

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2010

A. John Voelker
Acting 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. 2009AP1974-CR

**Cir. Ct. Nos. 2006CF4963
2006CF5246**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANKLIN CHANEAL BOGAN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Franklin Chaneal Bogan appeals from judgments of conviction, entered upon a jury's verdicts, and an order denying his motion for postconviction relief without a hearing. Bogan asserts that trial counsel was ineffective for failing to call two witnesses to testify at Bogan's bail jumping trial. We conclude that, even assuming that the allegations in Bogan's postconviction

motion are true, Bogan is not entitled to relief on his ineffective-assistance claim. Therefore, we affirm the judgments and order.

BACKGROUND

¶2 Three no-contact orders—two written and one oral—were imposed against Bogan relative to his ex-girlfriend, Deanya Brown. The written orders, the receipt of which Bogan acknowledged, advised him:

You are the defendant. This order restricts you and it is your responsibility to avoid contact.

....

If the person named above comes somewhere near to you, you must walk away.

If you accidentally come in contact with the above-named person in any private or public place, you must leave immediately. The person named above cannot give you legal permission to change this order

If you near the above-named person even with permission or consent, you can be arrested for violating this no contact order.^[1]

¶3 On September 16, 2006, Bogan and Brown were in a Wal-Mart store. According to the testimony of store employees, Brown entered the store and approached the customer service desk near the entrance, asking where the layaway counter was. Bogan was behind her. The clerk directed Brown, who left the service desk and went to the layaway area. Security video from the store shows

¹ The oral order did not expressly advise Bogan to leave any place where he might encounter Brown. He raised this issue in the postconviction motion underlying the current appeal, but the court rejected it. No issue regarding the express terms of the oral no-contact order is raised on appeal.

Bogan following Brown to the layaway area. Brown first entered the restroom in the layaway area. When she exited, she approached the layaway counter.

¶4 While the clerk was assisting Brown, another customer approached the layaway counter. The clerk asked for Brown's permission to assist the other customer before she finished helping Brown. Brown agreed and sat down on a bench.² The layaway employee testified that Bogan, arriving in the layaway area, first sat on a chair at an employment kiosk, then on the bench where Brown was seated. Police arrived while Bogan was seated on the bench. Bogan was taken into custody and charged with two counts of misdemeanor bail jumping and one count of felony bail jumping as a habitual criminal for violating the no-contact orders. Brown did not testify at trial.

¶5 Bogan testified as follows. On September 16, 2006, he was at the home of Quinn Payton, the mother of his daughter. Payton asked Bogan to go purchase some diapers for their daughter, because she was running low. When Bogan saw that Brown was parked next to his car in the lot of Payton's residence, Bogan decided to take the bus to Wal-Mart. Brown followed the bus. Bogan got off at the bus stop, located a block from the store, and Brown followed him as he walked, then followed him into the store. When they entered the store, Bogan approached the customer service desk and, while talking on his cell phone, mentioned that he was going to put some items on layaway. These items were going to be for Bogan's unborn son, with whom Brown was pregnant at the time.

² Brown had handed a note to the customer service clerk. The clerk showed the note to her manager and a loss prevention associate and was directed to call police. Brown gave a note to the layaway clerk, who testified that she first went into the back to pretend to look for a layaway order. The jury did not hear the contents of the notes, but the first one asked the clerk to call police and the second one asked the clerk to stall until police arrived.

Brown cut ahead of him and asked the customer service clerk for directions to layaway first. Bogan then realized he was not in the layaway department and left without ever having spoken to the customer service clerk. He did not recall seeing Brown enter the restroom in the layaway area, and testified that he sat down on a bench to wait his turn because he wanted to ask how layaway worked. Bogan also testified that he had called a cousin to come pick him up when he realized he was being “harassed” by Brown. A police officer, who testified before Bogan at trial, told the jury that no cousin was located or ever came looking for Bogan.

¶6 Bail jumping has three elements: that a defendant was arrested for or charged with a crime; that the defendant was released from custody on bond; and that the defendant intentionally failed to comply with the terms of the bond. *See* WIS JI—CRIMINAL 1795. Bogan stipulated to the first two elements for each crime, so the jury was asked only to decide the third element. This element required the State to prove “that the defendant knew of the terms of the bond and knew that [his] actions did not comply with those terms.” *Id.*

¶7 Bogan’s defense was that he had a legitimate reason for going to Wal-Mart that day, but Brown was only there to follow him. When asked why he did not leave the store when he realized Brown was there, he testified, “I was going to WalMart to purchase some pull-ups and Pampers and put a layaway on for my unborn son I figured we was in a public place, I was cool, I was straight.” On cross-examination, however, the State asked:

Q [by the State]: The three court orders you’re under say that if you’re in a public place, what are you supposed to do?

A: Supposed to leave.

Q: Okay, you are. And you knew that, right?

A: Yes.

Q: But you didn't do that?

A: No.

The jury convicted Bogan on all three counts.

¶8 After a first appeal was voluntarily dismissed,³ Bogan filed a motion for postconviction relief alleging, in relevant part, ineffective assistance of counsel. Bogan claimed that trial counsel should have called Payton and his cousin Reginald Polk. Payton would have confirmed that she asked Bogan to go buy diapers, and Polk would have testified that he arrived at Wal-Mart as Bogan was being arrested. Bogan asserts that both witnesses, because they corroborate his testimony, would have bolstered his credibility. The trial court denied the motion without a hearing, concluding that the witnesses would not have helped Bogan's case, so there was no prejudice from the failure to call the witnesses and, therefore, no ineffective assistance. Bogan appeals.

DISCUSSION

¶9 Whether Bogan's postconviction motion alleges sufficient facts entitling him to a hearing is subject to a mixed standard of review. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first evaluate whether the motion on its face alleges sufficient material facts that, if true, would entitle him to relief. *See id.* We review this question of law *de novo*. *Id.* If the

³ Bogan's first postconviction attorney moved for sentence modification; that motion was denied after a hearing and Bogan appealed. Bogan then obtained a new attorney, who asked this court to dismiss the pending appeal and reinstate the time, under WIS. STAT. RULE 809.30(2)(e) (2007-08), for ordering transcripts, as prior counsel had ordered only the sentencing transcript. The motion was granted by order of this court dated May 9, 2008.

motion raises such facts, the trial court must grant an evidentiary hearing. *Id.* However, the trial court in its discretion “may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief.” *Id.*, ¶¶9, 12. We review the trial court’s discretionary decisions for an erroneous exercise of discretion. *Id.*, ¶9.

¶10 Here, Bogan’s motion seeks a hearing based on the alleged ineffective assistance of trial counsel. Before we can say that counsel rendered ineffective assistance, the defendant must show that counsel’s representation was deficient and that this deficiency prejudiced the defendant. *See State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. A court need not consider whether counsel performed deficiently if the court concludes there was no prejudice. *See State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶11 To show counsel’s performance was prejudicial, “the 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.’” *Thiel*, 264 Wis. 2d 571, ¶20 (citation omitted). “The focus of this inquiry is not on the outcome of the trial, but on ‘the reliability of the proceedings.’” *Id.* (quoting *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)). Whether counsel rendered ineffective assistance is a question of law that we review *de novo*. *Thiel*, 264 Wis. 2d 571, ¶21.

¶12 The trial court concluded that Polk’s presence at Wal-Mart, assuming it to be true, “would not have resuscitated the defendant’s credibility at trial” because the video showed Bogan following Brown and Bogan “had no business following the victim back to the layaway department or sitting on the

same bench with her there.” We agree. Even if Polk bolstered Bogan’s credibility so that the jury believed everything Bogan said, Bogan still admitted knowing that he was supposed to leave if he encountered Brown at a public place.

¶13 The trial court also concluded that Payton would have “destroyed [Bogan’s] credibility completely” because, while she would have testified that she needed diapers, a jury “would have wondered why he was going to put them on layaway.” On appeal, Bogan contends this is a mischaracterization of his testimony, as he never stated the diapers were going on layaway. However, even if the court mischaracterized Bogan’s testimony, Payton’s testimony would not have been beneficial to his case. Payton only requested that Bogan go out to purchase diapers for their daughter. If she was in such desperate need for those diapers, a reasonable jury would have to wonder why Bogan also decided to take the opportunity to put things on layaway for a child mothered by someone else. Further, assuming Payton’s testimony would convince a jury that Bogan had a “legitimate” reason for initially being in Wal-Mart, a reasonable jury would also have to wonder why, if Bogan was not going to comply with the no-contact orders by actually leaving the store, he did not at least leave the layaway area and go to retrieve and purchase the diapers he claimed to need.

¶14 Irrespective of the trial court’s reasoning relating to these two witnesses, we ultimately agree with the court’s conclusion there is no prejudice to Bogan from counsel’s failure to call either witness. *See Leander v. Billmeyer*, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992) (we may affirm for reasons other than those relied upon by trial court). In addition the reasons stated above, neither witness contradicts Bogan’s own testimony that he knew the terms of the no-contact order required him to leave a public place if he encountered Brown there, yet he failed to leave when he encountered her at Wal-Mart.

By the Court.—Judgments and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

