COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1514-CR **Cir. Ct. No. 98-CF-226**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN PAUL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. John Paul appeals from judgments convicting him of arson, criminal damage to property and nine counts of first-degree recklessly endangering safety and from an order denying his postconviction motion for a new trial due to ineffective assistance of counsel. He challenges the assistance he received from trial counsel and the voluntariness of his statements to police and

his reactions to what he contends were coercive police interview techniques. We affirm.

¶2 The charges against Paul arose from a fire at his place of employment. Paul worked in shipping and receiving. On February 28, 1998, a power outage occurred, and the employees left early. Immediately after the employees' early departure, a fire completely destroyed the plant. Investigators determined that the fire had been deliberately set in a gaylord, a large bin used to store and transport material. The jury convicted Paul of all charges against him.

¶3 Postconviction, Paul argued that his trial counsel was ineffective because he did not call as a witness Joe W., a fellow employee whom Paul wanted to suggest to the jury as the person who started the fire.

¶4 At the postconviction motion hearing, an investigator hired by trial counsel testified that he took statements from several individuals, including Joe W. In his statement, Joe W. indicated that he left the plant at 3:55 p.m. on the day of the fire via a south walkway, which was not the walkway near the gaylords where the fire started shortly thereafter. When Joe W. left the plant, he did not see Paul and did not know whether Paul had left the plant at that time. But, once outside, Joe W. noticed that Paul's vehicle was not in the parking lot. The investigator could not locate Joe W. to serve him with a subpoena requiring him to appear at trial.

¶5 Trial counsel viewed Joe W. as a witness who could corroborate the absence of Paul's vehicle before the fire started. However, counsel also had the testimony of other employees who stated that they saw Paul driving away from the plant at approximately the same time. Moreover, there were inconsistencies among the witnesses regarding Joe W.'s whereabouts and the route he used to exit

the plant, and counsel felt that these inconsistencies would have impaired Joe W.'s utility as an alibi witness.

¶6 On the question of whether Joe W. could be suggested as the cause of the fire, counsel conceded that there was evidence that Joe W. was a smoker, that he smoked in the plant and that he had been seen smoking in the plant in the hour before the fire started. Counsel considered that Joe W. might have caused the fire by carelessly handling smoking materials, but dismissed that possibility because Joe W. was last seen with an unlit cigarette on the other side of the building from the gaylords. Counsel believed there was insufficient evidence that Joe W. was involved in the fire, and others were more useful as alibi witnesses. Therefore, counsel did not consider seeking an adjournment to locate Joe W. because his testimony was not necessary to establish Paul's defense that he was elsewhere when the fire started.

¶7 In ruling on Paul's postconviction motion, the circuit court found that had Joe W. testified and been impeached with inconsistencies about when and by which route he left the plant, his utility as a witness to Paul's absence from the plant before the fire started would have been undermined. Furthermore, there was other evidence at trial that Paul left the plant before the fire started. For example, one of the State's witnesses saw Paul driving away from the plant before the fire started. The court questioned the value of Joe W.'s testimony on the question of Paul's whereabouts in light of the other evidence adduced at trial on the same question.

¶8 On the question of whether trial counsel should have called Joe W. to suggest him as a possible cause of the fire, the court noted inconsistencies in the evidence about Joe W.'s proximity to the gaylords at the time of the fire. While

Joe W. stated that he did not exit the plant near the gaylords, another witness stated that she and Joe W. walked past the gaylords on their way out of the plant shortly before the fire was discovered. In light of these inconsistencies the circuit court determined it was not reasonably probable that the result of the trial would have been different had Joe W. testified and been suggested to the jury as a possible cause of the fire. The court did not find trial counsel's performance deficient.

¶9 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defendant. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.*** at 236-37.

¶10 On the performance prong, we determine whether trial counsel's performance fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. ***Id.*** We presume that counsel's performance was satisfactory. ***Id.*** "We do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." ***Id.***

¶11 We will not second-guess trial counsel's "considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel. A strategic trial decision rationally based

on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

¶12 The circuit court's findings regarding trial counsel's conduct are not clearly erroneous based on the record before us. We agree with the circuit court that counsel made a strategic decision not to call Joe W. as a witness at trial. Counsel determined that the useful aspects of Joe W.'s testimony—that Paul had left the plant before the fire started—could be achieved through the testimony of other employees, and that there was insufficient evidence to suggest to the jury that Joe W. caused the fire. Trial counsel made a reasonable strategic choice in selecting witnesses to support Paul's defense. We agree with the circuit court that it would have been inconsistent and perhaps damaging to call Joe W. to testify that Paul was not in the plant at the time of the fire and then to suggest that Joe W. started the fire, thereby undermining his credibility on the question of Paul's whereabouts.

¶13 Paul next argues that his statements to law enforcement officers and his reactions to their interview techniques were not voluntary because the officers tricked him on several occasions. The circuit court declined to suppress Paul's statements or evidence of his reactions after finding that the police did not engage in any coercive or improper conduct during their interviews with Paul, that Paul gave his statements voluntarily, and that Paul was not in police custody during any of the interviews, making ***Miranda***[1] warnings unnecessary. On appeal, Paul argues that his statements and reactions should have been suppressed because they were the result of "police trickery using fabricated evidence."

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶14 The conduct of the police officers in this case is undisputed. In an interview on the day after the fire, the police falsely informed Paul that a person near the gaylords matching Paul's description had been caught on a surveillance camera at the plant.[2] Paul sat down and an officer testified that "the color just flushed right out of [Paul's] face." Paul told the officers he had a mental disorder and did not remember setting the fire.

¶15 In a subsequent interview, the officers play-acted. One of them took the role of an insurance investigator whose role was to enter Paul's home during an interview with officers and drop off props, including a stapler from Paul's work area, a fingerprint card, a fake fingerprint lift and "burned up video tapes." When the "investigator" arrived at Paul's home, he looked at Paul and said that he was the person on the videotape. Paul looked down at the kitchen table. A detective then picked up the fake fingerprint lift and compared it to Paul's fingers and suggested that it looked "really close." Although Paul never expressly confessed to setting the fire, police officers testified that Paul's responses to their charades evidenced a guilty mind.

¶16 The State argues that even if error, the circuit court's refusal to suppress Paul's statements and reactions was harmless. The State notes that throughout the police charades, Paul never confessed to setting the fire and his responses to the officers were equivocal. Even though the State suggested that Paul's responses were evidence of his guilt, there was other direct and circumstantial evidence of Paul's guilt.

[2] The plant did not have any such cameras.

¶17 We have serious reservations about the conduct of the police in this case. The police engaged in a course of manipulation and falsehoods during separate encounters with Paul. Although Paul does not raise it, we also question the admissibility of the testimony of police officers who gave their opinions and impressions of Paul's response to police tactics. Nevertheless, we agree with the State that refusing to suppress this evidence was harmless error. Therefore, we do not address whether the police engaged in coercive or otherwise improper conduct.

¶18 To establish harmless error, "the State, as 'beneficiary of the error,' bears the burden 'to establish that there is no reasonable possibility that the error contributed to the conviction.'" ***State v. Bond,*** 2001 WI App 118, ¶24, 237 Wis. 2d 633, 614 N.W.2d 552, *aff'd*, 2001 WI 56, 243 Wis. 2d 476, 627 N.W.2d 484 (citations omitted). We will reverse only where there is a reasonable possibility that the error contributed to the final result. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶19 At trial, the State produced evidence that Paul bore animosity toward his employer's president and owner, was extremely angry with the owner on the day of the fire and threatened to "do something physical" if he could not talk to the owner. Paul told other employees that the best thing that could happen to the business was for it to "get torched," Paul left notes at the plant stating that the whole company was going to "go down," and Paul told other employees on the day of the fire that he was going to "mess up" the owner's world, and that employees who left early would miss the excitement that afternoon. Paul told a co-worker that he had had a disagreement with the owner that day and that he could do something to put him and others out of jobs by "starting a fire." Paul was preoccupied with fire and had set fires on previous occasions.

¶20 We cannot conclude that it is reasonably possible that the evidence obtained through the police charades contributed to the outcome of the trial. Any error in declining to suppress Paul's statements and reactions was harmless because there was sufficient other evidence of Paul's guilt.

By the Court.—Judgments and order affirmed.

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