COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2298-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN H. JONES, JR.

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. John H. Jones, Jr., appeals from a judgment entered after a jury found him guilty of armed robbery, as a party to a crime. *See* §§ 943.32(1)(b) & (2), 939.05, STATS. Jones also appeals from an order denying his motion for postconviction relief. Jones argues that he received ineffective

assistance of trial counsel, and that the trial court erred in denying his motion for postconviction relief without a hearing. We affirm.

BACKGROUND

At around 6:00 p.m. on October 24, 1995, four men robbed a family in their home. During the course of the robbery, one of the robbers hit an adult victim over the head with the butt of his gun, causing the gun to discharge. The bullet struck one of the other robbers in the lower right leg.

At 11:49 p.m. on October 24, 1995, Jones's girlfriend called 911, and Jones was taken to the hospital and treated for a gunshot wound to his lower right leg. Jones told the police who were investigating his gunshot wound that he was shot by rival gang members while he was walking home, at about 11:00 p.m.

On October 26, 1995, the adult robbery victims' eight-year-old daughter identified Jones, from a photo array, as the robber who was shot during the robbery. Her parents were unable to identify Jones because, during the robbery, Jones wore a hood and glasses that magnified his eyes; however, the child said that, when she and Jones were alone together, she had seen Jones remove his hood and glasses, and wipe his eyes.

Police subsequently arrested Jones, and asked him to submit a blood sample so that they could compare his blood with a small amount of blood that they had recovered from the victims' home, in the area where the robber had been shot. Jones refused to provide a blood sample, and the police then obtained a warrant compelling Jones to provide a blood sample. Nonetheless, Jones again refused to provide a blood sample. Jones eventually provided a blood sample after police told him that, if he failed to cooperate, they would restrain him and take the

sample against his will. An enzyme analysis of the blood samples revealed that Jones was among the 32.1% of the population whose blood was consistent with the blood left at the scene of the robbery.

DISCUSSION

Jones argues that he received ineffective assistance of counsel, and that the trial court erred in denying his motion for postconviction relief without a hearing. Specifically, Jones argues that his trial counsel was ineffective in failing to object to evidence that Jones was a gang member, in failing to object to evidence that Jones refused to provide a blood sample before a warrant was issued, and in failing to object to the admission of medical records that had not been timely provided to the defense.

If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *See* ***id.***

> However, 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., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (citations omitted). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See* ***id.***, 201 Wis.2d at 311, 548 N.W.2d at 53.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, the defendant must demonstrate "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." ***Strickland***, 466 U.S. at 694.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

Jones's first claim is that his counsel was ineffective in failing to object to evidence that Jones was a gang member. At trial, a police officer testified that Jones had explained that he had a gunshot wound to his lower right leg because he was shot by a rival gang member as he was walking home. We conclude that this evidence was consistent with Jones's theory of defense, and, therefore, the record conclusively demonstrates that Jones's counsel was not ineffective in failing to object to the evidence that Jones was a gang member. *See* ***Bentley***, 201 Wis.2d at 309–310, 548 N.W.2d at 53.

Jones's girlfriend testified that Jones was at home with her until about 10:00 p.m. on October 23, 1995. She further testified that Jones then left, and returned about an hour later with a gunshot wound to his right leg. She testified that Jones told her that some men had shot him as he was walking home. The evidence that Jones was a gang member and that he was shot by rival gang members strengthens Jones's theory of defense by providing an explanation of why the men would have wanted to shoot Jones. We therefore conclude that Jones was not prejudiced by the gang references, and that Jones's counsel was not ineffective in failing to object to the gang references.[1]

Jones's next argument is that his trial counsel was ineffective in failing to object to testimony that he refused to submit a blood sample before a warrant was issued. We again conclude that the record conclusively demonstrates that Jones is not entitled to relief. *See* ***Bentley***, 201 Wis.2d at 309–310, 548 N.W.2d at 53. The jury heard evidence that Jones refused to permit his blood to be drawn both before and after the warrant was issued; Jones does not argue, however, that his counsel should have objected to the evidence that Jones refused to submit a blood sample after the warrant was issued. In light of the evidence that Jones resisted the blood sample even after a warrant was issued, we conclude that Jones could not possibly have been prejudiced by the evidence of his earlier resistance. Even in the absence of the testimony that Jones refused to provide a blood sample prior to the issuance of a warrant, the evidence that Jones resisted

[1] Jones also argues that his trial counsel was deficient in failing to request a cautionary instruction to prevent the jury from convicting Jones based solely upon his gang affiliation. Our review of the record reveals that the references to Jones's gang membership were brief, and focused only on Jones's explanation of how he was shot. We therefore conclude that there is no reasonable probability that the jury convicted Jones based upon his gang affiliation, and thus the lack of a cautionary instruction did not prejudice Jones.

the blood sample after the warrant was issued supports such an inference; it is reasonable to infer that Jones would not have resisted giving a blood sample after the warrant was issued if he had been willing to provide a sample before the warrant was issued. Moreover, because the jury heard evidence that Jones resisted providing a blood sample after the warrant was issued, the testimony of Jones's refusal before the warrant had little impact on the verdict. There is, thus, no reasonable probability that the challenged evidence contributed to the verdict, and that Jones's counsel was not ineffective in failing to object to the evidence.

Jones's final argument is that his trial counsel was ineffective in failing to object to the admission of hearsay testimony regarding medical records that were not timely provided to the defense. Jones argues that he was prejudiced because the jury heard testimony that the medical records reported two conflicting times as the time of Jones's injury; one page of the records stated that Jones was shot at about 6:00 p.m., and another page stated that Jones was shot at about 11:30 p.m. The sources of the time information were not reported in the medical records.

The record discloses that the State provided the medical records to the defense on July 25, 1996, less than thirty days before they were presented at trial on August 21, 1996. Jones argues that, under § 908.03(6m), STATS., the records were inadmissible hearsay because the State failed to provide them at least forty days before trial, and also failed to authenticate the medical records by presenting an authentication witness.[2] Jones further argues that his counsel was

[2] Section 908.03, STATS., provides, in relevant part:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(continued)

ineffective in failing to object to the admission of the medical records on this basis. We reject Jones's claim because the record conclusively demonstrates that Jones was not prejudiced by the admission of the medical records. *See* ***Bentley***, 201 Wis.2d at 309–310, 548 N.W.2d at 53.

First, had Jones's lawyer objected, the records would have been received under RULE 908.03(6), STATS., via the testimony of a records custodian. Second, the medical records contained conflicting information with respect to the time when Jones was shot. One page of the medical records stated that Jones had been shot at about 6:00 p.m., and thus supported the State's case, because the robbery had occurred at about 6:00 p.m. Another page of the medical records, however, stated that Jones had been shot at about 11:30 p.m., and thus supported Jones's assertion that he was shot as he was walking home at about 11:00 p.m. Thus, because the records contained conflicting information that equally supported

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> ….
> **(6)** RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.
> **(6m)** HEALTH CARE PROVIDER RECORDS….
> (b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer health care provider records into evidence at trial or hearing does one of the following at least 40 days before the trial or hearing:
> 1. Serves upon all appearing parties an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian.
> 2. Notifies all appearing parties that an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

both the State's and the defense's cases, we conclude that Jones was not prejudiced by the challenged evidence.

Additionally, in light of the evidence as a whole, there is no reasonable probability that the challenged medical-records evidence contributed to the verdict. The evidence discloses that the child had seen Jones's face during the robbery, and that she identified Jones from a photo array as the robber who had been shot in the lower right leg. The evidence further discloses that, on the same night that the robbery occurred, Jones was treated for a gunshot wound to his lower right leg. This compelling evidence convinces us that there is no reasonable probability that the verdict would have been different in the absence of the conflicting evidence from the medical records regarding the time of the shooting. *See* ***Strickland***, 466 U.S. at 694.

By the Court.—Judgment and order affirmed.

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