COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0180

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JONOTHAN GILS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jonothan Gils, *pro se*, appeals from the trial court's denial of his postconviction motion. Gils claims his postconviction lawyer gave him ineffective assistance by failing to raise the following issues on direct appeal: 1) the trial judge did not have jurisdiction over his case; 2) the evidence

presented by the State was insufficient to convict him of aggravated battery; 3) police memo books were never produced by the State; 4) his trial lawyer failed to impeach a witness with allegedly inconsistent statements and did not object when the trial court instructed the jury that it would not be able to have testimony read back during deliberation. We affirm.

I.

¶2 Jonothan Gils and co-actor, Cory Gilmore, robbed a liquor store owned by Claudino Claudio. According to the criminal complaint, Gils and Gilmore entered the liquor store while Claudio and his son, James, were working. Gils pulled out a gun, removed money from the store, and struck both victims with liquor bottles. Gils was convicted after a jury found him guilty of two counts of armed robbery, one count of substantial battery, and one count of aggravated battery, all as a party to a crime. *See* WIS. STAT. §§ 939.05, 940.19(2), 940.19(5) and 943.32(1)(a) & (2) (1995-96).[1]

¶3 Gils, represented by new counsel, filed a postconviction motion alleging ineffective assistance of trial counsel, prosecutorial misconduct, and trial-court error. The trial court denied the motion after a hearing. Gils appealed the trial court's decision to this court and we affirmed.[2] Gils later filed a *pro se* motion pursuant to WIS. STAT. § 974.06 for postconviction relief, claiming ineffective assistance of postconviction counsel. This motion was denied by the

[1] All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] *See* ***State v. Gils***, No. 96-3543-CR, unpublished slip op. (Wis. Ct. App. Jan. 20, 1998).

trial court without a hearing. Gils now appeals from the denial of his *pro se* postconviction motion.

II.

¶4 A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's performance was deficient and, as a result, that he or she suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We will "strongly presume" counsel has rendered adequate assistance. ***Id.*** To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. ***Id.***, 466 U.S. at 687. If a defendant fails on either aspect—deficient performance or prejudice—the ineffective-assistance-of-counsel claim fails. ***Id.***, 466 U.S. at 697.

¶5 Whether a lawyer gives a defendant ineffective assistance of counsel is a mixed question of law and fact. ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. The trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). Whether proof satisfies either the deficiency or the prejudice prong is a question of law that we review de novo. ***Pitsch***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

¶6 Gils claims that his postconviction lawyer gave him ineffective assistance because the lawyer did not raise certain issues on direct appeal that Gils believes would have been successful, i.e., the claims Gils raises here. As we will discuss, however, each issue raised by Gils in this appeal is without merit.

Therefore, Gils suffered no prejudice by his postconviction attorney's failure to raise these issues.

A. Jurisdiction of the trial court.

¶7 Gils first argues that Judge DiMotto did not have jurisdiction over his case. According to Gils, Judge DiMotto handled the case on behalf of Judge Stanley Miller without proper authority. We disagree. Judge DiMotto had authority to act for Judge Miller. "The chief judge of any judicial administrative district may assign any circuit judge within the district to serve in any circuit court within the district." WIS. STAT. § 751.03(3). Moreover, Milwaukee County Circuit Court Rule 404(d) permits the "transfer of cases to facilitate the fair and efficient operation of the felony division." Here, Judge Miller, to whom the case was originally assigned, was unavailable to preside over Gils's trial. The case was properly transferred to Judge DiMotto, who presided over the trial. Moreover, Gils requested a speedy trial, and did not object to the judicial transfer to Judge DiMotto, which enabled his request to be honored.

B. Sufficient evidence.

¶8 Gils next claims that there was insufficient evidence to convict him of aggravated battery because the State failed to present medical testimony or reports to establish that Claudino Claudio suffered "great bodily harm." We will not reverse a conviction for 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).

¶9 To obtain a conviction for aggravated battery, the State must prove that the defendant: 1) caused great bodily harm to another person, and 2) intended to cause substantial bodily harm or great bodily harm. WIS. STAT. § 940.19(5). The definition of "great bodily harm" includes "serious bodily injury." WIS. STAT. § 939.22(14); *see also* WIS JI—CRIMINAL 1225. As we noted in our earlier decision upholding the denial of Gils's first postconviction motion—and on which the trial court correctly relied in denying the present postconviction motion—"no reasonable jury could conclude that Claudino Claudio's injuries were not 'serious.'" Indeed, the victim had multiple facial lacerations and required 210 stitches. Thus, there was clearly sufficient evidence to convict Gils of aggravated battery.[3]

C. Police memo books.

¶10 Gils claims that the police memo books he requested from the State were never produced despite the trial court's order to do so. The postconviction court noted that Gils "offers no grounds to support his conclusuory fishing expedition." Thus, Gils also claims that the postconviction court erred by not considering this issue.

¶11 The record does not support Gils's contention that the memo books were not turned over to the defense. At the beginning of the trial, the prosecutor told the court, "I don't have any memo books of anybody … [n]or have I ever seen

[3] Contrary to Gils's assertion, ***Irby v. State***, 49 Wis. 2d 612, 182 N.W.2d 251 (1971) does not support his position that expert medical evidence is required to determine the seriousness of a victim's injuries. ***Irby*** did not establish a general rule. Rather, ***Irby*** held: "Under the facts of *this case* the doctor's testimony was necessary to determine the seriousness of the wounds." ***Id.***, 49 Wis. 2d at 618, 182 N.W.2d at 254 (emphasis added). Such medical testimony was not needed here.

them." Later in the trial, the attorney for co-defendant Gilmore referred to the memo book of Detective Thomas Welch. Thus, the record reflects that the State did, in fact, provide at least one memo book to the defense. Regardless of whether or not the memo books were provided to Gils, however, Gils has not shown that anything in the "missing" memo books would have resulted in his acquittal. Accordingly, Gils has not shown that he was prejudiced. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317, 321 (Ct. App. 1993) (demonstrating prejudice, under ***Strickland***, requires more than speculation).

D. Ineffective assistance of trial counsel.

¶12 Gils also claims that postconviction counsel was ineffective by not raising two instances of his trial lawyer's alleged ineffectiveness on direct appeal. First, Gils asserts that his trial lawyer gave him ineffective representation by not attempting to impeach a witness with prior inconsistent statements. Second, Gils claims that his trial lawyer was ineffective by failing to object to the trial court's instruction to the jury that it would not be able to have testimony read back during deliberation. Trial counsel was not ineffective in either regard.

1. Prior inconsistent statements.

¶13 Gils contends that trial counsel should have attempted to impeach Claudino Claudio at trial with four prior inconsistent statements allegedly made by Claudio, and that counsel's failure to do so was prejudicial to Gils because Claudio's credibility was essential to the State's case. While a lawyer's failure to impeach a key witness could constitute ineffective assistance of counsel, *see* ***State v. Johnson***, 153 Wis. 2d 121, 449 N.W.2d 845 (1990), Gils has not shown that he suffered any prejudice.

¶14 The first claimed inconsistency is between Claudio's statement to the police and his trial testimony. In 1995, Claudio told police he did not know if Gils and Gilmore took any money but at trial he stated that he saw them take money. We conclude that trial counsel adequately explored this inconsistency at trial. On cross-examination, counsel asked Claudio, "[Y]ou never told [police] that there was any money missing at all until … the time of the lineups; isn't that right?" Claudio stated, "I was out of it. I was – with 210 stitches, I lost a lot of blood, and I don't know. I really don't know." Counsel also cross-examined Detective Johnson and asked: "While [Claudio] was in the ambulance, he at no time told you that any money was missing from the store, true?" Detective Johnson explained that Claudio "did not know what was taken or anything because he had been taken from the scene," that "money was flying all over the place," and that Claudio did not learn how much money was taken until his son checked the cash register receipts the day after Gilmore's preliminary hearing.

¶15 Second, Gils asserts that at co-actor Gilmore's preliminary hearing, Claudino Claudio indicated that he did not know who took his money and "imagined" that it was Gils and Gilmore, while at trial Claudio "inconsistently" stated he saw the two men taking his money. Gils takes the testimony out of context. The following exchange took place during the direct examination of Claudio at the preliminary hearing:

> Q What, if anything, happened to the money?
>
> A Oh, gone. They took it.
>
> Q Who took it?
>
> A I don't know. I was – I was fighting, and I was fearing for my life, so I *imagine* they both took it.

(Emphasis added.) Based on the overwhelming evidence against Gils, the alleged minor inconsistency did not affect the verdict. ***State v. DeLeon***, 127 Wis. 2d 74,

85, 377 N.W.2d 635, 641 (Ct. App. 1985) (no ineffectiveness when counsel does not attempt to impeach a witness based on minor inconsistencies that would not have affected the verdict).

¶16 The third and fourth claimed inconsistencies involve the same statement made by Claudino Claudio regarding when exactly he pulled his own gun on the robbers.[4] At both Gils's and Gilmore's preliminary hearings, Claudio testified that he pulled a gun when Gils approached him. At trial, however, Claudio stated that he did not pull a gun until Gils grabbed him. As the State correctly points out, "there is really no inconsistency" because Claudio later clarified his testimony at each preliminary hearing, explaining that he did not pull his gun out until Gils grabbed him.[5]

2. Read-back jury instruction.

¶17 Gils claims that trial counsel was ineffective by not objecting when the trial court instructed the jury that it would not be able to have testimony read back during deliberation.[6] Judge DiMotto instructed the jury in the following manner:

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[4] This court essentially decided this issue on direct appeal, where Gils claimed that trial counsel's failure to obtain a copy of his preliminary hearing transcript constituted ineffective assistance of counsel "because, without the transcript, his counsel on cross-examination was unable to impeach Claudino Claudio with inconsistencies between his trial and preliminary hearing testimony." We concluded that "counsel's failure to obtain the preliminary hearing transcript, although deficient, was not prejudicial, and therefore, did not amount to ineffective assistance of counsel." *See* ***Gils***, No. 96-3543-CR, unpublished slip op. at 7–9.

[5] Gils raises two additional alleged inconsistencies between Claudio's trial testimony and the police reports. Gils has not included the reports in the appellate record. When the record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).

[6] Pattern jury instruction WIS JI–CRIMINAL 58 (1992) provides:

(continued)

> Also, like I told you at the beginning of this trial, you will not have a copy of the transcript of the trial available for use during your deliberations. You must rely on your collective recollection regarding the evidence and testimony introduced during the trial.

¶18 "[T]he trial court has wide discretion in choosing the language of jury instructions." ***State v. Herriges***, 155 Wis. 2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990). "This discretion extends to both choice of language and emphasis." ***State v. Turner***, 114 Wis. 2d 544, 551, 339 N.W.2d 134, 138 (Ct. App. 1983). "A trial judge should exercise discretion ... 'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489, 495 (1981) (quoted source omitted). We will uphold a discretionary decision if the trial court "rationally applied the appropriate legal standard to the relevant facts before it." ***State v. Wenger***, 225 Wis. 2d 495, 502–503, 593 N.W.2d 467, 471 (Ct. App. 1999).

¶19 Gils contends that the trial court had a duty to inform the jury of its right to have testimony read back.[7] While a jury does have the right to have

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> **TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY**
>
> You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [*You may ask to have specific portions of the testimony read to you.*] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

(Footnote omitted; emphasis added.) This jury instruction was originally published in 1992 and was republished without substantive change in 2000.

[7] Gils relies on ***People v. Smith***, 396 Mich. 109, 240 N.W.2d 202 (1976), which held that it is *per se* reversible error to not inform a jury of its right to have testimony read back. Unlike the instant case, presented within an ineffective-assistance-of-counsel context, the issue in ***Smith*** involved a harmless error analysis on a direct appeal. Thus, ***Smith*** is not applicable here. *See* ***Kimmelman v. Morrison***, 477 U.S. 365 (1986).

testimony read, *see* ***State v. Cooper***, 4 Wis. 2d 251, 255–256, 89 N.W.2d 816, 819 (1958), this is an ineffective-assistance-of-counsel claim and Gils has not shown prejudice. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (substantive constitutional claim and related ineffective-assistance-of-counsel claim "have separate identities and reflect different constitutional values"). He has not demonstrated that any juror wanted testimony to be reread. Indeed, Gils admits in his reply brief to this court, he "could never make a showing that a jury wanted to have testimony reread to them." Accordingly, his ineffective-assistance-of-counsel claim fails.

III.

¶20 Because each issue raised by Gils in his *pro se* postconviction motion was without merit, the trial court properly denied the motion without a hearing. See ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996) (hearing not required if motion fails to allege sufficient facts, presents only conclusuory allegations, or if the record conclusively demonstrates that defendant is not entitled to relief).

By the Court.—Order affirmed.

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