COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1946-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Vergeront, Deininger and Lundsten, JJ.

¶1 DEININGER, J. Ronald Harris appeals a felony theft conviction and an order which denied his postconviction motion. A jury found Harris guilty of theft of property exceeding $2,500 in value after he took his car from a dealership without paying for repairs performed on it. *See* WIS. STAT.

§ 943.20(1)(c) and (3)(c) (1999-2000).[1] He argues that his trial counsel was ineffective for failing to challenge the State's proof of an essential element of the offense—that he knew of the dealership's superior right of possession—and for failing to investigate the reasonable value of the auto repairs at issue. Harris also claims the trial court denied his right to present a defense by excluding his testimony that a warranty company told him it would cover most of the repairs. Finally, Harris asks us to grant him a new trial under WIS. STAT. § 752.35 because the real controversy was not tried.

¶2 We conclude that Harris was not prejudiced by his counsel's allegedly deficient performance, and that the trial court did not err in denying his postconviction motion without a hearing. We also conclude that, even if the court erred in excluding Harris's testimony regarding what he was told by the warranty company, the error was harmless. Finally, we decline to exercise our discretionary authority to reverse and order a new trial. Accordingly, we affirm the appealed judgment and the order denying postconviction relief.

BACKGROUND

¶3 Harris was charged with felony theft for taking his car from a dealership without paying for repairs performed on the car. Under WIS. STAT. § 943.20(1)(c), a person commits theft when he or she, "[h]aving a legal interest in movable property, intentionally and without consent, takes such property out of the possession of a … person having a superior right of possession, with intent thereby to deprive the … other person permanently of the possession of such

[1] The relevant portions of the theft statute are quoted and discussed in the text. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

property." The Criminal Jury Instructions Committee has determined that to prove the crime, the State must establish five elements:

> The first element requires that the defendant intentionally took movable property out of the possession of [the dealership].
>
> The second element requires that [the dealership] had a right of possession of the property superior to that of the defendant.
>
> The third element requires that [the dealership] did not consent to the defendant taking the property.
>
> The fourth element requires that the defendant knew that [the dealership] had a right of possession superior to defendant's and knew that [the dealership] did not consent to taking the property.
>
> The fifth element requires that the defendant took such property with intent thereby to deprive [the dealership] permanently of possession of the property.

WIS JI—CRIMINAL 1450 (footnotes omitted). This appeal deals largely with the fourth element—whether Harris knew the dealership had the right to retain his car until he paid his bill.

¶4 During Harris's jury trial, a service advisor and a cashier from the dealership testified. The service advisor stated that Harris brought his car in for repairs on August 4, 1998. Harris told the service advisor that he had an extended warranty on the car, and inquired about tires and other service requests. The service advisor drafted a work order, which contained the following in a paragraph of small print adjacent to the signature area: "An express mechanic's lien is

acknowledged on vehicle to secure the amount of repairs thereto." Harris signed the work order.

¶5 According to the service advisor, Harris contacted him several times after leaving the car. Harris phoned the dealership on August 5, and the service advisor advised him of the price of the tires, an expense which Harris then authorized. On August 7, the service advisor spoke with Harris regarding specific repairs on the car, and Harris approved $2,094 of repairs from the list of repairs. At that time, he declined to authorize work on the brakes and on the rear struts because they would not be covered by his warranty. However, on August 12, Harris called the service advisor and told him to complete these repairs as well.

¶6 The service advisor testified that he informed Harris on August 4 and 7, that the dealership did not have a direct account with his warranty company, and that Harris would have to pay the bill in full and then request reimbursement from the warranty company.

¶7 Harris came to pick up his car on August 17. He asked where the car was located. The service advisor took him to see the car, and explained what repairs were performed. Before moving the car to the front lot, the service advisor directed Harris to the cashier. After returning the keys to the cashier's window, the service advisor went through the repair bill with Harris, again explaining the procedure for him to obtain reimbursement from his warranty company. The service advisor then returned to his duties. According to the service advisor, about ten minutes later, Harris left with the car. He later discovered that Harris had not paid the repair bill before taking the car.

¶8 The dealership's cashier testified that when she saw Harris on August 17, she explained to him that he was responsible for the total amount of the

bill and that he would have to seek reimbursement from his warranty company. He asked for a copy of his bill, and she provided him with one. Harris then asked to speak with his warranty company, and she directed him to a phone at the service desk. She saw him go toward the service desk, but did not see whether he placed a call. Harris did not pay anything on his bill on that date, and the cashier did not return the car keys to him. She later asked the service advisor when Harris was going to pick up the car. Now realizing that Harris had taken his car without paying the repair bill, the service advisor phoned the police.

¶9 The repair bill amounted to $4,527.24. The dealership ultimately received $1,237.97 from the warranty company, and repairs not covered by the warranty totaled $3,352.63.[2] Both the service advisor and the cashier testified that Harris did not argue regarding the amount of the bill.

¶10 Harris testified at trial. He said that he took his car to the dealership because the car "was sounding rough" and he wanted to know if the problem was covered by his extended warranty. He also asked the service advisor if there was anything else wrong with the car and about new tires. He signed a work order, but did not authorize any repairs at that time. Also, he said that he had only one key for the car, and asked for a second key to be made.

¶11 According to Harris, the work order indicated that no work would be done without a written estimate, but he never received a written estimate. He testified that he authorized work under the warranty, but specifically declined additional repair work on August 6. He stated that he never contacted the

[2] The trial exhibits are not included in the record on appeal, and we are unable to discern from the testimony why the balance due on Harris's account exceeds the original invoice amount less the sum paid by the warranty company.

dealership after that and never authorized any additional repairs. He was unaware that the dealership had completed all of the repairs until he went to pick up his car on August 17.

¶12 Harris testified that when he saw the bill, he "kind of disputed the cost and the additional repairs, but the first issue was the fact that they said I had to be reimbursed, which … clearly from the onset they told me that I was approved for the payment for the work being done." He thought that he did not have to pay any additional costs when he picked up the car because he thought the repairs were covered by the warranty. He disputed the amount of the invoice. He said that the cashier responded by handing him the keys:

> After I gave her the phone for my warranty company she said, what about the additional charges. I said I didn't authorize any additional charges. She slid me the copy I had and the key. I took my one key. She stepped away from the window, and that was it.

He then left with the car.

¶13 The jury found Harris guilty of theft as charged and that the "value of the property stolen" was more than $2,500. Harris filed a motion for postconviction relief, asserting the claims he argues on appeal. The court denied the motion without conducting an evidentiary hearing. Harris appeals the judgment of conviction and the subsequent order denying postconviction relief.

ANALYSIS

¶14 We first address Harris's claim that his trial counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his trial counsel's performance was deficient and that this

performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether trial counsel's actions constitute ineffective assistance presents a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's factual findings regarding counsel's actions at trial unless those findings are clearly erroneous. ***Id.*** at 634. Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense, however, are questions of law which we review de novo. ***Id.***

¶15 Because the trial court denied Harris's motion alleging ineffective assistance of counsel without an evidentiary hearing, we must preliminarily determine whether the court erred in not conducting a hearing on the motion. The supreme court has provided the following guidance:

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson***. [***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972) ("[i]f the defendant fails to allege sufficient facts in his motion 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….").] When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard.

State v. Bentley, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996) (citations omitted).

¶16 We have reviewed Harris's postconviction motion. The only "facts" alleged in it are a summary of the testimony of various witnesses at the trial, and the undisputed facts that Harris's trial counsel challenged neither the State's proof that Harris knew the dealership had a superior right to possession of his automobile, nor the reasonableness of the dealership's charges for the repairs performed. Attached to the motion was the affidavit of a repair shop manager opining that the reasonable value of the repairs that were *not* covered by Harris's warranty was $2,176.25. The remainder of the motion consisted of conclusory allegations and argument as to why counsel's failures constituted deficient performance which prejudiced Harris.

¶17 We conclude both that the motion alleged no facts which would entitle Harris to relief, and that the trial court did not erroneously exercise its discretion in denying the motion without a hearing because the record conclusively demonstrates that Harris is not entitled to relief. We present the basis for these conclusions together with our discussion of the merits of Harris's claims of ineffective assistance of counsel, which follows.

¶18 In analyzing an ineffective assistance claim, we may choose to address either the "deficient performance" component or the "prejudice" component first. ***Strickland***, 466 U.S. at 697. If we determine that the defendant has made an inadequate showing on either component, we need not address the other. ***Id.*** We turn first to the issue of prejudice. To establish prejudice, Harris must show that trial counsel's errors had an actual, adverse effect on the defense. ***Id.*** at 693. He must persuade us 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. Specifically, Harris must show that the errors deprived him of a "fair trial, a trial whose result is reliable." ***Id.*** at 687. We are not persuaded

that there is a reasonable probability the results of Harris's trial would have been different if his counsel had pursued either of the issues Harris cites as deficiencies in his defense at trial.

¶19 Harris's first claim is that his counsel was ineffective "for failing to challenge an essential scienter element of the offense of theft." He contends that his counsel failed "to challenge the state's proof, or lack thereof, that Mr. Harris knew that [the dealership] had a right of possession superior to his own." Harris claims that the "only notice that Mr. Harris had that there was a mechanic's lien on the vehicle was a single sentence buried in numerous paragraphs of a long passage of very fine print which begins with the caption 'DISCLAIMER OF WARRANTIES.'" Moreover, according to Harris: "Even assuming that he did read the fine print, the single sentence which refers to the lien … gives no notice to a layperson that [the dealership] has a superior right to possession in the car and could keep the car until reasonable value of the repairs was paid."

¶20 Essentially, Harris contends that the State did not present sufficient evidence to convince a jury that he had the requisite knowledge to be found guilty of the crime, and that his counsel was ineffective for not emphasizing this hole in the State's case by calling the jury's attention to the fine print in the work order.[3] We do not accept either premise. Rather, we conclude that there was sufficient evidence for the jury to infer that Harris knew that he did not have the right to take the car without paying the bill, and further, that it is not reasonably probable that

[3] Harris does *not* separately argue that we should set aside the verdict for insufficiency of the evidence to support his theft conviction. Accordingly, we consider the evidence relating to Harris's knowledge only in the context of his claim of ineffective assistance of counsel.

additional evidence regarding the fine print of the work order would have produced a different verdict.

¶21 Appellate review of the sufficiency of the evidence to support a jury verdict is highly deferential. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) ("'The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact.'") (citation omitted). In order to convict Harris of theft under WIS. STAT. § 943.20(1)(c), the State had to convince the jury beyond a reasonable doubt that Harris knew that the dealership had a superior right to possession of the car. The element in question relates to the defendant's mental state, of which direct proof is rare. ***State v. Hoffman***, 106 Wis. 2d 185, 200, 316 N.W.2d 143 (Ct. App. 1982). It has long been recognized, however, that a person's state of mind "may reasonably be ascertained from [his or her] acts and conduct ... and the inferences fairly deducible from the circumstances." ***Jacobs v. State***, 50 Wis. 2d 361, 366, 184 N.W.2d 113 (1971).

¶22 The State presented ample evidence of Harris's actions and statements and those of the dealership's agents. The jury could reasonably infer from the following evidence that Harris understood the dealership had the right to retain possession of his car until he paid for the repairs.

¶23 (1) It is undisputed that Harris signed the work order below the "mechanic's lien" language. The work order containing the mechanic's lien language and Harris's signature was received into evidence, and the presence of

the mechanic's lien language was noted before the jury.[4] Harris claimed to have read some of the fine print (such as that requiring a written estimate), but not the provision regarding the mechanic's lien. The jury could have inferred, however, that if he read some of the fine print, he read all of it, and that he understood what it meant.

¶24 (2) The dealership employees testified that Harris was told repeatedly (including on the day he picked up the car) that he had to pay the entire amount for the repairs, and then seek reimbursement from the warranty company for the covered portion. The strong implication from this testimony is that Harris was aware that he had to pay the entire bill prior to retrieving his car. If he could delay payment of the bill to a later date, the warranty/reimbursement policy would be of little consequence.

¶25 (3) The dealership employees testified they did not provide Harris with a key to the car, but Harris testified that the cashier did so. If jurors believed the State's witnesses on this point, they could infer from Harris's fabrication that he knew that he could not retrieve his car unless or until the dealership relinquished it to him.

¶26 (4) The cashier testified that the dealership's customary practice is to collect payments due for repairs before releasing an automobile and returning the keys. Harris testified that he had brought his car to this dealership for repairs on previous occasions. The jury could thus reasonably infer that Harris was

[4] Following closing arguments, the State consented to sending the work order to the jury room, but defense counsel stated his preference that exhibits only be submitted to the jury if they requested them. It was agreed that the court would submit exhibits if the jury requested any, without further input from counsel. The record is silent, however, as to whether the jury requested or was given any exhibits.

familiar with the dealership's customary requirement for payment before possession. In addition, jurors could also rely on their own knowledge and experience regarding auto repair industry practices in the Milwaukee area in order to determine that Harris knew that the dealership had the right to retain possession of his vehicle until the repair bill was paid. *See* WIS JI—CRIMINAL 195 ("In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.").

¶27 Harris's testimony at trial was that he had authorized only the warranty repairs; that the warranty company had agreed to pay for those repairs; and that he did not believe he owed the dealership anything for performing non-warranty repairs which he had not authorized. He also claimed that, upon informing the cashier of these things, she released the car keys to him. The jury could reasonably have questioned Harris's credibility, however. He testified that he had six prior criminal convictions. There was also testimony that Harris portrayed himself as a medical doctor, even though he is not one, and that he sometimes went by another name. Also, the service advisor stated that Harris identified himself as residing in Hackensack, New Jersey, while at trial Harris acknowledged that he has lived in Milwaukee for over thirty years.

¶28 We conclude that even if Harris had also claimed at trial that he did not know the dealership had a superior right to possess his car until his repair bill was paid in full because the mechanic's lien language was inconspicuous and incomplete, there is no reasonable probability that the result would have been different. We concur with the trial court's reasoning in deciding Harris's postconviction motions:

> Under the circumstances, had trial counsel's focus been set on the small print of the work order containing the

> mechanic's lien, the court concludes there is not a reasonable probability the outcome would have been different. In short, the jurors did not believe Harris; they believed [the service advisor]. Confidence in the outcome is not undermined by counsel's failure to focus on the small print of the work order given the totality of the testimony presented and the credibility determination that the jurors made.

¶29 Harris also claims his counsel was ineffective because counsel failed to introduce evidence disputing the reasonable value of the repairs at issue. If the value of the repairs at issue did not exceed $2,500, Harris would have been subject to a lesser penalty.[5] In support of his postconviction motion, Harris submitted an affidavit from another auto repair shop stating that "the reasonable fee for the parts and labor for the repairs that were performed [on] Mr. Harris's vehicle, *excluding repairs covered by the warranty*, would be $2,176.25." (Emphasis added.)

¶30 Harris's second claim of ineffective assistance also fails for lack of prejudice. It is undisputed that the dealership informed Harris that he was required to pay for both the warranty and non-warranty repairs and then seek reimbursement from the warranty company for the repairs covered by warranty. Accordingly, even if we accept the affidavit as establishing the reasonable value of the non-warranty repairs, the total amount due to the dealership on the day in question for all of the repairs would still exceed $2,500.[6] Thus, any deficiency in counsel's failure to challenge the reasonableness of the repair charges was not

[5] If the value of the property taken exceeds $2,500, the offense is punishable by up to ten years in prison as a class C felony. WIS. STAT. §§ 943.20(3)(c) & 939.50(3)(c) (1997-98). If the value of the property is more than $1,000 but not more than $2,500, the maximum imprisonment is two years for a class E felony. Sections 943.20(3)(b) & 939.50(3)(e) (1997-98).

[6] The affidavit indicates a reasonable amount for the non-warranty repairs is $2,176.25, and the warranty company paid $1,237.97 for the warranty repairs, for a total of $3,414.22.

prejudicial to Harris because the proffered evidence does not establish that Harris committed a less serious theft.

¶31 In summary, Harris's motion alleged no disputed facts which, if proven true at an evidentiary hearing, would entitle Harris to relief on his claim of ineffective assistance of counsel. And, because the record conclusively demonstrates that Harris suffered no prejudice from counsel's alleged errors, the trial court did not erroneously exercise its discretion in denying the motion without an evidentiary hearing.

¶32 Harris next argues that the trial court denied him his constitutional right to present a defense when it refused to admit his testimony that a representative from the warranty company made certain statements to him. He asserts that this testimony would have shown that he did not *knowingly* act to deprive the dealership of its right of superior possession because it established that Harris believed "most, if not all, the repairs were covered [by the warranty company] at the time he took his car." The State objected on hearsay grounds,[7]

[7] The State's objection arose during Harris's testimony as follows:

> Q …[W]ell did you ever have any conversations with your warranty company regarding [repairs to your vehicle]?
>
> A Yes, I did.
>
> Q Do you recall those dates?
>
> A I spoke to them on the 17th when I came to get the car. When the cashier gave me the invoice I kind of disputed the cost and the additional repairs, but the first issue was the fact that they said I had to be reimbursed, which I clearly from the onset they told me that I was approved for the payment for the work being done. So I asked the cashier to call the warranty company for me. She said the phone would not reach, I can go to the phone at – I guess they had a little island or service area. So I proceeded to the service area and made a phone call, spoke to a supervisor in regards to the reimbursement claim that [the

(continued)

and Harris asserts on appeal that the court should have admitted the testimony, both because it was not offered for the truth of the matter asserted, and because it falls within the "state of mind" exception to the hearsay rule. *See* WIS. STAT. § 908.03(3).

¶33 The bench conference following the State's objection was not reported, contrary to SCR 71.01(2) (1999) (requiring that the court record all but a few matters). We thus have no way to review the trial court's reasoning in excluding the testimony, or Harris's proffered justification for allowing it. However, even if we assume (without deciding) that Harris's proffered testimony was erroneously excluded, we conclude that the ruling constituted harmless error, regardless of whether the issue is framed as an evidentiary question or one of constitutional dimension. The supreme court has explained:

> [I]n view of the gradual merger of this court's collective thinking in respect to harmless versus prejudicial error, whether of omission or commission, whether of constitutional proportions or not, the test should be whether

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> dealership] said I had to take care of. Supervisor told me at that time that they still had a binding contract with [the dealership].
>
> [THE STATE]: Your Honor, I would object as to hearsay.
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> THE COURT: Sustained.
>
> THE COURT: The fact that he had a call—that is about all you can get into.
>
> [HARRIS'S COUNSEL]: Well your Honor, it is not being offered for hearsay. It is offered for why he intended—
>
> THE COURT: Well quick side bar, please.
>
> (Discussions were held at the side bar among counsel and the Court off the record and out of the hearing of the jury.)
>
> THE COURT: All right. I am going to ask that you not consider and I ask be stricken the last answer from this defendant concerning that question, and you may proceed then….

> there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.

State v. Dyess, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (footnote and citation omitted). We conclude that even if Harris had been permitted to testify as to what the warranty company allegedly told him during his phone call, there is no reasonable possibility that he would have been acquitted.

¶34 Harris amply conveyed to the jury his claim to having believed that the warranty company would cover all of the repairs he had authorized and his belief that he owed the dealership nothing further when he left with his car. For example, he testified that the service advisor had informed him that warranty company representatives had authorized "work on the engine," and that he specifically declined to authorize any additional repairs. Harris also said that, on the day he retrieved his car, after he had spoken with the warranty company representative, he handed the phone to the cashier, who then also spoke to the representative. His counsel then asked him, "At that point did you think everything was covered by your warranty company?" and Harris replied:

> Correct. After she [the cashier] got off the phone she said, but you still owe for the additional amount. At that point I said I never authorized the additional amount. At this particular time she slid me the invoice, and there was two keys. I took one key off … took the invoice, and proceeded to leave at that particular time.

¶35 We are not persuaded that it is reasonably possible that additional testimony from Harris regarding what he claimed the warranty company told him would have led to a different verdict. The testimony would have simply been an

uncorroborated and self-serving detail of Harris's defense, which was otherwise well communicated to the jury. We have discussed the evidence of Harris's guilt presented by the State, as well as the evidence which tended to undermine his credibility. Consequently, we deem any error relating to the exclusion of this bit of testimony harmless.

¶36 Finally, Harris also asks us to exercise our discretionary reversal authority under WIS. STAT. § 752.35, to grant him a new trial. The request is based entirely on the claims of error we have addressed above. Harris argues that "[a]s a result of counsel's errors and an erroneous evidentiary ruling which have been discussed above, the real controversies in this case, namely the issue of Mr. Harris' intent and the reasonable value of the repairs to the vehicle, were never considered by the jury." For the reasons we have discussed above, we disagree and decline to reverse under § 752.35. The real controversy—whether Harris took his car without the dealership's consent, knowing that the dealership had a superior right of possession until the repair bill was paid—was tried, and to the extent that either his counsel performed deficiently or the trial court improperly excluded certain testimony, Harris was not prejudiced thereby.

CONCLUSION

¶37 For the reasons discussed above, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.