COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP526-CR **Cir. Ct. No. 2015CF254**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID CHRISTOPHER LEE WALTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. David Walton appeals from a judgment of conviction for armed robbery, felony theft, and misdemeanor theft, all as party to a crime and as a repeater. Walton also appeals the circuit court's order denying his postconviction motion for a new trial. Walton argues that he received ineffective assistance of counsel due to several claimed errors at trial. He further contends that we should grant a new trial in the interests of justice. We reject Walton's arguments and affirm.

BACKGROUND

¶2 Walton was charged with multiple counts relating to the armed robbery of a tavern. We take the following facts from the criminal complaint. On the night in question, a black male entered the tavern wearing a camouflage jacket, gloves, a baseball hat, and a bandana covering his face. The man displayed a gun and took approximately $7,000 in cash as well as the manager's purse. After the robbery, various items were recovered from a nearby dumpster, including clothing worn by the robber and the manager's purse. When police searched the car belonging to Walton's girlfriend, Courtney Stalsberg, they found a case containing more than $6,000 in the trunk. Police also found bank slips showing Walton had deposited $828 in cash the day after the robbery.

¶3 At trial, several witnesses testified to the facts set forth in the complaint, including Stalsberg. Stalsberg testified that Walton entered the tavern while she waited in the car with their housemate, Cody Nelson. Walton was wearing a camouflage jacket, gloves, bandana, "do-rag," and a baseball cap. Stalsberg testified that, after the robbery, Walton discarded the clothing and other items in the dumpster.

¶4 We need not recount all the State's remaining evidence here, but five pieces of evidence were particularly significant to the State's case against Walton. First, the State introduced a series of text messages exchanged between Walton and Stalsberg discussing possible targets for robberies, including the tavern. Second, the State presented DNA evidence connecting Walton to the bandana, do-rag, and hat found in the dumpster. Third, there was a security video recording of the robbery which showed that the suspect had a build similar to Walton's. Fourth, Walton opened up the new bank account with over $800 in cash the day after the robbery, even though Walton had recently told various people, including his probation officer, that he did not have any money. Fifth, police found a case containing over $6,000 in cash in the trunk of the car Walton was driving when he was arrested.

¶5 At trial, Walton argued that the evidence did not establish beyond a reasonable doubt that he had committed the robbery. Walton also contended that Stalsberg engineered the robbery and framed him for it because Walton had become involved with another woman. Walton testified about various threats that Stalsberg made in an attempt to prevent Walton from leaving her, including threats to have him arrested. Walton denied any involvement in the tavern robbery and also denied sending all but one of the incriminating texts. Walton testified that Stalsberg often used his phone and could have created the trail of text messages in order to frame him. He further testified that Stalsberg was using his phone at the time of the incriminating text that mentioned the tavern. In an effort to bolster his own credibility, Walton testified about his 2008 conviction for two armed robberies, asserting that he admitted his involvement and had taken responsibility for those crimes.

¶6 To support his defense, Walton presented testimony from an acquaintance of Stalsberg who testified that Stalsberg threatened that Walton would be sorry if he left her. According to the acquaintance, when Stalsberg was asked if she set Walton up for the robbery, Stalsberg replied, "Well, I told you if I can't have him, nobody can." Walton also presented testimony from Stalsberg's father that she did not have a reputation for truthfulness. Finally, Walton presented testimony from his former in-laws, who stated that they did not believe that the robber in the tavern video recording was Walton.

¶7 The jury found Walton guilty on all counts. Walton filed a motion for postconviction relief, arguing that he received ineffective assistance of counsel and that a new trial should be ordered in the interest of justice. The circuit court denied Walton's motion after a hearing. The circuit court agreed that the performance of Walton's attorney was clearly deficient in some respects but not all respects alleged by Walton. However, the court concluded that Walton was not prejudiced by his attorney's deficient performance. Specifically, the circuit court found that Walton could not demonstrate a reasonable probability of a different result in the face of the overwhelming evidence against him. The circuit court also found that a new trial was not in the interests of justice. Walton appeals.

DISCUSSION

¶8 Walton presents two issues for appeal. First, he contends that he is entitled to a new trial because he received ineffective assistance of counsel. Second, he contends that he is entitled to a new trial in the interests of justice. We address each argument in turn.

A. Is Walton Entitled to a New Trial Based on Ineffective Assistance of Counsel?

¶9 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). "We will not disturb the circuit court's findings of fact unless they are clearly erroneous." ***Id.*** "[T]he circumstances of the case and the counsel's conduct and strategy" are considered findings of fact. ***State v. Jenkins***, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786. We then review independently the legal question of whether counsel's performance "falls below the constitutional minimum." *See* ***Erickson***, 227 Wis. 2d at 768.

¶10 Walton points to almost a dozen ways in which he believes his trial attorney's performance was deficient. The circuit court in some respects agreed with Walton, concluding that there was "no question" that trial counsel's performance was in part deficient. The State concedes that certain aspects of the defense attorney's performance were deficient, but disputes the remainder. Walton did not file a reply brief to respond to the State's arguments. A proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). However, we need not rely on Walton's failure to file a reply brief because, as explained below, we conclude that Walton has not demonstrated prejudice. *See* ***Strickland***, 466 U.S. at 697 ("[T]here is no reason … to address both components of the inquiry if the defendant makes an insufficient showing on one.").

¶11 A defendant can establish prejudice if there is a reasonable probability of a different result absent the attorney's errors. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (quoting ***Strickland***, 466 U.S. at 669).

¶12 The circuit court determined that Walton could not establish prejudice because the evidence against him was overwhelming. As explained above, this evidence included incriminating text messages, DNA evidence connecting Walton to clothing worn in the robbery, the video recording, Walton's newly opened bank account, and the $6,000 in cash found in the trunk of the car Walton was driving. Moreover, the circuit court determined that Walton did not have a viable defense in the face of this overwhelming evidence. The court explained that, in order to acquit Walton, the jury would have to believe that Stalsberg was capable of planning and carrying out an "elaborate scheme of fabricating and planting evidence to pin this on Mr. Walton."

¶13 Walton argues that the jury's view of Stalsberg's veracity and credibility was affected by trial counsel's deficient performance. Specifically, he argues that his trial attorney failed to impeach Stalsberg with her prior inconsistent statements about a fourth individual's involvement in the robbery. The trial attorney also did not raise the issue of Stalsberg's bias as a cooperating co-defendant.

¶14 The circuit court determined that effective representation "could have moved the needle … a little bit," but concluded that, in light of the overwhelming evidence, there was not a reasonable probability of a different result. The circuit court was in the best position to evaluate the evidence, and we

agree with its determination on this issue. In particular, even if the trial attorney had given the jury more reason to doubt Stalsberg's testimony, the jury would still need to believe that Stalsberg was capable of fabricating all the other evidence against Walton. While Walton contends that Stalsberg had both the means and opportunity to frame Walton, we see no argument from Walton about how effective counsel could have moved the needle (using the circuit court's phrase) on this aspect of Walton's defense.[1]

¶15 Walton also argues that his trial attorney could have done more to limit or undermine damaging testimony from various witnesses, including Walton's probation agent, the detective who questioned him after his arrest, and two jailhouse informants who testified that Walton admitted robbing the tavern. But, even assuming that Walton could demonstrate deficient performance on each of these issues, Walton cannot establish prejudice. This is because Walton's arguments about these witnesses do not help him overcome the damaging effect of the remaining evidence against him, including the text messages, the DNA evidence, the video recording, the new bank account, and the $6,000 in the trunk of the car Walton was driving.

¶16 Because we conclude that Walton has not established that he was prejudiced by the deficiencies in his attorney's performance, we affirm the circuit

[1] Walton also points to newly discovered evidence consisting of Facebook messages in which Stalsberg expresses regret that she lied about "him in the robbery" and "everything." The State argues that these messages add little to the analysis, because evidence of recantation is not a sufficient basis to grant a new trial in the absence of other newly discovered evidence. *See* ***State v. Marcum***, 166 Wis. 2d 908, 928, 480 N.W.2d 545 (Ct. App. 1992). Walton's failure to file a reply brief may be deemed a concession on this point. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Moreover, we see nothing in these messages that would help Walton establish that Stalsberg concocted and carried out an elaborate scheme to frame Walton.

court's determination that Walton is not entitled to a new trial on the ground of ineffective assistance of counsel.

B. Is a New Trial Necessary to Prevent a Miscarriage of Justice?

¶17 Walton's second argument for reversal is that we should exercise our discretionary power to grant a new trial in the interests of justice. A court may grant a new trial if it finds that the real controversy was not fully tried, or that there was a miscarriage of justice. *See* ***State v. Burns***, 2011 WI 22, ¶24, 332 Wis. 2d 730, 798 N.W.2d 166. "We exercise our discretionary-reversal powers 'only in exceptional cases.'" ***Id.***, ¶25 (quoting ***State v. McGuire***, 2010 WI 91, ¶59, 328 Wis. 2d 289, 786 N.W.2d 227).

¶18 Here, Walton argues that trial counsel's failure to object to law enforcement testimony about his 2008 robberies, as well as the failure to impeach Stalsberg and two jailhouse informants, means that the real controversy was not fully tried. A new trial should be granted if the jury had evidence before it that "so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). As to the testimony that was not objected to, the problem for Walton is that, even if the circuit court had excluded all this testimony, the evidence against him would still be overwhelming. We therefore cannot conclude that testimony from any of these additional witnesses clouded a crucial issue.

¶19 As to the failure to impeach, Walton also argues that the real controversy was not fully tried because the jury did not have the opportunity to examine evidence that bears on a significant issue. *See* ***State v. Davis***, 2011 WI App 147, ¶16, 337 Wis. 2d 688, 808 N.W.2d 130. Specifically, Walton contends

that the trial attorney's failure to impeach the two jailhouse informants means that the jury did not have the opportunity to examine their testimony that Walton admitted involvement in the tavern robbery. Likewise, Walton argues that the jury did not have the opportunity to hear evidence that would have helped him call Stalsberg's testimony into doubt. The State argues that Walton is simply repurposing his ineffective assistance of counsel claims, and we agree. In light of the overwhelming evidence against Walton, we do not believe that trial counsel's failure to effectively impeach these particular witnesses is a significant enough issue to warrant a new trial.

CONCLUSION

¶20 Because we reject Walton's arguments that he received ineffective assistance of counsel and that the real controversy was not fully tried, we affirm the judgment of conviction and the circuit court's order denying Walton a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).