COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2890 **Cir. Ct. No. 2001CF1185**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAMMEL V. JOHNSON,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Trammel V. Johnson appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion. He claims the trial court

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

erred in denying his motion alleging that his trial counsel and his appellate counsel provided ineffective assistance. Because Johnson fails to establish that either counsel provided ineffective assistance, we affirm.

BACKGROUND

¶2 In October 2000, Johnson and two of his associates decided to rob a fast-food restaurant in Milwaukee. As they approached the back door of the restaurant, the manager, Thomas Erwine, surprised them by opening the door. One of Johnson's accomplices, Toni Toston, tussled with Erwine. Toston then put his gun in Erwine's face and announced he was going to kill Erwine.

¶3 At this point, Johnson claimed that he did not want to be a part of any murder, so he took off running. As he did so, he heard Toston fire his gun. Erwine survived the shooting. As a part of the police investigation, Johnson was interviewed by police. During the interview, Johnson admitted that he and the others intended to commit an armed robbery, but told police that he did not know that Toston was going to shoot to kill the manager. He stated that when he heard Toston's threat to kill, he took off.

¶4 Johnson was charged with one count of attempted first-degree intentional homicide and one count of attempted armed robbery, both as party to a crime. Johnson filed a motion seeking to suppress his statement, which was denied. In June 2001, the prosecutor sent Johnson's counsel a plea offer—in exchange for pleading guilty, she would recommend twenty years on the homicide, consisting of fifteen years of initial confinement and five years of extended supervision, and ten years consecutive to the homicide on the armed robbery. She indicated that she would not make any recommendations as to

whether these sentences should be consecutive or concurrent to the sentence to be imposed in an unrelated case.

¶5 Shortly after the plea offer, Johnson was sentenced in the unrelated case. He received a sentence consisting of eighteen years of initial confinement, followed by twenty-seven years of extended supervision. In July 2001, the prosecutor in the instant case amended her plea offer—indicating that she would downgrade the homicide count to first-degree reckless homicide and recommend that the homicide and armed robbery counts be imposed concurrently, and not make any recommendation as to whether the sentence in the instant case be concurrent or consecutive to the unrelated case sentence. Johnson rejected the offer and the case was tried to a jury in October 2001.

¶6 During the trial, the defense strategy was to admit the armed robbery participation, but convince the jury that Johnson should be acquitted on the homicide charge because his running away when Toston threatened to kill the victim constituted withdrawal. Johnson testified on his own behalf, repeating what he had told police—that he did not intend for the victim to be killed and ran when he heard Toston threaten to do so. The victim also testified. In response to questions, he indicated that Johnson did not run away when Toston threatened him, but was standing nearby the entire time. The trial court gave the jury the instruction on withdrawal. The jury returned a verdict finding Johnson guilty on both counts. The trial court sentenced Johnson to two concurrent sentences of twenty years each, both consisting of ten years of initial confinement, followed by ten years of extended supervision.

¶7 Johnson, with postconviction counsel, Lynn Ellen Hackbarth, filed a motion seeking postconviction relief. The motion raised two issues: (1)

ineffective assistance of trial counsel for failing to take the plea offer; and (2) sentencing. The motion was summarily denied. When Johnson appealed the denial to this court, we affirmed the trial court's ruling.

¶8 In May 2003, Johnson filed a *pro se* WIS. STAT. § 974.06 motion, asserting that Hackbarth had provided ineffective assistance of counsel by failing to adequately present the issue of trial counsel's ineffectiveness. Specifically, Johnson claimed that trial counsel failed to fully explain the elements of the withdrawal defense and the natural and probable consequences basis of criminal liability. He also claimed that trial counsel was ineffective for conceding the elements of the charges in his opening statement. The trial court ruled that the opening statement of trial counsel was not prejudicial, but ordered a ***Machner***[2] hearing on whether trial counsel was deficient with respect to advice about going to trial versus taking the plea offer and explaining the elements of the offenses.

¶9 Johnson's trial counsel testified at the evidentiary hearing. He stated that he explained the withdrawal defense and its elements to Johnson. He indicated that Johnson was adequately advised and he explained that if the case goes to trial, the defense would be that his running away was an "implicit announcement" to Toston that Johnson was withdrawing. Counsel testified that he told Johnson that the withdrawal defense requires the conspirator to announce to his partner that you are no longer going along with the plan. Counsel also said that he adequately advised Johnson about his liability under the natural and probable consequences basis. With respect to plea negotiations, counsel stated

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

that there was a push to dismiss the homicide count based on withdrawal and that Johnson's stance was that he would plead guilty to the armed robbery if the State dismissed the homicide. Otherwise, he was taking the case to trial. It was Johnson's decision to go to trial, that they had many discussions about it and that if Johnson said he did not want to go to trial, counsel would not have tried the case.

¶10 Johnson also testified at the ***Machner*** hearing, contradicting much of what trial counsel stated. Johnson said his trial counsel never told him he would have to notify Toston of his withdrawal in order for that defense to work. Johnson also testified that he told trial counsel he did not want to go to trial, but counsel talked him into it. Johnson also said that when the trial court read the elements of the withdrawal defense, he heard the notice requirement for the first time and realized he had "no chance." At the conclusion of the hearing, the trial court denied Johnson's motion, ruling:

> [B]efore trial [trial counsel] told you the elements of both the withdrawal defense and the party to a crime theory that the State was using.
>
> In other words, that you could be held responsible for the natural and probable consequences of another person's crime if you had something to do with creating those consequences.

¶11 The trial court explained that it found trial counsel's testimony more credible because Johnson is the type of person who would stand up for himself and interrupt regardless of what an attorney advises. The trial court stated that if Johnson actually heard the notice element of withdrawal for the first time from the court and thought he had "no chance," Johnson would have spoken up and pled guilty. The trial court found that Johnson was adequately advised with respect to the withdrawal defense and the elements necessary to this case. It also found that

even if counsel did not adequately advise Johnson, such was not prejudicial because the trial court advised Johnson, so that Johnson had sufficient time to change his mind and plead guilty before the jury started deliberating. An order was entered denying Johnson's WIS. STAT. § 974.04 motion. He now appeals.

DISCUSSION

¶12 Johnson raises two issues with this court: (1) trial counsel provided ineffective assistance by proceeding to trial instead of having Johnson plead guilty, and by making concessions during the opening statement; and (2) postconviction counsel provided ineffective assistance by failing to sufficiently raise the ineffective assistance of trial counsel. We are not convinced.

¶13 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶14 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶15 Johnson claims his trial counsel provided ineffective assistance by relying on the withdrawal defense, which was "invalid as a matter of law" because there was no notice to Toston of Johnson's decision to withdraw. Accordingly, Johnson asserts trial counsel should have convinced him to plead guilty. Johnson also contends that trial counsel failed to explain the elements of the withdrawal defense to him because if he had known about the notice element of the withdrawal defense, he would have pled guilty. We are not persuaded.

¶16 Based on the record in this case, the withdrawal defense was not "invalid as a matter of law." If that was the case, the trial court never would have instructed the jury on withdrawal as it is not permitted to give instructions, which are not supported by the evidence. ***McGuire v. Stein's Gift & Garden Ctr, Inc.***, 178 Wis. 2d 379, 390, 504 N.W.2d 385 (Ct. App. 1993). As the State correctly asserts, the withdrawal defense requires "notice of withdrawal." WIS JI—CRIMINAL 412 (2005). The instruction does not require "verbal notice." Rather, it is possible that the defense may be based on an affirmative act. *See* ***United States***

v. Shaw, 106 F. Supp. 2d 103, 123 (D. Mass. 2000). Here, trial counsel adequately asserted during the trial that the "affirmative act" constituting notice of withdrawal was Johnson turning and running away. If the jury believed Johnson's theory of defense, withdrawal would have been a viable defense. The use of the withdrawal defense in this case was not "outside the wide range of professionally competent assistance," but was a reasonable choice of trial strategy. ***Strickland***, 466 U.S. at 690-91. We conclude that trial counsel's conduct did not constitute deficient performance.

¶17 We also reject Johnson's assertions that trial counsel failed to adequately advise him as to the elements of the withdrawal defense and the natural and probable consequences of criminal liability. The trial court found that trial counsel did discuss these issues with Johnson and that finding is not clearly erroneous. The testimony of trial counsel at the ***Machner*** hearing supports the trial court's findings. We defer to the credibility determinations of the trial court. *See* ***State v. McCallum***, 208 Wis. 2d 463, 479-80, 561 N.W.2d 707 (1997).

¶18 We also agree that Johnson's argument erroneously rests in substantial part on his claim that the jury rejected the withdrawal defense on the basis that flight did not constitute notification. We do not know that such was the basis upon which the jury rejected the defense. The record reflects that the only evidence suggesting flight by Johnson is Johnson's own claim that he fled. The record also contains testimony from the victim that Johnson did not run away, and that there was no affirmative action by Johnson notifying anyone that he was withdrawing from the criminal activity. Based on all the facts and circumstances in this case, we conclude that trial counsel's chosen strategy did not constitute deficient performance. Rather, it was a reasonable choice given the fact that

Johnson would not accept the State's plea offer. In fact, it was the *only* possible strategy under the facts and circumstances in this case.

¶19 We also reject Johnson's contention that the concessions made by trial counsel during the opening statement constituted ineffective assistance. We do so on the basis that Johnson has failed to establish that trial counsel's conduct prejudiced him. First, Johnson has repeatedly conceded that he intended to aid Toston in the armed robbery—he testified to this on the witness stand. Thus, there was clearly no prejudice to Johnson with respect to any concession made with respect to the armed robbery. Second, we are not convinced that the concessions with respect to the homicide were prejudicial either. Johnson objects to two concessions trial counsel made during opening statement. One was that the victim would testify that Toston had the intent to kill. This concession was not prejudicial to Johnson based on the facts and circumstances *and* the entire defense theory of the case. The defense theory was that Toston, on the spur of the moment, formed the intent to kill and that Johnson, as a result of that spur of the moment intent, withdrew from the crime. Thus, the concession, which accurately predicted the State's case, was reasonable in gaining credibility with the jury. *See* ***State v. Gordon***, 2003 WI 69, ¶¶24-26, 262 Wis. 2d 380, 663 N.W.2d 765. Based on the defense theory, there would be no other way to present the factual description of what occurred.

¶20 The second concession related to whether homicide is a natural consequence of the armed robbery. In reviewing trial counsel's opening remarks with respect to this, we are not convinced that they prejudiced Johnson. Trial counsel was attempting to convey to the jury that although attempted homicide may be a natural and probable consequence of attempted armed robbery, it was not in this case, because Toston decided to kill the victim on the spur of the moment

and Johnson should not be held liable for that decision because he was withdrawing from the conspiracy as Toston was deciding to kill the victim.

We also agree with the trial court that the evidence in this case would have led the jury to the same verdict regardless of the opening statement concessions. Based on the forgoing, we conclude that the concessions made during opening statement did not prejudice Johnson.[3]

¶21 Johnson also asserts that the trial court erred in summarily denying his motion based on the opening statement concessions. He argues he should be afforded an evidentiary hearing on this issue. We disagree. If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is

[3] We note that ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765, addressed only concessions made in closing statements. ***Id.***, ¶30. In addition, federal courts have upheld opening statement concessions only when there is evidence of consultation between counsel and client. *See, e.g.*, ***United States v. Holman***, 314 F.3d 837, 841-43 (7th Cir. 2002). Based on our determination that Johnson has not demonstrated prejudice, we need not address this issue further.

not entitled to relief, our review of this determination is "limited to whether the court erroneously exercised its discretion in making this determination." ***Id.*** at 318.

¶22 With respect to the opening statement issue, the trial court summarily concluded that Johnson had not been prejudiced by any opening statement concessions and therefore no evidentiary hearing was needed on this specific claim. The trial court's determination in this regard was not erroneous. The record conclusively demonstrates that Johnson is not entitled to relief on this issue and therefore no evidentiary hearing was required.

¶23 Finally, Johnson's last contention is that postconviction counsel provided ineffective assistance for failing to raise the claims of trial counsel ineffectiveness that Johnson raises in this motion. Because we have rejected each of Johnson's contentions of trial counsel ineffectiveness, it logically follows that postconviction counsel cannot be ineffective for failing to raise these issues. Accordingly, we summarily reject Johnson's contention that he received ineffective assistance from postconviction counsel.

By the Court.—Order affirmed.

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