**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 5, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP1593-CR** **Cir. Ct. No. 1993CF597**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DENNIS E. JONES,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Dennis Jones appeals from the judgment of conviction entered against him, and from the orders denying his motions for postconviction relief. Jones raises various challenges to his conviction and to the denial of his postconviction motions.

¶2 In 1994, Jones was charged with armed robbery, felon in possession of a firearm, and possession of a short-barreled shotgun, all as a repeater. He entered a no-contest plea to the armed robbery count. Before sentencing, Jones moved to withdraw his plea. The court granted the motion, and Jones went to trial on all three charges. The jury found him guilty of all three, and the court sentenced him to a total of forty-six years in prison. Jones then appealed his conviction. The Office of the State Public Defender appointed counsel to represent him. Because Jones and his appointed counsel could not agree on how to proceed with the appeal, counsel closed the file and Jones proceeded *pro se*.

¶3 In 1996, Jones filed a postconviction motion raising various challenges. The circuit court treated the motion as one brought under WIS. STAT. § 974.06 (2003-04)[1], and denied it, finding that the claims were merely conclusory.

¶4 Jones appealed. This court treated his appeal as a direct appeal from the judgment of conviction and from the order denying his motion for postconviction relief. This court affirmed the conviction and order in an unpublished opinion. ***State v. Jones***, No. 96-3443-CR, unpublished slip op. (Ct. App. June 17, 1998). We concluded that the evidence was sufficient to sustain the conviction for felon in possession and possession of a short-barreled shotgun; that the presentence report established Jones's status as a repeat offender; that the prosecution did not withhold exculpatory evidence or intimidate Jones's alibi witnesses; that Jones had not established that the judges were biased against him

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

by making erroneous and prejudicial rulings against him; that the circuit did not err when it denied Jones's claim of ineffective assistance of counsel without holding a hearing; that Jones's claims of ineffective assistance of counsel did not establish prejudice; and that the court of appeals did not err when it denied Jones's motion to supplement the appellate record. Jones filed a petition for review, which the Wisconsin Supreme Court denied.

¶5 Jones then filed a petition for a writ of habeas corpus in this court claiming that he had been denied his right to counsel in his direct appeal. We denied the petition. Jones then filed a petition for a writ of habeas corpus in the federal court. That court granted Jones's petition and ordered that he be released from prison unless his appellate rights with appointed counsel were reinstated within 120 days. ***Jones v. Berge***, 246 F. Supp. 2d 1045, 1059 (E.D. Wis. 2003). The court reasoned that Jones had not knowingly and intelligently waived his right to counsel in his direct appeal. ***Id.*** at 1058-59.

¶6 Jones's appellate rights were reinstated and counsel was appointed to represent him. Before a postconviction motion could be heard, new counsel moved the circuit court to be allowed to withdraw. In the motion, counsel stated that Jones disagreed with counsel about the grounds for a postconviction motion, and told counsel he would either represent himself or retain a new attorney. The court held a hearing on the motion on October 2, 2003. The court conducted a thorough colloquy with Jones to determine whether he truly wished to proceed without counsel, and whether he truly understood the responsibilities and difficulties of self-representation. The court found that Jones had the "competency and ability" to represent himself, and that he wanted to do so. The court granted counsel's motion to withdraw. At the beginning of the hearing on his motion for postconviction relief, the court also conducted another brief colloquy with Jones

about proceeding without counsel. We conclude that Jones knowingly, intelligently, and voluntarily waived his right to counsel for this appeal.

¶7 The federal court ordered that Jones's appellate rights be reinstated so that he could exercise his right to be represented by counsel on appeal. His appellate rights were reinstated, and counsel was appointed to represent him. Jones then knowingly, intelligently, and voluntarily waived his right to be represented in this appeal. Consequently, we will not revisit the issues we decided in his previous *pro se* appeal. As to those issues, we affirm all of our rulings in his previous appeal, and incorporate our decision from that appeal as our decision in this appeal.

¶8 The first new issue Jones raises involves another claim of ineffective assistance of trial counsel. Jones asserts that his trial counsel was ineffective when he referred to Jones's prior convictions during the opening argument. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington*****,** 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id***. at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶9 In this case, the circuit court found after the ***Machner***[2] hearing, that counsel presented credible testimony that he mentioned the prior convictions in his opening statement to pre-empt the State from offering the details of Jones's prior convictions. We agree with the circuit court's finding that this was a reasonable trial tactic, and did not constitute ineffective assistance of trial counsel.

¶10 Jones also argues that the circuit court erred when it refused to allow him to call Charles Crenshaw, the person a witness initially identified as the robber. The circuit court denied the request, finding that the evidence was cumulative. Defense counsel argued that he wanted to ask the witness two questions, but that the purpose of having the witness testify was to allow the jury to see what he looked like. The court would not allow Crenshaw to testify because it found that the jury had been told that the witness first identified Crenshaw as the robber, and that the jury had seen a photograph of Crenshaw. There was no dispute that the witness picked the wrong person. The court further found that it did not really matter what Crenshaw looked like at the time of trial because this was two years after the crime. The court stated: "If he comes in today, you can't say, you know, things change. You know, two years older, maybe the hair's changed, maybe other things. So I'm not sure that really says how he looked in '93."

¶11 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins,*** 168 Wis. 2d 175, 186, 483

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

N.W.2d 262 (Ct. App. 1992) (citations omitted). We conclude that the circuit court properly exercised its discretion when it refused to allow Crenshaw to testify based on the offer of proof made by defense counsel.

¶12 Jones next argues that the State engaged in prosecutorial misconduct. In support of this claim, Jones gives a long list of examples of what he characterized as egregious conduct by the prosecutor. "A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998) (citation omitted). Prosecutors are permitted to strike hard blows, but not foul ones. ***State v. Neuser***, 191 Wis. 2d 131, 139, 528 N.W.2d 49 (Ct. App. 1995). The issue is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Id.*** at 136 (citation omitted). We see nothing in the examples he cites that rises to the level of prosecutorial misconduct.

¶13 Jones next argues that the State was allowed to dwell excessively on another type of other acts evidence. Jones argues that the State focused too much on evidence that he solicited Jumard Brooks to commit perjury. He argues that the evidence was used to incite the jury's passions and was cumulative. We disagree. The State used this evidence to show Jones's attempts to extricate himself from responsibility for the crime with which he was charged. The State was not using this as other acts evidence.

¶14 Next Jones argues that his trial counsel was ineffective in the way he handled an incident that occurred on the last day of trial. On that day, the court told the parties that one of the jurors had informed the court that someone had

come to his house to talk about the case. The court also said that the juror had refused to talk to the person and so the person left. At sentencing, the court suggested that Jones was behind the incident involving the juror. Jones argues that counsel was ineffective because he did not ask for a voir dire of the juror, and did not ask the court to instruct the juror not to discuss the incident with other jurors.

¶15 During the ***Machner*** hearing, defense counsel testified that he did not move to voir dire the juror because he did not want to draw attention to the incident, and that the jurors had been told not discuss such things with each other. The court also found the jurors are instructed not to talk among themselves about any aspect of the case, and to base their decision only on the facts presented at trial. The court concluded that counsel's decision not to voir dire was reasonable and that he had not performed ineffectively. The court found that the incident was "tenuous" and there was no potential harm. We agree with the court's conclusion that counsel did not perform ineffectively by not pursuing the matter any further.

¶16 Jones also argues that the trial court improperly prohibited him from questioning trial counsel during the ***Machner*** hearing. The record, however, belies this assertion. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Jenkins***, 168 Wis. 2d at 186 (citations omitted). The court granted Jones much leeway and acknowledged his status as a *pro se* litigant. The court, however, limited Jones's questions when he attempted to pursue matters over objections and beyond the scope of appropriate questioning. The court properly exercised its discretion when it limited Jones's questioning of defense counsel.

¶17 Jones next argues that the trial court's sentence exceeded sentencing guidelines in violation of ***Blakely v. Washington***, 542 U.S. 296 (2004). In a subsequent case, however, the Supreme Court held that ***Blakely*** did not apply to advisory sentencing guidelines. ***United States v. Booker***, 543 U.S.220, 233 (2005). In support of his argument, Jones cites ***State v. Speer***, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993). In that case, however, the Wisconsin Supreme Court stated: "The court must be aware of the guidelines and consider them when imposing sentence. It does not mean that the sentence imposed must fall within the guidelines. That is within the sound discretion of the sentencing court." ***Id.*** at 1125. The sentencing guidelines have never been mandatory in Wisconsin, and ***Blakely*** does not apply to Jones's case.

¶18 For the reasons stated in this opinion and in our previous opinion, we affirm the judgment and orders of the circuit court.

*By the Court.*—Judgment and orders affirmed.

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