COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1723 **Cir. Ct. No. 97-CF-1087**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT R. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert R. Taylor appeals from an order denying his WIS. STAT. § 974.06 (2001-02),[1] motion for postconviction relief. He argues

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

that trial counsel did not effectively use information that police officers made an in-court misidentification and that there was prosecutorial misconduct. We affirm the order denying postconviction relief.

¶2 Taylor was convicted of party to the crime of armed robbery for the 1995 robbery of the Cooperative Credit Union in Racine. Taylor acted as the getaway driver and shared in the proceeds of the robbery. On direct appeal Taylor argued that his trial counsel was ineffective.[2] His conviction was affirmed. ***State v. Taylor***, No. 00-0486-CR, unpublished slip op. at ¶1 (WI App Feb. 14, 2001). Taylor filed a pro se motion for postconviction relief under WIS. STAT. § 974.06, claiming he was denied the effective assistance of trial counsel and that his postconviction counsel was ineffective for not raising the claims in his first appeal.[3] The circuit court determined that a ***Machner***[4] hearing was not necessary and denied Taylor's motion.

¶3 The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The test for the performance prong is whether counsel's

[2] Taylor claimed that trial counsel was ineffective in three respects: (1) questioning Taylor's former girlfriend which led to the introduction of other bad acts by Taylor, including drug use and battery; (2) attempting to establish that Taylor had an account at the credit union with a middle initial which led to the introduction of evidence of previous judgments of conviction; and (3) failure to object to a question to Taylor's wife about where they married which led to an answer that they married while Taylor was incarcerated. ***State v. Taylor***, No. 00-0486-CR, unpublished slip op. at ¶¶9, 10, 14, 17 (WI App Feb. 14, 2001).

[3] Taylor advanced his claim of ineffective assistance of postconviction counsel as a sufficient reason for not raising his claims in his first appeal. *See* WIS. STAT. § 974.06(4).

[4] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***Pitsch***, 124 Wis. 2d at 636-37. Under the second prong of the test, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. ***Id.*** at 640-41. An error is prejudicial if it undermines confidence in the outcome. ***Id.*** at 642.

¶4 The circuit court's findings of fact as to what happened will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. ***Id.*** at 128. If we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient. ***State v. Kuhn***, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993).

¶5 Taylor first challenges the way trial counsel used an in-court misidentification by police officers. At trial, police officers described how they arrested an individual within twenty-four hours of the robbery. The police found the weapon used in the robbery in the individual's car and a large amount of cash. They said the man's name was Demetrious Jackson. Jackson is Taylor's nephew. On cross-examination, the officers identified Taylor as the man they arrested at that time. Taylor argues that trial counsel was ineffective for allowing perjured testimony to go uncorrected and waiting until closing argument to point out the misidentification to the jury.

¶6 First, Taylor incorrectly characterizes the misidentification by the officers as perjured testimony. Perjury is a willfully and knowingly false statement. *See* ***State v. Munz***, 198 Wis. 2d 379, 382, 541 N.W.2d 821 (Ct. App.

1995). On redirect examination, the prosecutor demonstrated that the police officers had not seen the man they arrested that night (Jackson) since the arrest three years earlier. Discrepancies in testimony attributable to defects of memory or mistake do not constitute perjury. *Cf.* ***State v. Williamson***, 84 Wis. 2d 370, 394, 267 N.W.2d 337 (1978) (the falsus in uno instruction is appropriate only when the witness willfully or intentionally gives false testimony and is not appropriate when discrepancies in testimony are attributable to defects of memory or mistake).

¶7 Secondly, the circuit court found that it was made clear to the jury that Taylor was not the man arrested right after the robbery. Defense counsel pointed out in closing argument that the officers were mistaken in their identification at trial. Taylor faults counsel for not introducing the officers' incident reports to impeach the officers on cross-examination. But the incident reports were consistent with the officers' testimony that they arrested Jackson and would not have served to directly impeach the in-court identification. It worked to Taylor's advantage to leave the attack on the officers' credibility for closing argument when their testimony (including the prosecutor's attempt to rehabilitate their credibility) was not fresh in the jurors' minds. Defense counsel ably argued that the officers' misidentification reflected their bias. Taylor was not prejudiced by trial counsel's failure to impeach the officers on the witness stand.

¶8 Next, Taylor argues that the prosecutor engaged in misconduct by making prejudicial remarks about his and his family's character, that the prosecutor introduced other "bad acts" evidence, and that the prosecutor unfairly introduced documentary evidence that showed prior misconduct in order to

impeach Taylor's claim that he had an account at the credit union under the name "Robert R. Taylor."[5] These claims were addressed in Taylor's first appeal and rejected. There we held that trial counsel adopted a reasonable strategy approach in attacking the credibility of the prosecution's witnesses even though it might open the door for the other bad acts evidence or prior judgments of convictions. ***Taylor***, unpublished slip op. at ¶¶13, 16. We also held that the prosecutor's isolated comment about the character of Taylor and his family, including the fact that Taylor had married his wife while in prison, was not prejudicial. ***Id.*** at ¶20. Our holding is the law of the case and we do not revisit the issues under new labels. ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338, *review denied*, 2001 WI 117, 247 Wis. 2d 1035, 635 N.W.2d 784 (Wis. Oct. 23, 2001) (Nos. 00-2852 & 00-2853); ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶9 Finally, Taylor contends that the prosecutor failed to disclose the plea bargains reached with two witnesses: his former girlfriend, Joyce Noble, and co-actor John Brinker. This is not true. Noble was asked if she got a deal for testifying against Taylor. She indicated that on the day of her arrest she offered the information she knew about Taylor. Noble was charged with three felonies the day after her arrest. Although the felonies were reduced to misdemeanors, it was

[5] Buried in this argument is a claim that trial counsel was ineffective for failing to investigate and prove that Taylor had an account at the credit union. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Although Taylor established that he uses the initial "R" with his name, he has not made the requisite proof that he had an account at the credit union. Moreover, he was not prejudiced by counsel's allegedly inadequate investigation since the credit union representative indicated that she searched for Taylor's account by social security number and date of birth and found none.

not part of any deal regarding testimony against Taylor. The jury was able to evaluate Noble's potential bias.

¶10 Brinker testified that he pled guilty for his role in the credit union robbery. He stated he did not make any deal with respect to cooperation or testimony in Taylor's case. The circuit court found that Taylor's proof that Brinker actually had made a deal with the prosecutor fell short and was mere speculation. This finding is not clearly erroneous. The court minutes on which Taylor relies only reflect that Brinker's plea was to an amended charge as part of a plea agreement but did not indicate that the plea agreement was conditioned on testimony at Taylor's trial. There was nothing for the prosecution to disclose.

By the Court.—Order affirmed.

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