COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2658 **Cir. Ct. No. 2002CF435**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY B. HOOKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: FREDERICK C. ROSA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Larry B. Hooker appeals from a postconviction order summarily denying his motion for a new trial predicated on the alleged ineffective assistance of postconviction counsel. The issues are whether trial

counsel was ineffective for failing to file a petition for interlocutory review to challenge the bindover decision (and postconviction counsel for failing to raise trial counsel's ineffectiveness), and whether the trial court erred in admitting (otherwise inadmissible) hearsay testimony, which also was allegedly shown to be false. We conclude that Hooker has not shown that trial counsel's failure to seek interlocutory review of the bindover decision was prejudicial, and thus, that he received ineffective assistance. Hooker misinterprets ***Page v. Frank***, 343 F.3d 901 (7th Cir. 2003), as excusing him from the requisite of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), which bars his challenge to the trial court's discretion in admitting certain evidence that he claims was otherwise inadmissible and false. Therefore, we affirm.

¶2 A jury found Hooker guilty of arson and two counts of first-degree recklessly endangering safety for setting fire to the apartment of his estranged wife (who was not in the apartment at that time), and her daughter (who was asleep in the apartment), and for endangering their sixty-two-year-old neighbor (whose apartment door displayed a sign saying "oxygen in use"), who lived in the apartment across the hall. The trial court imposed a sixty-year aggregate sentence comprised of thirty-five- and twenty-five-year respective aggregate periods of initial confinement and extended supervision. Hooker sought sentence modification, which the trial court denied. On direct appeal, Hooker challenged the sufficiency of the evidence binding him over for trial, the sufficiency of the evidence supporting his conviction, and the trial court's exercise of sentencing discretion. This court affirmed the judgment of conviction and the postconviction order. *See* ***State v. Hooker***, No. 2003AP1318-CR, unpublished slip op. (WI App Feb. 3, 2004) ("***Hooker I***").

¶3 Hooker then filed a petition for a writ of habeas corpus alleging the ineffective assistance of appellate counsel for failing to challenge trial counsel's effectiveness for failing to pursue the insufficiency of the evidence supporting his bindover by failing to file a petition for interlocutory review. *See* ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (procedure for challenging the effectiveness of appellate counsel); WIS. STAT. RULE 809.50 (2003-04) (procedure for seeking interlocutory review). This court dismissed the petition because Hooker was actually challenging the effectiveness of postconviction rather than appellate counsel, and explained that his challenge should be raised initially in the trial court pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). *See* ***State ex rel. Hooker v. Kingston***, No. 2005AP174-W, unpublished slip op. at 2-3 (WI App July 26, 2005) ("***Hooker II***").

¶4 Hooker then filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06), renewing his challenge to the sufficiency of the evidence binding him over for trial, and claiming that trial counsel was ineffective for failing to challenge that decision by seeking interlocutory review, and that postconviction counsel was correlatively ineffective. The trial court denied the motion on its merits, ruling that it was "appropriate" to admit the excited utterances of Hooker's stepdaughter at the preliminary hearing, and that insofar as trial is concerned, the "retract[ion of] any unfavorable statements about the defendant and inform[ing] the State that those prior statements were 'false' did not preclude the State from introducing evidence of the prior statements through the detective. This was a proper credibility determination for the jurors to decide." It is from this order that Hooker now appeals.

¶5 "[A] conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing. Accordingly, a defendant who claims

error occurred at his preliminary hearing may only obtain relief before trial." ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Specifically,

> [i]f the defendant is dissatisfied with what occurred at the preliminary hearing, he can seek relief before trial in a motion to dismiss brought before the trial court based on errors or insufficiencies of the preliminary hearing. He may challenge his bindover by way of a permissive interlocutory appeal from the non-final order binding him over for trial. Section 809.50, Stats.

Id. at 636. Failure to seek interlocutory review results in waiver of the right to challenge the nonfinal bindover decision. *See* ***id.*** If, however, this court denies the petition for interlocutory review, the defendant has not waived the right to renew that issue on direct appeal (although the test on review then becomes whether that alleged error was prejudicial). *See* ***State v. Wolverton***, 193 Wis. 2d 234, 254-55, 533 N.W.2d 167 (1995), *abrogated on other grounds by* ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582.

¶6 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).

¶7 Trial counsel objected to the admissibility of a Milwaukee City Police Arson Detective's rendition of hearsay of Hooker's stepdaughter at the preliminary hearing.[1] Trial counsel moved to dismiss the charges at the close of the preliminary hearing, challenging the admissibility of the hearsay statements. She again renewed her dismissal motion, challenging the sufficiency of the evidence supporting the bindover. The trial court reviewed and upheld the circuit court commissioner's decision based principally on the hearsay testimony admitted pursuant to the excited utterance exception to the hearsay rule. Trial counsel did not, however, petition for interlocutory review to obtain appellate review of the bindover decision.

¶8 Appellate counsel did not file a postconviction motion challenging trial counsel's effectiveness. On appeal, however, appellate counsel challenged the sufficiency of the evidence supporting the bindover decision, specifically challenging the admissibility of the hearsay (and allegedly false) statements. The State relied on ***Webb***, contending that Hooker waived this issue by failing to seek interlocutory review. Hooker failed to file a reply brief. This court refused to review this issue on its merits because: (1) Hooker's conviction resulted from "a fair and error-free trial"; and (2) Hooker "concede[d] the point" by failing to reply to the State's response brief on appeal. *See* ***Hooker I***, No. 2003AP1318-CR,

[1] The preliminary hearing occurred over several dates. Initially, trial counsel objected to the admissibility of this hearsay testimony, but the objections were overruled. Trial counsel then challenged that testimony through cross-examination.

unpublished slip op., ¶8. ***Hooker I*** prompted Hooker to allege the ineffectiveness of appellate counsel.

¶9 In ***Hooker II***, we explained that appellate counsel "could not properly raise the issue of ineffectiveness of trial counsel for the first time in a reply brief."[2] ***Hooker II***, No. 2005AP174-W, unpublished slip op. at 2. In his postconviction motion thereafter, Hooker alleged alternatively that, ***Page*** excused the sufficient reason required by ***Escalona***, or postconviction counsel's ineffectiveness was sufficient to overcome ***Escalona***'s procedural bar. *See* ***Rothering***, 205 Wis. 2d at 682. We accept the latter allegation as a sufficient reason to overcome ***Escalona***'s procedural bar. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (we determine the sufficiency of the reason pursuant to ***Escalona*** as a question of law entitled to independent review).

¶10 We reject Hooker's ineffective assistance claim. First, we implicitly decided on direct appeal that Hooker received a fair and errorless trial when we rejected the sufficiency of the evidence supporting the conviction and sentencing challenges on their merits. *See* ***Hooker I***, No. 2003AP1318-CR, unpublished slip op., ¶1. Consequently, the alleged error that occurred at the preliminary hearing would not have been legally consequential following a fair and errorless trial. *See* ***Wolverton***, 193 Wis. 2d at 254; ***Webb***, 160 Wis. 2d at 636.

[2] Hooker also criticizes appellate counsel for attempting to challenge on appeal what occurred at the preliminary hearing, in apparent ignorance of ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Hooker has failed, however, to show how that misplaced appellate argument was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶11 Second, the trial court's review of the detective's testimony in its oral decision denying Hooker's dismissal motion is supported by the record from the preliminary hearing and supports the discretionary determination to admit the hearsay statements of Hooker's stepdaughter as excited utterances. *See* WIS. STAT. § 908.03(2) (2001-02).[3] Obtaining a reversal of a fact-intensive discretionary determination on appeal (interlocutory or otherwise) requires the appellant to overcome the great deference we afford discretionary determinations. *See* ***Moats***, 156 Wis. 2d at 96 ("The decision whether to admit a hearsay statement under the excited utterance exception is within the discretion of the trial court. This court will not disturb this determination unless the record shows that the ruling was manifestly wrong and an [erroneous exercise] of discretion."). In this case, the detective's testimony was very specific regarding the stepdaughter's behavior and demeanor following her being awakened by a telephone ringing, and hearing Hooker "yelling on the phone" from inside the apartment, and discovering that her mother's apartment, where she had been sleeping, was ablaze.[4] It would

[3] An excited utterance, which is an exception to the hearsay rule, is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." WIS. STAT. § 908.03(2) (2001-02).

[4] The detective testified that Hooker's stepdaughter

> seemed upset. She was –- She was holding her hands in a — they were crossed across her chest holding her jacket closed in a very tight position, almost a fetal position.
>
> She had trouble talking. She was stuttering. She wouldn't look at me in the eyes. She was kind of looking off into space like she was uncomfortable with the situation. She –- She wasn't crying, but she seemed very tense and stressed out.

(continued)

be difficult to demonstrate an erroneous exercise of discretion. *See* ***Moats***, 156 Wis. 2d at 96.

¶12 Initially, trial counsel objected to the admissibility of the detective's testimony recounting the stepdaughter's alleged hearsay. The circuit court commissioner overruled the objection, later reasoning that the stepdaughter was being questioned by the detective in a vehicle outside the apartment building less than two hours after a 9-1-1 call was made to report the fire in her mother's apartment. The circuit court commissioner explained, in admitting that hearsay testimony, that the detective recounted the stepdaughter's "reactions that indicate a response to the stress of that circumstance [of the fire at her mother's apartment]."

¶13 The trial court, in denying Hooker's dismissal motion to the bindover decision, explained the admissibility of the stepdaughter's statements as recounted by the detective at the preliminary hearing:

> An excited utterance exception has three requirements…. First, there must be a startling event or condition. Second, the declarant's out-of-court statement must relate to the startling event or condition, and third, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition….
>
> On the first element of an excited utterance, that there's a startling event, there is record evidence at the

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The detective then testified that the stepdaughter told her that "she was scared about the fire and that she and [the defendant] argued a lot." Although the stepdaughter did not claim to have seen Hooker start the fire, according to the detective, the stepdaughter told her that "she heard the whooshing sound, she stepped out of her room and saw [Hooker] leaving the apartment and then saw the fire." It is the trial court, not this court, which finds facts. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980) ("The weight of the evidence and the credibility of the witnesses are matters resting within the province of the trier of fact. It is axiomatic that trial court findings may not be disturbed on appeal unless they are contrary to the great weight and clear preponderance of the evidence.").

preliminary hearing of [the stepdaughter] being awakened, hearing [Hooker]'s voice, identifying [Hooker] as h[er] mother's husband, hearing [Hooker] make a statement, of [the stepdaughter], the declarant, opening the door, hearing a, quote "big whooshing" sound, seeing [Hooker] walk past her or leave the apartment, and finding two fires and a burning candle.

….

As to the second element of an excited utterance…. Here, the statement given by the declarant, [the stepdaughter], related in that she identified by voice and by sight as this defendant as being on the scene at the time that she discovered the fires and was awoken.

While the detective admitted that [the stepdaughter] did not tell her that she, [the stepdaughter], saw Mr. Hooker start the fires, [the stepdaughter]'s statements that she saw and heard Mr. Hooker that morning when she woke up and the fires had been lit does relate to the startling event of the fire. The startling event was the fire and being awakened by the phone call, and [the stepdaughter]'s statements to the detective related to those events.

….

As for the third element….

… There is record evidence in Detective Wallich's description of [the stepdaughter] that, notwithstanding the approximately 90 to 105 minutes between the time of the 911 call, which occurred shortly after [the stepdaughter] awoke, to the time the detective spoke with [the stepdaughter] in a squad car, that [the stepdaughter] remained under a great deal of stress relating to the startling event which she described to the detective.

The defense is correct that the time factor is not crystal clear from this record, but the sequence of the facts testified to is important and ultimately dispositive on this third element. In these circumstances, a court may apply a sliding scale to the relationship between the startling event and the contemporaneous nature of the statement. The more startling the event, the longer an utterance might be made in an excited state.

Here, the witness testified to a frightening, harrowing experience: Awakening to find her mother's husband making a potentially threatening statement in the

> apartment, finding at least two fires in the apartment, hearing the big whooshing sound, seeing a burning candle. All of these facts allow for the commissioner's reasonable conclusion that that third element has been satisfied.
>
> A less startling event or condition may not have allowed for the time lag of approximately 90 to 105 minutes. A more startling condition allows for the Court to analyze the declarant's state of mind and state of person at the time the declarant made the statement to the detective. Here, the detective testified in great detail concerning a 15-year-old who was upset, not crying, blinking and looking away, crossing her arms in a fetal position, who said she was scared about the fire.

It is unlikely that Hooker could have persuaded this court that the trial court erroneously exercised its discretion in admitting the stepdaughter's statements as recounted by the detective as excited utterances. *See* WIS. STAT. § 908.03(2) (2001-02).

¶14 Third, it would be difficult to establish prejudice because Hooker's stepdaughter testified at trial, and was questioned about her statements to the detective, and her trial testimony that differed from her prior statements. It would consequently be difficult to demonstrate prejudice from an alleged error in the admission of evidence at the preliminary hearing when the hearsay declarant testified at trial, demonstrating the difference in her statements. Hooker's failure to affirmatively prove prejudice from trial counsel's failure to seek interlocutory review of this evidentiary issue from the preliminary hearing obviates any potential ineffective assistance claim on this issue. *See* ***Moats***, 156 Wis. 2d at 101.

¶15 Hooker's next claim (which he characterizes as prosecutorial misconduct) is against the trial court for admitting evidence proffered by the State's witnesses that was allegedly inadmissible and false. In his postconviction motion, Hooker alleges that he does not need a (sufficient) reason for failing to

previously raise this issue because ***Page*** excuses ***Escalona***'s procedural bar.[5] Hooker misunderstands ***Page***, which does not excuse a defendant from ***Escalona***'s threshold requirement to allege a sufficient reason for failing to previously raise the issue now being raised to collaterally attack his state court judgment by postconviction motion. *See* ***Page***, 343 F.3d at 907. Consequently, Hooker's second issue is procedurally barred by ***Escalona***.

By the Court.—Order affirmed.

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

[5] Unlike Hooker's first issue, for which he claimed ineffective assistance as his (alternative) reason for failing to previously raise the issue, he alleges only ***Page*** as his reason for failing to previously raise his second issue. *See* ***Page v. Frank***, 343 F.3d 901, 907 (7th Cir. 2003). ***Page*** does not excuse him from the applicability of ***Escalona***'s procedural bar. *See* ***Page***, 343 F.3d at 907. ***Page*** explains that ***Escalona***'s procedural bar does not affect the availability of federal habeas corpus relief to state prisoners; it does not address ***Escalona***'s applicability to issues raised by state prisoners seeking collateral review of state court judgments, as is the case here. *See* ***Page***, 343 F.3d at 907.