COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP1974 **Cir. Ct. No. 1990CF900498**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENZY WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lenzy Wilson appeals from a postconviction order denying his motion for a new trial. The issue is whether trial and postconviction counsels' deficient performance, in respectively failing to object to the prosecutor's repeated references during closing argument to the evidence as

uncontroverted, implicitly emphasizing Wilson's failure to testify, and in subsequently failing to raise that issue, was prejudicial. We conclude that Wilson has not proven that those arguable failures prejudiced his defense. Therefore, we affirm.

¶2 A jury found Wilson guilty of armed robbery as a party to the crime and as a habitual criminal, in violation of WIS. STAT. §§ 943.32(1)(b) and (2), 939.05 and 939.62 (1987-88).[1] The trial court imposed a thirty-year sentence to run consecutive to any other sentence. Wilson filed a postconviction motion pursuant to WIS. STAT. RULE 809.30(2)(h) (amended July 1, 1991). After an evidentiary hearing, the trial court denied the motion. On direct appeal, this court affirmed the judgment of conviction and the postconviction order.

¶3 More than ten years later, Wilson moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2003-04). The trial court summarily denied the motion. This court summarily reversed the postconviction order and remanded the matter for an evidentiary hearing to determine whether trial counsel was ineffective for failing to object to the prosecutor's repeated comments during closing argument that the evidence was uncontroverted, thereby arguably violating Wilson's Fifth Amendment right to remain silent, and whether postconviction counsel was correlatively ineffective for failing to pursue trial counsel's alleged ineffectiveness.[2] After an evidentiary hearing at which both Wilson's trial and postconviction counsel testified, the trial court denied the motion, ruling that,

[1] Wilson was convicted of these offenses, which were charged pursuant to the 1987-88 version of the Wisconsin Statutes.

[2] *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8(1).

although trial counsel's failure to object to the prosecutor's improper references to Wilson's failure to testify constituted deficient performance, as did postconviction counsel's failure to pursue this issue, there was no resulting prejudice because "the evidence was more than sufficient to convict [Wilson] beyond a reasonable doubt," also negating any viable related postconviction claim. Wilson appeals.

¶4 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶5 As contextual background, we repeat the prosecutor's problematic references during closing argument.

> Absolutely nothing has shown or has been said or has been presented that says this is a case of mistaken identity. Everybody that you have heard, the uncontr[o]verted evidence, all the evidence you heard says this defendant is guilty. This defendant committed that armed robbery as he held a knife to Myra Grabowski's throat and took her purse. All of the evidence says that.
>
> There is unquestionable proof beyond a reasonable doubt that this defendant is the one who committed this

> offense. The uncontr[o]verted evidence of Myra Grabowski [the victim], of Detective Mischka [who witnessed Grabowski's identification of Wilson in a line-up], is that this defendant is the guilty party. This is the person who did it. All of the witnesses who testified who knew anything about this offense said he did it. There is no evidence to the contrary. That evidence was credible. That evidence was uncontr[o]verted. Look at that evidence.
>
> ….
>
> The fact that he held that knife to her throat didn't scare her enough so that she couldn't identify him. It didn't happen like he had counted on. She was able to identify him and she did because she had the time. She had the opportunity. She had the proximity of his face to her, and she had the attention just like she had to that car that he got into that Robert Green was driving. Is that proof beyond a reasonable doubt? Absolutely. It is uncontr[o]verted.
>
> ….
>
> And then there is the defense case. What other evidence did you hear? You heard from his mother. She didn't have anything to tell you about this armed robbery. She didn't tell you he wasn't there. She didn't tell you he didn't do it. She didn't tell you that he wasn't guilty….
>
> … I don't know what her testimony provides in this case. I can tell you one thing. It does absolutely nothing to contr[o]vert what Myra Grabowski told you. Absolutely nothing.
>
> … [A]ll of the evidence, every piece of evidence, says he is guilty. Says he did it.

In rebuttal, the prosecutor, reiterated:

> What matters is the evidence and the only person who was there who testified is Myra Grabowski, and she told you it was this defendant who robbed her. Nobody told you it wasn't and nothing—Her testimony and nothing in the evidence says it wasn't him. Everybody that was present regarding an identification said this is the person who did it, and it's only defense counsel [who] wants you to speculate.
>
> ….

> What you're to rely on is the evidence. And Ladies and Gentlemen, when you go back to reach your verdict, forget everything I told you. Forget everything I said in voir dire. Forget everything I said in my opening statement, and forget everything I have said to you right now, and forget everything he told you because that's not what you're basing your verdict on.
>
> You base your verdict on the evidence and all the evidence relevant to who did this says he did it and that's because he did do it, and you have the tools to do justice…

¶6 The trial court determined that trial counsel's performance was deficient because he failed to object to the prosecutor's repeated references to the absence of conflicting testimony, which implicitly emphasized Wilson's failure to testify. The State questions this determination, contending that trial counsel's postconviction explanation for failing to object to the prosecutor's references constituted reasonably sound trial strategy, necessarily negating the ineffective assistance claims.[3] We instead examine the trial court's determination that trial counsel's deficient performance was not prejudicial.[4]

¶7 Wilson contends that the trial court applied the wrong standard for prejudice. We disagree. Wilson confuses the trial court's ultimate determination, which was that "the testimony in this case presents sufficient evidence to support a

[3] Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984). Specifically, "[w]e will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment." ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).

[4] We do not discuss counsels' postconviction testimony because its principal relevance is to the trial court's determination of deficient performance, which we do not address. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address non-dispositive issues).

determination that the prosecutor's comments were harmless beyond a reasonable doubt," with the standard for prejudice, which is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***Wirts***, 176 Wis. 2d at 187 (emphasis in ***Wirts***). The trial court applied the correct test for prejudice, and also analyzed the interrelationship between that test and whether the violation of the defendant's constitutional right to remain silent was harmless, pursuant to ***United States v. Cotnam***, 88 F.3d 487, 500 (7th Cir. 1996), which was decided almost five years after Wilson was convicted.

¶8 At trial, only three witnesses testified: the victim, a police detective, and Wilson's mother, who was the only defense witness. The charged incident was an armed robbery, and the only two people present were Grabowski and Wilson. Grabowski testified; Wilson did not. Grabowski identified Wilson two days after the incident; she said, "it's number three [who was Wilson], I'll never forget that face." She also circled and initialed the number three on her special identification showup card and wrote "[t]here is absolutely no doubt in my mind that number three is the man who robbed me at knifepoint on Wednesday, October 26, 1988." At trial, Grabowski identified Wilson definitively, estimating that during the robbery she had stood approximately eighteen to twenty-four inches from him. At sentencing, the trial court characterized the evidence of Wilson's guilt as "overwhelming."

¶9 In its postconviction order, the trial court reiterated the factual information supporting its determination that Wilson had not shown prejudice.

> The court finds that the evidence presented to the jurors was very strong and substantially unfavorable to the defendant. The victim correctly noted the license number of the vehicle she had seen in the alley and in which she

> said the defendant had entered after taking her purse. She identified the vehicle and the driver, Robert Green, the same evening after police found the vehicle. She identified the defendant positively in a line-up very quickly, writing on the back of the card, "There is absolutely no doubt in my mind that number three [the defendant] is the man who robbed me a[t] knifepoint on Wednesday, October 26, 1988, and telling Officer Mischka "[I]t's number three, I'll never forget that face." She also identified the defendant beyond all doubt at the preliminary hearing and at the trial.
>
> The victim was 34 years old at the time of the trial and was very specific in her testimony. She testified that the defendant was not wearing anything to conceal his identity, that he was right in front of her "face to face," and that he looked at her when he told her to give him her purse or he would slash her throat. She estimated that he was approximately 18-24 inches away from her and that she kept looking at his face. Although she was not certain about his height and weight or what he was wearing, there is no question that it was predominately a face to face encounter before he ran off and that the whole incident happened very quickly. Moreover, she testified, "I just looked at him, to try to remember what he looked like.

(Footnote and trial transcript notations omitted.)

¶10 Considering these facts, we independently conclude that a different result (other than a guilty verdict) would not have been reasonably probable had trial counsel objected to the prosecutor's references to uncontroverted testimony and to his implications emphasizing Wilson's failure to testify (assuming *arguendo* that failing to object was deficient performance). The evidence of Wilson's guilt was overwhelming, and the jury was instructed that the lawyers' closing arguments were not evidence. Consequently, Wilson has not "*affirmatively* prove[n]" prejudice. *See* ***Wirts***, 176 Wis. 2d at 187. We conclude that Wilson has not affirmatively proven the reasonable probability of a different result or that the trial was "unreliable," absent trial counsel's arguably deficient performance. *See* ***Strickland***, 466 U.S. at 694. Consequently, postconviction counsel was not ineffective for failing to pursue trial counsel's failures to object to

the prosecutor's expressed references to uncontroverted testimony and to his implicit references to Wilson's failure to testify.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).