COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. Stat. § 808.10 and RULE 809.62.

No. 00-3117-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO J. SPENCER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY BRENNAN and MICHAEL B. BRENNAN, Judges.[1] *Affirmed.*

¶1 CURLEY, J.[2] Antonio Spencer appeals the judgment convicting him of carrying a concealed weapon while masked, as party to a crime; disorderly

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[1] Judge Kitty Brennan presided over the jury trial and heard a portion of the postconviction motion. Judge Michael Brennan (no relation) conducted a hearing on the remaining claims following remand by this court.

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

conduct while armed and masked, as party to a crime, and obstructing an officer while masked, as party to a crime, contrary to WIS. STATS. §§ 941.23, 947.01, 946.41(1), 939.05 and 939.641,[3] and from the trial court's order denying his postconviction motion. Spencer argues that his attorney was ineffective for failing to object to a six-person jury, and for failing to object, on confrontational and hearsay grounds, to the admission of the co-defendant's inculpatory statement through the testimony of an officer. This court affirms.[4]

I. BACKGROUND.

¶2 In July 1997, a Milwaukee police officer reported that he observed what appeared to be a carjacking at a car wash in the 3100 block of North 27th Street. The officer, Phillip Henschel, testified that he saw two suspects, both black males. One of the men was standing on the passenger's side of a car, and the other one was standing on the driver's side. Both men were masked, and the one on the driver's side had "what appeared to be a large, black, semiautomatic handgun" that was pointed into the car window. He described the suspect on the driver's side as wearing a long black shirt, black pants and a black ski mask. The officer related that when the man on the passenger side saw the officer, he began to yell "po-po," a street term for "police," and both of the suspects fled. The suspect on the passenger side, later identified as Michael Hawthorne, was caught after a brief

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[4] This case is decided by one judge, pursuant to WIS. STAT. § 752.31(2). Spencer has asked for both oral argument and publication. Publication is prohibited under WIS. STAT. § 809.23(b)(4) in one-judge decisions. Although this court has the authority to request that this case be heard by a three-judge panel, *see* WIS. STAT. § 752.31, this court does not view this matter as appropriate for three-judge treatment. This case also does not require oral argument.

chase. He was wearing the identical clothes Henschel saw him wearing earlier, as well as latex gloves, but he did not have a gun.

¶3 Another officer who came to assist Henschel arrested Spencer. This officer testified that he saw a black man wearing a white tank top and black shorts jump a fence and he gave chase, eventually catching Spencer as he came out between two houses. When arrested, Spencer was sweating profusely and his shirt was soaked with perspiration, suggesting that he had recently been running. He was stopped a block away from where the suspected carjacking took place and within a minute to a minute and a half after the officer heard the request for backup. This officer testified that he saw no other people when he was searching for the suspect. Further, he related that Spencer was traveling in the opposite direction from his "auntie's" house where Spencer claimed he was going.

¶4 A third officer found a black sweatshirt, a pair of black pants similar to those observed on the second suspect, and latex gloves in a neighborhood yard and a black ski mask in a different yard. A fourth officer found a gun in yet another nearby yard. These officers testified they saw no other people in the yards when they discovered the items.

¶5 Both Hawthorne and Spencer were charged. Later, an amended complaint was filed against Spencer containing, essentially, the same charges. A speedy trial demand was made on Spencer's behalf and Spencer also filed a motion seeking to suppress statements he gave to the police. This latter motion was denied on the day of trial. A six-person jury convicted Spencer of all three offenses. He was sentenced to a nine-month term on count one, an eighteen-month term on count two to be served consecutive to count one, and six

months for count three to be served consecutive to the sentence given in count one and two. All the sentences were to be served in the House of Correction.

¶6 Following his conviction, Spencer filed a postconviction motion that the trial court granted, in part, after conducting an evidentiary hearing. The trial court found, relying on ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), that Spencer was entitled to a new trial because his jury had only six jurors, pursuant to the recently promulgated statute permitting only six jurors in misdemeanor jury trials.

¶7 As noted, the trial court's decision to overturn Spencer's conviction was based on the ruling in ***Hansford*** that WIS. STAT. § 756.096(3)(am) (1995-96), authorizing a six-person jury in misdemeanor cases, was unconstitutional.[5] ***Hansford***, 219 Wis. 2d at 230. The State appealed the trial court's decision and this court reversed. On remand, the trial court heard Spencer's remaining legal arguments and denied the motion.

II. ANALYSIS.

¶8 Spencer claims that he was denied effective assistance of counsel. Spencer submits that his attorney's failure to object to the constitutionality of WIS. STAT. § 756.096(3)(am) (1995-96) was evidence of deficient performance, and that the absence of the additional six jurors hearing his case produced a situation where "no one can say with any assurance how that might have effected the outcome." He also argues that his attorney was ineffective when he failed to object to the introduction of the co-defendant's, Hawthorne's, statement, in which

[5] WISCONSIN STAT. § 756.096(3)(am) (1995-96) states: "A jury in [ ] misdemeanor case[s] shall consist of 6 persons."

Hawthorne admitted concealing a gun on his person which he later abandoned in a yard. He argues that he was prejudiced by this omission because without the statement, the State could not have connected him with any concealed weapon. This court is satisfied that Spencer has not met his burden of proof on either claim.

¶9 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing two prongs—both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). If the defendant fails to establish that counsel's alleged conduct was either deficient or prejudicial, this court need not address the other prong. ***Strickland***, 466 U.S. at 697. "An attorney's performance is not deficient unless it is shown that, 'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" ***State v. Foy***, 206 Wis. 2d 629, 640, 557 N.W.2d 494 (Ct. App. 1996) (citations omitted). This court must strongly presume counsel has rendered adequate assistance. ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must establish "a reasonable probability" that, but for counsel's performance, "the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** Ineffective-assistance-of-counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-634, 369 N.W.2d 711 (1985). The trial court determines the facts. ***Id.*** at 634. Whether an alleged deficient performance prejudiced a defendant is an issue of law, subject to this court's *de novo* review. ***Id.***

1. *Counsel's failure to object to a six-person jury resulted in no prejudice to Spencer.*

¶10 As noted, this court need not address both ***Strickland*** prongs if Spencer fails to meet his burden on one of the two prongs. ***Strickland***, 466 U.S. at 697. Spencer has failed to prove that his counsel's alleged deficient performance in failing to object to a six-person jury prejudiced him. Spencer notes that his attorney's failure to object to WIS. STAT. § 756.096(3)(am) (1995-96) permitting six-person juries in misdemeanor cases forecloses him from the relief granted in ***Hansford***. There, the supreme court determined that because Hansford objected to a six-person jury, and because the statute violated Art. I, § 7 of the Wisconsin Constitution, he was entitled to a new trial. ***Hansford***, 219 Wis. 2d at 250. In a later ruling, the supreme court declared in ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, that the failure to object to a six-person jury deprived one of the retroactive application of the ***Hansford*** rule. ***Huebner***, 2000 WI 59 at ¶26. Thus, Spencer argues that his attorney's failure to object to a six-person jury prejudiced him. This court disagrees.

¶11 In ***Huebner***, the supreme court determined that ***Hansford*** did not apply retroactively to invalidate the conviction by a six-person jury in the absence of a defense objection to the six-person jury. *See* ***Huebner***, 2000 WI 59 at ¶5. The supreme court concluded that Huebner waived his right to a twelve-person jury by failing to object. ***Id.*** at ¶26. In upholding the conviction, the court observed that Huebner's trial was fair, and determined that ordering a new trial in such circumstances would be a substantial and unwarranted imposition on judicial resources. Additionally, the court found that "***Hansford*** did not state that a six-person jury is procedurally unfair or that it is an inherently invalid fact finding mechanism." ***Huebner***, 2000 WI 59 at ¶18. While not squarely addressing the

ineffective assistance of counsel claim, the court opined that increasing the number of jurors to twelve did not result in a reasonable probability that a twelve-person jury would have produced a different result. ***Id.*** at ¶19.

¶12 Extrapolating from the ***Huebner*** rationale, this court is satisfied that Spencer was not prejudiced by his attorney's failure to object to a six-person jury. The supreme court found a six-person jury unlawful only because it is prohibited by our constitution. However, as noted in ***Huebner***, "a six-person jury is entirely consistent with the United States Constitution." ***Id.*** at ¶25. Inasmuch as there are no other constitutional infirmities presented by a six-person jury, Spencer has failed to prove that he was prejudiced by a six-person jury. Further, there has been no showing that an additional six jurors would, in all likelihood, have changed the result of the trial. Indeed, the supreme court found that the addition of six jurors would not create a reasonable probability that a different outcome would occur.

2. *Spenser's attorney's failure to object to the admission of the co-defendant's statement was reasonable trial strategy.*

¶13 Next, Spencer argues that under the Sixth Amendment to the United States Constitution and Art. 1, § 7 of the Wisconsin Constitution, he was denied his constitutional right to confront his accusers when his attorney failed to object to the confession of the co-defendant, Hawthorne, in which Hawthorne admitted concealing a gun on his person. This statement was introduced through the testimony of the detective who took Hawthorne's statement. Spencer posits that his attorney was deficient for allowing the introduction of Hawthorne's statement because it was the only evidence linking him to the carrying a concealed weapon charge and it violated his right to confront his accuser and was inadmissible hearsay.

¶14 At the evidentiary hearing held on Spencer's postconviction motion, Spencer's trial attorney testified that he did not object to the introduction of the co-defendant's statement for strategic reasons. The attorney explained that Hawthorne's statement made no mention of Spencer and implicated only Hawthorne. Further, the attorney related that the theory of defense was that Spencer was an innocent bystander, having no involvement in the criminal acts that precipitated Spencer's arrest. Thus, the attorney stated that by admitting the confession of another person, he believed Spencer's defense was strengthened because the jury would know that someone else admitted to carrying a concealed weapon, enhancing Spencer's claim of innocence. Spencer claims his attorney's performance was deficient. The performance inquiry determines whether counsel's assistance was reasonable under prevailing professional norms and considering all the circumstances. ***Strickland*****,** 466 U.S. at 688. An act done in furtherance of a reasonable theory of defense is not deficient performance. A presumption exists that, under the circumstances, the challenged action of trial counsel was sound trial strategy. *See* ***id.*** at 689. Here, the trial court concluded that the failure to object to the admission of Hawthorne's inculpatory statement was reasonable trial strategy. This court agrees. While the statement did connect Spencer with the carrying of a concealed weapon, it was reasonable to believe that the jury might also have exonerated Spencer after hearing that another person confessed to the crime. This is particularly true when the person confessing never mentions Spencer's involvement. Consequently, Spencer has failed to prove that his attorney engaged in deficient performance.

¶15 For the reasons stated, this court affirms.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.