COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
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.

Appeal No. 2008AP1960-CR

Cir. Ct. Nos. 2005CF6918
2006CF2557

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIELLE MARIE VALOE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and JEFFREY A. WAGNER, Judges. *Affirmed.*

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

¶1 PER CURIAM. A jury found Danielle Marie Valoe guilty of one count of conspiracy to commit theft by false representation, value greater than

$10,000, *see* WIS. STAT. §§ 943.20(1)(d) and (3)(c), 939.61 (2005-06),[1] and one count of conspiracy to commit theft by false representation, value between $2500 and $5000, *see* §§ 943.20(1)(d) and (3)(bf), 939.61 (2005-06). In a postconviction motion, Valoe sought a new trial, arguing that evidence of Valoe's prior criminal convictions was erroneously placed before the jury. The trial court denied the motion, ruling that any error was harmless in light of the "strong and overwhelming evidence" of Valoe's guilt.[2] We affirm.

BACKGROUND

¶2 In two criminal complaints, the State charged Valoe with defrauding U.S. Bank and Wells Fargo Bank. The complaints alleged that Valoe would recruit other persons to open accounts with the banks. The account balances would then be inflated with deposits of worthless checks or empty envelopes at automatic teller machines. Valoe would then withdraw money from the accounts before the banks ascertained that the balances were false.

¶3 At trial, several of the persons recruited by Valoe testified about what she asked them to do in setting up the accounts. In addition, security officers from both banks testified about the scheme and how Valoe was identified through ATM surveillance cameras showing Valoe making deposits of empty envelopes, deposits of worthless checks, and subsequent withdrawals. A fingerprint

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The Honorable Timothy G. Dugan presided over Valoe's trial; the Honorable Jeffrey A. Wagner denied Valoe's postconviction motion.

technician testified that Valoe's fingerprints were identified on several of the empty deposit envelopes and checks used in the scheme.

¶4 Prior to trial, Valoe filed a motion *in limine* to exclude "[a]ny evidence indicating that … Valoe has a fingerprint card already on file with the Milwaukee Police Department as such evidence is indicative of prior bad acts which are not admissible and are overly prejudicial." Upon stipulation of the parties, the court granted the motion, ruling that the fingerprint technician should state that he "compared the fingerprints in question to that of a fingerprint that was known to be that of [Valoe]," and that he should "make no reference to prior police fingerprints." The parties also agreed that "if [Valoe] chooses to testify, … she has five prior convictions." Further facts will be stated below as necessary.

DISCUSSION

¶5 The only issue on appeal concerns two items of evidence that were introduced without objection by Valoe. First, a fingerprint technician employed by the Milwaukee Police Department, identified Exhibit 108 as the "fingerprint card that we keep on file" and that the exhibit is a copy of the "fingerprint card … for [Valoe.]" Second, during the testimony of Clarence Banks, Valoe's co-defendant in the Wells Fargo scheme, Banks described Fannie Rhodes as Valoe's probation officer. Banks had been called by the State, and on cross-examination, Valoe's attorney asked several questions about Banks's interactions with Rhodes. On re-direct, the State asked Banks who Rhodes was, and Banks answered that she was Valoe's probation officer, thereby, implicitly informing the jury that Valoe had been convicted in the past. As noted above, Valoe did not object to either the technician's description of Exhibit 108 or to Banks's testimony.

¶6 Because Valoe did not object to either item of evidence, we conclude that the appropriate context within which to consider Valoe's motion for a new trial is whether her trial counsel provided ineffective assistance by failing to object. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective assistance of counsel standards).

¶7 In evaluating an ineffective assistance claim, we review whether the defendant has proven 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, "'[a] 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).

¶8 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.

¶9 The State essentially concedes that both items of evidence were erroneously admitted and, therefore, for purposes of our opinion, we assume that Valoe's counsel performed deficiently. The question then becomes whether Valoe was prejudiced by counsel's deficient performance, in other words, whether counsel's failure to object was error "so serious as to deprive [Valoe] of a fair trial, a trial whose result is reliable." *See **Strickland***, 466 U.S. at 687. The record shows that the answer to that question is "no,"—Valoe received a fair trial and the result of that trial is reliable. There is not a reasonable probability that, but for counsel's errors, the result of the trial would have been different, and our confidence in the outcome is not undermined. *See **Sanchez***, 201 Wis. 2d at 236.

¶10 As noted above, the State presented the testimony of several persons recruited by Valoe to participate in the fraud. At Valoe's direction, they would open a bank account that Valoe later accessed to defraud the banks. Many of the checks later deposited in the accounts were endorsed in their names, but the witnesses denied endorsing the checks. Several of the witnesses acknowledged that they had been criminally charged for their conduct. The jury viewed numerous photographs from surveillance cameras showing Valoe cashing checks drawn on the accounts.

¶11 The fingerprint technician testified at length about his findings. Valoe's fingerprints were identified on several deposit envelopes and cashed checks, and on each occasion, the technician testified that the fingerprint recovered from the document matched a "known fingerprint" of Valoe, and in that

testimony, the technician did not violate the court's pre-trial order. Only when the State sought to introduce Exhibit 108, which contained Valoe's baseline known fingerprints, did the technician's answer suggest that the police department had a prior fingerprint record for Valoe.[3] That reference was *de minimis* against the backdrop of the rest of the technician's testimony.

¶12 A similar rationale may be applied to Banks's testimony.[4] Although during his testimony Banks mentioned that Valoe was on probation and identified Rhodes as Valoe's probation officer, those portions of his testimony were peripheral to the main thrust of Banks's testimony, that is, a detailed description of the conspiracy to defraud Wells Fargo and Valoe's actions taken in furtherance of the conspiracy. The State did not rely on either the technician's description of Exhibit 108 or Banks's reference to probation as evidence of Valoe's guilt. The evidence that Valoe now complains about were brief moments in a multi-day jury trial and she cannot show that "'but for'" counsel's failure to object, "'the result of the proceeding would have been different.'" *See* ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

[3] While Valoe contends that the technician's description of Exhibit 108 "revealed that [Valoe] had a prior criminal record," the technician made no reference to any prior arrest or conviction. He merely stated that Exhibit 108 is the fingerprint card "kep[t] on file at our division."

[4] We expressly reject one argument offered by the State as to Banks's testimony. The State suggests that "the jury was well aware of [Valoe's] prior criminal record" because of the stipulation that Valoe had five prior criminal convictions. The stipulation was put on the record outside of the presence of the jury. Valoe did not testify at trial, however, and the jury was never made aware of the stipulated-to number of prior convictions.

CONCLUSION

¶13 Valoe failed to object to the evidence at the time the alleged violations occurred and, therefore, she is limited to appellate review under an ineffective assistance of counsel construct. For the above reasons, this court's confidence in the outcome is not undermined and, therefore, Valoe cannot show prejudice and her claim fails. *See* ***id.***

By the Court.—Judgment and order affirmed.

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