COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 3, 1997

NOTICE

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.

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

No. 96-3158-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRETT E. ALFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Brett E. Alford appeals a judgment convicting him of burglary, bail jumping, and criminal damage to property, and an order denying his postconviction motion alleging ineffective assistance of counsel. Alford argues that his trial counsel was ineffective because he failed to object to evidence that Alford invoked his right to remain silent and because his counsel failed to

impeach a witness regarding one of Alford's inculpatory statements. He also argues that he is entitled to a new trial in the interest of justice because the same alleged errors resulted in the matter not being fully tried. We reject these arguments and affirm the judgment and order.

The victim of the burglary testified that she returned to her residence on Thomas Street around 3:40 a.m. and discovered that her home had been entered. The back door was standing open and a window was broken. The outside light had been unscrewed. She then observed a black male coming down the stairwell. The man pointed a gun at her and stated that all he wanted was to get out of the house. The victim called the police and described the perpetrator and his clothing.

Officer Mark Pankow, who parked his car about a block from the victim's residence heard the sound of someone running through the brush toward the river. He shined his flashlight in the area, identified himself, and told the person to stop. The person fled and shortly thereafter the officer heard a splash in the river. The officer then found Alford standing in the river.

After Alford was advised of his ***Miranda***[1] rights, and after the victim was brought to the scene and identified Alford, he made the following statement according to Office Pankow:

> He told me that two friends of his, who he only knew as Tommy and an Al, had been to the same residence the previous evening and that they were going to break in on that night but a motion light had gone off so they decided not to and that just prior to or shortly prior to this, my contact with him, the three of them had gone back to the residence where they had, I believe, he stated the other, one

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

> of the other two persons had broken a window so they were able to gain access to the house. And again he told me that he had gone in there to get some beer.

After Alford was transported to the jail, the police asked whether he was willing to sign a written statement. Alford refused to sign a statement, claiming that he had had too much to drink. He was checked for alcohol content as a part of the standard booking process and was found to have no blood alcohol content. The prosecutor, in her closing argument, and again in rebuttal, referred not only to Alford's initial inculpatory statement to the police, but also noted that he lied when he gave his reason for refusing to sign the written statement. Alford's attorney did not object to the admission of evidence or the prosecutor's arguments relating to his refusal to sign the written statement.

To establish ineffective assistance of counsel, Alford must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Proof of prejudice requires a showing that Alford was deprived of a fair proceeding whose result is reliable. *See* ***State v. Smith***, 207 Wis.2d 259, 277, 558 N.W.2d 379, 387 (1997). Alford must show a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one that undermines confidence in the outcome. ***Id***. We need not review whether counsel's performance was deficient because we conclude that the defense was not prejudiced. The State's case against Alford does not depend upon any inferences that could be drawn from his refusal to sign the written statement and his convictions cannot be attributed to the absence of a curative instruction on that question. Alford was initially charged with burglary while armed, bail jumping, theft, endangering safety by use of a dangerous weapon, and criminal damage to property. The jury found him not guilty of

burglary while armed and endangering safety by use of a dangerous weapon. The verdict shows that the jury drew no adverse inference from Alford's silence, but convicted him only of the crimes that he had previously confessed when he admitted that he, Tommy and Al broke a window to gain access to a house for the purpose of stealing beer. This untainted confession constitutes such evidence of guilt that admission of evidence regarding his refusal to sign the written statement and the prosecutor's comments on that refusal do not undermine our confidence in the verdict.

Alford argues that his trial counsel should have cross-examined Pankow on the question whether Alford confessed to entering "the" house rather than "a" house on Thomas Street. When the police respond to a burglary and a short time later apprehend a suspect in the neighborhood who is identified by the victim and who confesses to deactivating a motion light and breaking a window to gain access, trial counsel is not deficient and the defense is not prejudiced by counsel's failure to determine whether the confession relates to the same house.

Alford has not established any basis for this court to grant a new trial in the interest of justice. The real controversy was fully and fairly tried. *See* § 752.35, STATS. The evidence and argument relating to Alford's refusal to sign a written statement did not so cloud a critical issue that a fair and just result could not be reached. *See* ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 771 (1985).

By the Court.—Judgment and order affirmed.

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