's alleged deficient conduct prejudiced him such that the result of the trial was unreliable. First, the trial court acknowledged that counsel's "inartful" direct examination of Goodman opened the door to his impeachment with his prior armed robbery convictions. Although the trial court concluded that the admission of this ordinarily inadmissible evidence was prejudicial to Goodman, the trial court properly determined that due to the "absolutely overwhelming case against" Goodman, this prejudice did not rise to the level necessary under *Strickland*. The trial court cited the fact that four witnesses identified Goodman as the armed robber, and that between the first and second trial, the State also procured the testimony of Goodman's alleged accomplices, who identified him as the armed robber. Finally, the court noted that the jury had been given a cautionary instruction on the use of the prior conviction testimony.

The trial court also correctly rejected Goodman's claim that the alleged failure of his counsel to obtain the "official" revocation hearing transcripts prejudiced him because it denied him the chance to impeach two witnesses with inconsistent testimony. The trial court acknowledged that the witnesses had testified differently at the revocation hearing and Goodman's trial. The court noted, however, that counsel used "all portions of the unofficial copy of the revocation proceeding transcript that were necessary to impeach [the first witness.]" The first witness also admitted at the trial that he lied at the revocation hearing. Accordingly, the trial court properly concluded that Goodman had not been prejudiced because the failure of his counsel to obtain a certified copy of the transcript did not impede his ability to impeach the witness.

With respect to the second witness, the trial court correctly concluded that Goodman had not: (1) presented the court with an "official" copy of the witness's testimony at the revocation hearing; (2) identified which statements he contends should and would have been the subject of

impeachment; or (3) identified the prior testimony that would have changed the outcome of the trial.

The trial court also properly rejected Goodman's claim of prejudice arising out of his counsel's failure to subpoena the witness who was unable to identify Goodman as the armed robber in a lineup and who had testified in the first trial. The trial court correctly concluded that even if the witness had testified in the second trial, it would have had no effect on the outcome of the trial because the victim and all three accomplices identified Goodman as the robber.

Finally, the trial court properly concluded that Goodman had not shown the necessary prejudice in his allegation that his counsel did not properly prepare for the trial. The court concluded that Goodman's examples of this lack of preparation were either a repeat of the above claims of deficient performance or completely irrelevant to the outcome of the trial. Our independent review supports these conclusions. In sum, the trial court could properly reject Goodman's ineffective assistance of counsel claim because the trial court correctly determined that the record conclusively established that Goodman was not prejudiced within the meaning of *Strickland*.

Goodman also argues that the trial court erroneously exercised its discretion when it refused to order sanctions for the alleged violations of the witness sequestration order. We disagree.

We review this issue under the erroneous exercise of discretion standard. See *State v. Wright*, 196 Wis.2d 149, 160, 537 N.W.2d 134, 137 (Ct. App. 1995). A trial court need only declare a mistrial or refuse to allow a witness to testify if actual prejudice resulted from the violation of the sequestration order. See *Nyberg v. State*, 75 Wis.2d 400, 409-10, 249 N.W.2d 524, 529 (1977).

Here, Goodman has not demonstrated any actual prejudice arising out of the witnesses' alleged violation of the sequestration order. His argument is comprised of speculative and conclusory allegations about the witnesses'

conduct and their resulting testimony. The trial court properly exercised its discretion in rejecting Goodman's argument for that reason.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.