COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0393-CR **Cir. Ct. No. 01 CM 37**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS E. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN and CARL ASHLEY, Judges. *Affirmed.*

¶1 FINE. J. Douglas E. Smith appeals from a judgment entered on a jury verdict convicting him of obstructing an officer, *see* WIS. STAT. § 946.41(1), as an habitual criminal, *see* WIS. STAT. § 939.62, and from the trial court's order denying his motion for postconviction relief. He claims that the trial court did not adequately instruct the jury. He also claims that his trial lawyer did not give him

effective assistance of counsel because the lawyer did not object to the trial court's jury instructions. Smith asserts that he is entitled to an evidentiary hearing on his ineffective-assistance-of-counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979) (evidentiary hearing required where ineffective-assistance-of-counsel claim turns on "counsel's conduct at trial"). We affirm.

I.

¶2 Smith was charged with obstructing Milwaukee police officer Nicole Matter. Matter and her partner Nicole Pecha-Crom were on patrol when they were sent to a house in Milwaukee to investigate a domestic-battery complaint. According to the testimony of Officer Pecha-Crom, the suspect was described as "a black male in his 30's [*sic*] by the name of Doug wearing a purple leather suit." Pecha-Crom told the jury that when she and her partner approached the house, someone "[yell]ed to us to hurry up, that he's holding her down." Officer Pecha-Crom then said that they saw someone fitting the suspect's description standing behind a woman, and "at which time [the woman] said he's running for the back door." The officers chased the man, who turned out to be Smith, and, according to Pecha-Crom's testimony, Officer Matter told him to stop "on numerous occasions." Smith did not stop, but ran down a set of stairs into a snow bank. According to Pecha-Crom, Matter caught up with Smith and "attempted to decentralize [*sic* — neutralize?] him." Pecha-Crom told the trial court that they "had a hard time trying to take him into custody, as he flailed his arms and didn't want to listen to our commands." Pecha-Crom then doused Smith with a pepper spray, and they arrested him.

¶3 Smith testified. He denied running from the officers or resisting them. He told the jury: "I had no reason to run or resist from nobody in that type of stuff.

I'm too old for that." The "stuff" to which Smith referred were the clothes he said he was wearing that night: "a purple double-breasted suit with a black dob and brand new shoes."

II.

¶4 WISCONSIN STAT. § 946.41(1) makes it a misdemeanor for a person to "knowingly resist[] or obstruct[] an officer while such officer is doing any act in an official capacity and with lawful authority." Smith complains that when the trial court told the jury that the State had to prove that "the officer was acting with lawful authority" before the jury could find that Smith "obstructed" her, the trial court did not adequately explain the concept of "lawful authority." The following is the material part of the trial court's instruction: "Police officers act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officer was attempting to detain and question the defendant." Smith's trial lawyer never objected to this instruction. Accordingly, Smith has waived his right to complain that the instruction was error. WIS. STAT. RULE 805.13(3); ***State v. Gomaz***, 141 Wis. 2d 302, 319–320, 414 N.W.2d 626, 634 (1987). We thus turn to his contention that his trial lawyer gave him ineffective assistance of counsel by not objecting to what the trial court told the jury. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension).

¶5 Every criminal defendant has a Sixth-Amendment right to the effective assistance of counsel, ***Strickland v. Washington***, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, ***State v. Sanchez***, 201 Wis. 2d 219, 226–236, 548 N.W.2d 69, 72–76 (1996). In order to establish a violation of this right, a defendant must prove two things: (1) that his or

her lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; *see* ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76. *See also* ***Bell v. Cone***, ___ U.S. ___, 122 S. Ct. 1843, 1850 (2002).

¶6 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. The defendant must also prove prejudice; that is, he or she must demonstrate that the trial lawyer's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Ibid***. Put another way: "In order to show prejudice, '[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, 548 N.W.2d at 76 (bracketing in ***Sanchez***) (quoting ***Strickland***, 466 U.S. at 694). *See also* ***Bell***, 122 S. Ct. at 1850. In assessing a defendant's claim that his or her counsel was ineffective, a court need not address both the deficient-performance and prejudice components if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697; ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76. A defendant is not entitled to an evidentiary hearing on an ineffective-assistance-of-counsel claim unless he or she "alleges facts which, if true, would entitle the defendant to relief." ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996) (quoted source omitted). Whether a defendant does so is a question of law that we review *de novo*. *See* ***id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53.

¶7 There are at least two flaws in Smith's argument that his trial lawyer did not give him effective assistance of counsel. First, what the trial court told the

jury was a correct statement of the law; Smith does not contend otherwise. Thus, Smith runs up against the paradigm that a "trial court has wide discretion in choosing the language of jury instructions and if the instructions given adequately explain the law applicable to the facts, that is sufficient and there is no error in the trial court's refusal to use the specific language requested by the defendant." ***State v. Herriges***, 155 Wis. 2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990). Further, a trial court's instructions to the jury must be read as a whole: "If the overall meaning is a correct statement of the law, then any erroneous part of the instruction is harmless and not grounds for reversal." ***State v. Petrone***, 161 Wis. 2d 530, 560–561, 468 N.W.2d 676, 668 (1991), *cert. denied*, 502 U.S. 925. Smith has not shown that the trial court's accurate, albeit truncated, statement of the law was an erroneous exercise of discretion. He has not, therefore, established that he was prejudiced by his trial lawyer's failure to object.

¶8 Second, although Smith says on appeal that the trial court should have given the jury "a standard by which a juror could determine whether the 'attempting to detain and question the defendant' was done in accordance with law," he does not explain what the trial court should have said, or, put more accurately, what his trial lawyer should have asked the trial court to tell the jury. This is fatal to his claim that his lawyer did not give him the legal representation guaranteed by both the federal and state constitutions. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (A defendant who alleges that his lawyer was ineffective because the law did not do something, must show with specificity what the lawyer would have done and how that would have either changed things or, at the very least, how that made the result either unreliable or fundamentally unfair.). He has not, therefore, shown that his lawyer gave him deficient representation.

¶9 Smith's further complaint that the trial court's statement to the jury that "it is alleged that the officer was attempting to detain and question the defendant" in essence directed the jury to find that the officer whom Smith was charged with obstructing was acting with lawful authority is belied by the trial court's words; the trial court was focussing the jury's attention on the charge—it remained the jury's function to decide whether under the circumstances the officer's claimed attempt to detain and question Smith was lawful. Again, Smith does not tell us what jury instruction his trial lawyer could have requested that would have made his acquittal more likely.

¶10 Smith has not shown that his trial lawyer did not give him effective assistance of counsel. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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