COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2270-CR **Cir. Ct. No. 2013CF66**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETRIUS M. BOYD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOSEPH G. SCIASCIA, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. After a trial to the court, Demetrius Boyd was found guilty of battery by a prisoner and disorderly conduct. *See* WIS. STAT.

§§ 940.20(1) and 947.01(1) (2013-14).[1] On appeal, Boyd challenges the sufficiency of the evidence as to both crimes. He also contends his trial counsel was ineffective in his investigation into whether a video recording of the incident existed. We conclude the State presented sufficient evidence to support a finding of guilt on both crimes. We further conclude that Boyd has not established that counsel's performance was deficient. Accordingly, we affirm the judgment of conviction and postconviction order.

FACTS

¶2 On November 27, 2012, Demetrius Boyd was housed in the segregation unit at Waupun Correctional Institution, as he had been for four years. On that morning, two correctional officers, Edward Budler-Ronzoni and D.S., escorted Boyd to the shower area. When they arrived, Boyd refused to use his assigned shower stall because the inmate in a neighboring stall had threatened him in the past. The officers then returned Boyd to his cell.

¶3 When Boyd was returned to his cell, the officers told Boyd to kneel down, the first step in the procedure for removal of the leg shackles and handcuffs worn by inmates in the segregation unit when they are outside of their cells. Boyd refused and indicated that he wanted to shower in his cell. D.S. requested the assistance of a sergeant but another correctional officer, Brian Kaphingst, came to the cell. Boyd became belligerent and started cursing at Kaphingst. Eventually, a sergeant and lieutenant arrived on the scene and Boyd complied with the directive

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to kneel down. The leg shackles were removed and Boyd entered his cell. The cell door was closed.

¶4 The next step in the restraint removal process is for the prisoner to stand with his back to the cell door and extend his handcuffed hands through the trap in the cell door. Officers then remove the handcuffs. After Boyd put his hands through the trap, D.S. held onto Boyd's right hand, Kaphingst held onto Boyd's left hand, and Budler-Ronzoni began removing the cuffs. Additionally, a leather tether strap connected Boyd's left arm to the cell door. After Boyd's right hand was uncuffed, he pulled his right hand back through the trap. All the correctional officers testified that the proper procedure was for a prisoner to keep both hands extended through the trap until the handcuffs were completely removed. D.S. testified that Boyd, however, "violently" pulled his hand back into his cell before both hands were freed. As D.S. tried to keep control over Boyd's right hand, D.S.'s hand was pulled into the trap. As a result, D.S. sustained lacerations and scrapes to his fingers, knuckles and elbow. After a Taser was brought to the scene, Boyd stopped resisting. Officers then recuffed Boyd and he was placed in control segregation. Further facts will be stated below as needed.

SUFFICIENCY OF THE EVIDENCE

Standard of Review

¶5 When the court is the fact finder, a challenge to the sufficiency of the evidence is measured against the same standard of review as when a jury is the fact finder. *See* ***Gaddis v. State***, 63 Wis. 2d 120, 127, 216 N.W.2d 527 (1974). We may not substitute our judgment for that of the circuit court "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable fact finder "could have found guilt

beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the circuit court could have drawn the inference of guilty from the evidence. *See* ***id.*** It is the function of the trial court, as fact finder, to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *See* ***id.*** at 506. If more than one inference can be drawn from the evidence, we must follow the inference which supports the trial court's finding unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988).

Battery by a Prisoner

¶6 The State was required to prove that Boyd was confined in a state prison as a result of a violation of the law; that he intentionally caused bodily harm to D.S., a correctional officer, without D.S.'s consent; and that Boyd knew that D.S. was a correctional officer and knew that D.S. did not consent to the bodily injury. *See* WIS JI—CRIMINAL 1228 (2012); WIS. STAT. § 940.20(1). The only element disputed at trial or on appeal is whether Boyd acted intentionally, that is, whether he acted with either "a purpose to do the thing or cause the result specified" or acted with the awareness "that his … conduct is practically certain to cause that result." *See* WIS. STAT. § 939.23(3).

¶7 In its findings, the circuit court acknowledged that Boyd testified that D.S. was only lightly touching his hand and that he withdrew his hand through the trap in a normal manner. The circuit court, however, rejected Boyd's testimony as not credible. The circuit court reasoned that D.S.'s hand could only have been injured if D.S. had a "firm grasp" of Boyd's hand so that D.S.'s hand would be pulled through the trap "with enough force to cause the injury." The

circuit court further found that Boyd had been removed from his cell using this procedure "a number of times" and, therefore, knew or should have known that the trap was metal. The circuit court concluded that "dragging somebody's hand or causing somebody's hand to be dragged through that trap would in all likelihood result in a—practically certain to result in injury."

¶8 Boyd argues that the trial court's conclusion is unreasonable because the traps are designed to accommodate an inmate's hands and, in light of that design, Boyd could reasonably assume that the edges of the trap were not sharp. Boyd further argues there was no evidence that he "bang[ed] his arm up and down" so as to cause D.S.'s hand to strike the side of the trap.

¶9 Boyd's arguments do not defeat the trial court's factual findings. We must accept the trial court's credibility determination and, therefore, the court's rejection of Boyd's version of the incident must stand. *See* ***Poellinger***, 153 Wis. 2d at 506. Boyd had been housed in the segregation unit for four years and presumably was very familiar with both the procedure used to safely remove handcuffs through a cell door trap and the composition of the trap itself. D.S. testified that Boyd "violently yank[ed]" his right hand back through the trap while D.S. was restraining Boyd's hand. Boyd's deliberate actions were forceful enough to break the leather strap used to further restrain inmates. Ample testimony from D.S. and the other correctional officers support the finding that Boyd knew that his actions were "practically certain" to injure D.S. *See* WIS. STAT. § 939.23(3). Sufficient evidence supports the conviction for battery by a prisoner.

Disorderly Conduct

¶10 The State was required to prove that Boyd engaged in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly

conduct under circumstances in which the conduct tends to cause or provoke a disturbance." WIS. STAT. § 947.01. The circuit court acknowledged that the segregation unit was noisy so that Boyd's making noise during the incident was not disorderly conduct. The court further found that "saying unpleasant things" to correctional officers was not disorderly conduct. The court concluded, however, that the safety of prisoners and staff required that "commands have to be followed without resistance [and t]o resist or obstruct under those circumstances constitute[s] disorderly conduct." The court emphasized that Boyd did not comply with the procedure for reentering his cell until five officers were present and he was threatened with a Taser. The resultant disturbance, the circuit court concluded, was otherwise "disorderly conduct."

¶11 On appeal, Boyd contends that the circuit court's finding of guilt is premised solely on his initial refusal to kneel down prior to the removal of his leg shackles. Citing to ***State v. Werstein***, 60 Wis. 2d 668, 211 N.W.2d 437 (1973), and ***City of Oak Creek v. King***, 148 Wis. 2d 532, 436 N.W.2d 285 (1989), Boyd argues that his refusal to obey the officers' directives cannot be considered disorderly conduct. Boyd characterizes his conduct as "passive" and not likely to provoke a disturbance given that other inmates in the segregation unit could not "run amok in response to or as a result of" his conduct.

¶12 We are not persuaded. In both cases, the supreme court stated that the "mere refusal to obey a police command" does not constitute disorderly conduct. ***King***, 148 Wis. 2d at 544, ***Werstein***, 60 Wis. 2d at 676. The court, however, also stressed the importance of "coalescing … conduct and circumstances." ***King***, 148 Wis. 2d at 542, ***Werstein***, 60 Wis. 2d at 674. In this case, Boyd's actions in pulling his right hand back through the trap led to a struggle with officers that lasted several seconds. The officers repeatedly told

Boyd to stop resisting but he did not to stop struggling until a Taser was brought to the scene. Boyd's conduct extended far beyond the "mere refusal" to obey the commands of correctional officers.

¶13 The circuit court did not limit its discussion to Boyd's refusal to kneel outside the cell door. The court found Boyd guilty of disorderly conduct because "five officers ha[d] to be deployed in order to get [Boyd] to kneel down so that the restraints can be removed in order to secure" Boyd in his cell. The removal of Boyd's restraints was a process that began with the request to kneel down and extended through the removal of the handcuffs through the trap. "[O]therwise disorderly conduct means conduct having a tendency to disrupt good order and provoke a disturbance." WIS JI—CRIMINAL 1900 (2012). The totality of Boyd's actions provoked a disturbance that tended to disrupt the good order. While Boyd suggests that the inability of other inmates to "run amok" is a mitigating factor, we conclude that the prison setting only underscores the need for order.

¶14 Boyd complains that he should not be held responsible for the number of correctional officers who were involved in the incident, emphasizing that he only asked to see a sergeant. Boyd is not absolved from criminal responsibility because he only asked to talk to a sergeant. Prison officials may exercise reasonable discretion in determining how to respond to inmate conduct. The number of officers involved does not impact the nature of Boyd's conduct, which ranged from refusing to obey an order to a physical struggle through a locked cell door. Sufficient evidence supports the circuit court's finding of guilt.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶15 Boyd argues that his trial attorney was ineffective because he did not adequately investigate whether a video recording of the incident existed. The following additional facts are pertinent to this issue.

¶16 Prior to trial, Boyd's attorney requested that the State disclose any video recording of the incident. Counsel never received a video recording.

¶17 At trial, the following exchange between Boyd's attorney and Detective Dan Stiesma took place on the cross-examination.

> Q: In your experience as a—as a detective investigating these matters, is it—you know it to be common procedure for correctional staff to use video cameras in these types of incidents?
>
> A: At times they do. If it's a dynamic situation, they don't have time to get a camera. Something that's actually going on they rely on the surveillance video from the unit.
>
> Q: Are you aware of either in this particular case?
>
> A: There was a surveillance video. The problem is the DVR is not functioning—was not functioning during that time period.
>
> Q: So there is no video either way?
>
> A: Correct.

No video recording of the incident was presented at trial.

¶18 At the postconviction hearing, Boyd's trial attorney testified that he filed several written requests that the State disclose any video recorded evidence. His file did not contain any written response. Although trial counsel did not specifically recall what happened in this case, he testified that "in most instances … [he] would have received some form of a response … verbally either to

existence or lack thereof" from either the district attorney or Detective Stiesma. When asked why he did not file a motion to compel or a motion for sanctions, counsel replied, "I can only assume that I was told that … a video was not in existence." Counsel testified that he would have moved to compel if he knew a video recording existed and the State had not disclosed it. Counsel testified that he had never filed a motion to compel because the district attorney had "always been forthcoming."

¶19 Detective Stiesma also testified at the postconviction hearing. He testified that the initial packet of information he received from prison officials did not include a video recording. Stiesma knew that Boyd believed that video recordings would support his account of the incident. Stiesma asked Waupun Security Director Meli about a video recording, and Stiesma described Meli's response as follows:

> I believe that is at the point where the DVR system was down. If I recall, it was down for several months during that time frame. It was hit or miss if it was actually working or not and recording. And I don't know specifically if that falls under this time frame. I'm quite sure it does.

Stiesma acknowledged he was not "100 percent" sure of Meli's response and that there was nothing in writing. He testified that he typically does not report when he does not receive a particular item from prison officials. In his experience investigating "[s]everal hundred" prison incidents, some involved video recorded evidence and some did not. Stiesma testified that prison officials have never refused his request for a video recording when a video recording existed.

¶20 Waupun Security Director Anthony Meli also testified at the postconviction hearing. Meli testified that there are two, wall-mounted, stationary

cameras in each cell range in the segregation unit, one at the start of the range and another midway down the range. Boyd's cell was at the "very end of the viewing capacity" of one of the cameras. Boyd's cell also had a camera inside the cell. The cameras operate twenty-four hours a day, seven days a week, and are monitored by guards in the unit's control bubble. Camera footage is not automatically saved and would be overwritten in about thirty to forty days. Footage can be saved if desired. Only Meli and the deputy warden can delete footage.

¶21 Meli testified that the archiving function of the camera system occasionally malfunctions. Staff still sees images in real time but the images are not being recorded. Staff does not know that images are not being stored until someone tries to review past footage and discovers that it was not recorded. Meli testified that no written records were kept documenting when a camera malfunctioned. He also did not keep any record of what documents were given to the district attorney. Meli testified that he has never refused a request for material and that if someone asked for an item he did not have, he would verbally tell the requester that he did not have it.

¶22 Boyd argues that his trial attorney should have done further investigation. Boyd states that if counsel had done further investigation, the facts adduced at the postconviction hearing could have been presented at trial. He asserts that counsel "never obtained a definitive answer from the State as to why" there was no video recording of the incident. He complains that his attorney did not contact prison officials directly in an effort to obtain the video recording. Boyd contends that counsel should have filed a motion to compel the disclosure of the video recording, which he asserts was exculpatory, and should have sought sanctions against the state when no video recording was produced. Lastly, Boyd

argues that counsel should have asked Detective Stiesma additional questions as to why no video recording existed.

¶23 The two-part test for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). If the defendant is unable to show one prong, the court need not address the other. ***Strickland***, 466 U.S. at 697. The first prong of ***Strickland*** requires a defendant to show, against a "strong presumption that counsel acted reasonably within professional norms," that his attorney's performance was deficient. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "This first test requires the defendant to show that his counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 127 (*quoting* ***Strickland***, 466 U.S. at 687). An attorney's performance is not deficient if it is reasonable under prevailing professional norms and considering all the circumstances. ***Id.***

¶24 The second prong of ***Strickland*** requires the defendant to prove that his right to a fair trial was prejudiced. ***Strickland***, 466 U.S. at 687. "The 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." ***Id.*** at 694. "A defendant who alleges that counsel was ineffective by failing to take certain steps 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. 1998). When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." ***Strickland***, 466 U.S. at 689.

¶25 We defer to a circuit court's factual findings regarding counsel's actions during trial court proceedings. ***State v. Jones***, 181 Wis. 2d 194, 199, 510 N.W.2d 784 (Ct. App. 1993). However, whether counsel's performance was deficient and, if so, whether that performance prejudiced the defense, are questions of law, which we review de novo. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Finally, since the defendant has the burden of showing both deficient performance and prejudice, we affirm the denial of postconviction relief if we conclude that he had failed to meet the burden on either issue. ***Jones***, 181 Wis. 2d at 200.

¶26 The circuit court addressed both prongs of the ***Strickland*** test. The court first found that the performance of Boyd's trial attorney was not deficient. Counsel "made a formal discovery request" and "followed up on it." Counsel asked Stiesma, the investigating detective, under oath, whether a video recording existed. Stiesma testified that there was no video recording. The circuit court wrote that it was "pure speculation" to state that evidence that might have changed the result of the trial would have been produced if counsel had "done something further." The court found that Meli would have saved the videos if any had existed when he investigated the incident. The court expressly stated there were "no facts upon which to make a finding that anybody destroyed the video."

¶27 The circuit court also considered that the hall camera was not located near Boyd's cell and stated that it was "questionable whether that camera would have shown anything that went on between" Boyd and D.S. The court noted that there was no evidence what the cell camera would have shown. The court concluded that Boyd had not shown that the result of the trial might have been different if video recorded evidence had been presented. Therefore, Boyd did not establish prejudice.

¶28 We agree with the circuit court's conclusion that counsel's performance was not deficient.[2] The fundamental fact made apparent both at trial and the postconviction hearing is that no video recording of this incident ever existed. Counsel filed an appropriate discovery request and was informed that there was no video recording. Detective Stiesma testified, under oath at trial, that the DVR was not functioning so no video recording was available. The evidence adduced at the postconviction hearing only reinforces Stiesma's trial testimony that the recording system had malfunctioned so that no video recording existed. The lack of written records about camera malfunctions does not alter the fact that no video recording existed. A motion to compel would have been futile since there was nothing for the State to disclose. Boyd does not challenge the trial court's finding that there was no evidence that the video recording was destroyed. Counsel acted reasonably and his performance was not deficient.

By the Court.—Judgment and order affirmed.

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

[2] The circuit court concluded that Boyd had not shown prejudice because it was not likely that the wall-mounted camera would have shed light on the struggle at Boyd's cell door and there was no evidence as to what the interior cell camera would have shown. Thus, it was not reasonably probable that the result of Boyd's trial would have been different. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). This court need not address both prongs of the ***Strickland*** test. *See* ***State v. Jones***, 181 Wis. 2d 194, 200, 510 N.W.2d 784 (Ct. App. 1993). We limit our discussion to the performance prong.