COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2730-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CURTIS W. ROSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Curtis W. Ross appeals, *pro se*, from a judgment entered after a jury convicted him of possession of a controlled substance (cocaine) with intent to deliver, as a second or subsequent offense, contrary to

WIS. STAT. §§ 961.41(1m)(cm)1, 961.16(2)(b)1, & 961.48 (1997-98).[1] Ross argues that his trial counsel was ineffective, and that the evidence was insufficient. We affirm.

I. BACKGROUND

¶2 On August 14, 1997, Milwaukee Police Officers Steven Beres and Steven Kelly went to the Lapham Park housing project to investigate a citizen complaint. Upon their arrival, they were met in the courtyard by the complainant, Maria Jones. As Officer Kelly spoke with Jones, Officer Beres observed two men, subsequently identified as Curtis Ross and Fentriess Boyd, standing behind a nearby building. When the men noticed the officers, they began to walk away from the building. As the men walked away, Officer Beres observed Ross drop a clear plastic baggie. Officer Beres then approached them and saw the bag Ross had dropped; it contained what Officer Beres suspected to be cocaine. Officer Beres then questioned the men and arrested them for possession of a controlled substance. Subsequent testing revealed that the baggie contained 1.846 grams of cocaine base.

¶3 At Ross's trial, the defense called Jones and Boyd. Jones disputed Officer Beres's account. She testified that she had not seen any men in the courtyard that evening, and had not seen Ross drop a baggie or notice him in the area. Boyd testified that he and Ross were merely conversing outside Ross's residence when the police arrested them. Defense counsel questioned State witnesses regarding the absence of fingerprint evidence and challenged the

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

arresting officer's account of Ross's actions. After a two day trial, the jury found Ross guilty.

II. ANALYSIS

¶4 Ross claims that his trial counsel was ineffective for failing to investigate the circumstances of the charges. Specifically, Ross contends that counsel should have had the plastic bags in which the cocaine was found tested for fingerprint evidence. He also contends that counsel should have expended more effort to locate a potential defense witness, Kenya McNeil, whom he alleges would have testified that no adult males were in the area where Officer Beres said he saw Ross drop the packaged cocaine. Finally, Ross contends that trial counsel was ineffective for failing to file a motion for substitution of judge. We reject his contentions.

¶5 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 232-236, 548 N.W.2d 69 (1996). If this court concludes that the defendant has failed to establish that counsel was deficient, we need not address whether the defendant was prejudiced by counsel's actions. *See* ***Strickland***, 466 U.S. at 697.

¶6 To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***id.*** Counsel is presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.*** 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." ***Id.*** at 694.

¶7 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 (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 (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.

¶8 If a postconviction motion alleges facts that, if true, would entitle a 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 (1996). If, however, the motion fails to allege sufficient facts 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 deny the motion without a hearing. *See* ***id.***, 201 Wis. 2d at 309-310. We will reverse the trial court's decision to deny an evidentiary hearing only if the trial court erroneously exercised discretion. *See* ***id.*** at 311. Whether a motion alleges sufficient facts to require a hearing presents a question of law, which we review de novo. *See* ***id.***

¶9 Ross first claims that trial counsel was ineffective for failing to have the baggie and the corner cuts in which the cocaine was found tested for fingerprints. He also claims that counsel did not effectively cross-examine the

State's witness regarding the fingerprint evidence. We disagree, and conclude that Ross's complaints would not warrant a ***Machner***[2] hearing.

¶10 Detective John Kaltenbrun testified extensively regarding the testing of the seized evidence. Detective Kaltenbrun explained that as the inventory officer in charge of seized narcotics, he was responsible for examining, testing, weighing, and sealing the confiscated narcotics. Detective Kaltenbrun stated that he would not have ordered fingerprint testing of the plastic bags in which the drugs were packaged due to the difficulty in testing them. Specifying his reasons for not submitting these materials for fingerprint testing, Detective Kaltenbrun explained:

> My information from the officers [was] that they had witnessed someone dropping this particular bag. [I]f you take a look at this clear plastic bag which originally held all of these bags, these bags originally were filled with [crack cocaine].
>
> . . . When [the bag] was delivered to me, it was knotted up in a small portion. When you touch it and hold it, you have—would have a whole fingerprint. Once you open it up now, that fingerprint becomes sort of like a jigsaw puzzle and gets scattered across it.
>
> . . . [F]ingerprints do not adhere very well to this particular type of plastic surface . . . [s]o obtaining a fingerprint from this bag itself would be extremely difficult, if [not] highly unlikely.

Detective Kaltenbrun also testified that in his twelve years of experience, he has never been able to recover fingerprint evidence from corner cut bags.

¶11 Here, trial testimony established the futility of fingerprint testing. Even assuming fingerprint testing had established the absence of Ross's prints from the bags, that fact would have made no difference. In light of Detective

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

Kaltenbrun's testimony, that result would not have provided any support for Ross's claim of innocence because the detective's testimony provided a satisfactory explanation for the absence of fingerprints on the material even if Ross had handled it. Accordingly, the absence of Ross's fingerprints "would be comparably insignificant in view of the fact that persons frequently fail to leave latent fingerprints." ***Escalona v. United States***, 350 F. Supp. 894, 896-97 (N.D. Ill. 1972).

¶12 Ross also claims that counsel failed to sufficiently explore, through cross-examination, the police's failure to conduct fingerprint testing. The record belies his claim. During cross-examination, defense counsel questioned Detective Kaltenbrun about his failure to order fingerprints testing and, in his closing argument, counsel seized upon the absence of fingerprint evidence to argue for reasonable doubt and to support his theory that the police "pin[ned] drugs on an innocent man." Ross's claims therefore do not merit a ***Machner*** hearing.

¶13 Ross next argues that counsel was ineffective for failing to make sufficient efforts to locate Kenya McNeil who, he alleges, would have testified that no adult males were in the area as police claimed, thus corroborating Jones's and Boyd's testimony, and countering the police account. We disagree.

¶14 A defendant who alleges that counsel was ineffective for failing to take certain steps in his or her investigation "must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999). Ross's submissions fail to support his allegation that counsel's efforts to locate McNeil were insufficient.

¶15 The record establishes that defense counsel twice attempted to contact McNeil; his efforts were unsuccessful. Ross, asserting only that "a more substantial investigation" should have been undertaken to locate McNeil and obtain her statement, has failed to establish any deficiency because he has not specified what additional actions counsel could have taken to secure McNeil's appearance at trial. Consequently, we conclude that Ross has failed to alleged facts sufficient to support his claim of ineffective assistance of counsel.

¶16 Ross next argues that counsel was ineffective for failing to file for a substitution of judge. He maintains that he advised counsel that he wanted to substitute against Judge Kremers who had presided over his previous drug case. He further contends that counsel advised him "at that time there were no substitutions available due to such a heavy calendar." We reject his argument.

¶17 To raise a successful claim of ineffective assistance of counsel based on counsel's failure to file a request for substitution of judge, a defendant must allege prejudice. *See* ***State v. Damaske***, 212 Wis. 2d 169, 198, 567 N.W.2d 905 (Ct. App. 1997). This court recently concluded that "[the] 'prejudice' component of ***Strickland*** 'focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***Damaske***, 212 Wis. 2d at 198 (citations omitted). Accordingly, we rejected Damaske's claim because he had not shown that Judge Kremers's handling of his case rendered the proceeding fundamentally unfair, or that Judge Kremers had not been impartial. *See* ***id.*** at 199. Absent an allegation of fundamental unfairness or judicial bias, Ross's ineffective assistance of counsel claim for his attorney's failure to file a request for substitution fails to merit a ***Machner*** hearing.

¶18 Finally, Ross argues that the evidence was insufficient. We disagree.

¶19 We will not reverse a conviction based on the insufficiency of the evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). Further, "viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused." ***Id.*** at 506.

¶20 Possession of cocaine with intent to deliver required the State to establish, beyond a reasonable doubt, four elements: (1) that Ross possessed a substance; (2) that the substance was cocaine; (3) that Ross knew or believed the substance was cocaine; and (4) that Ross possessed the cocaine with the intent to deliver it. *See* WIS JI-CRIMINAL 6035 (1997). Trial evidence established each of these elements.

¶21 Officer Beres testified to Ross's possession of the cocaine, noting that he had observed Ross drop the plastic baggie containing twenty-three corner cuts of an off-white, rock-like substance, which was later determined to be cocaine base. Officer Beres noted that Ross dropped the bag as soon as he (Ross) became aware of the officers in the courtyard. Detective Kaltenbrun testified that based on his training and experience, possession of twenty-three corner cuts of cocaine indicates an intent to distribute the drug, not an intent for personal use or consumption.

¶22 In his sufficiency of the evidence argument, Ross attacks Officer Beres's credibility and contends that the jury could not have credited his testimony because it conflicted with other witnesses' testimony. We reject his claim for two reasons. First, Ross's argument seeking to discredit Officer Beres's trial testimony relies on testimony from his revocation hearing, which was not introduced as evidence at trial. Second, Ross's argument ignores the fundamental proposition that "[t]he function of weighing the credibility of witnesses is exclusively in the jury's province." ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982). Consequently, we conclude that the jury reasonably found that the evidence proved Ross possessed a controlled substance—cocaine—with intent to deliver.

By the Court.—Judgment affirmed.

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