COURT OF APPEALS DECISION DATED AND FILED

October 1, 2003

Cornelia G. Clark
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. 02-2404-CR

Cir. Ct. No. 96-CF-37

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. GUERARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Joseph Guerard appeals from the judgment entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether Guerard received ineffective assistance of trial counsel. Because we conclude that Guerard has not established that he received ineffective assistance of trial counsel, we affirm.

¶2 Guerard was convicted in 1996 of one count of armed burglary, one count of armed robbery, one count of aggravated battery, and five counts of theft. The court sentenced him to a total of fifty-two years in prison on the first three counts, and seven years each of probation to be served concurrently to each other but consecutively to prison on the remaining five theft counts. Guerard's initial appellate counsel did not complete his appeal. This court reinstated his right to a direct appeal, and different counsel was appointed to represent him. A motion for postconviction relief was filed alleging that Guerard received ineffective assistance of trial counsel. After a ***Machner***[1] hearing, the court denied the motion finding that Guerard had not established that he had been prejudiced by counsel's alleged errors. Guerard appeals.

¶3 The facts underlying the conviction are necessary in order to understand the claim of ineffectiveness of counsel. Guerard was charged with breaking into the residence of Elizabeth Jean Borchelt and stealing five guns from a gun cabinet in the home. During the course of the burglary, Guerard hit Borchelt and broke the glass on the gun cabinet in order to get the guns. Borchelt testified that Guerard used a knife to cut through the cabinet's glass. Guerard's defense at trial was that it was his brother, Daniel Guerard, who actually committed the crime, and that the witnesses identified Joseph because he and Daniel look alike.

¶4 Joseph argues that counsel was ineffective because he did not introduce evidence that Daniel admitted to committing the crime. Joseph asserts that Daniel told his sister, mother, Joseph's trial counsel, and an investigator that

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

he had committed the crime.[2] Daniel also told an investigating officer that he did not commit the crime. Daniel was not available to testify at trial because he asserted his rights under the Fifth Amendment.

¶5 During the trial, the court allowed Joseph to testify about his version of the events, including a conversation with Daniel in which he admitted to committing the crime. Trial counsel, however, did not elicit any direct testimony from Joseph saying that Daniel admitted to committing the crime. When the State asked to be allowed to introduce as rebuttal the statement Daniel made to the investigating officer denying the crime, the court would not allow it. Defense counsel stated that he had been very careful not to "open the door" to allow that testimony in. The court agreed and said that counsel had not put in anything about what Daniel had said. The State was not allowed to offer the statement Daniel had given to the police denying any involvement with the crime. Defense counsel then argued during closing argument that the State had the wrong guy and suggested that the witnesses had confused Joseph for his brother.

¶6 The ***Machner*** hearing was held nearly six years after the trial. When he testified at the hearing, trial counsel remembered very little about what had happened at trial. He had not reviewed a file before the hearing because he had given the file to the previous appellate counsel. Trial counsel testified that he did not offer the testimony of the investigator to whom Daniel admitted committing the crime because he believed the evidence was work product of the state public defender and because Daniel had not signed his confession. He also said he

[2] The State asserts that Daniel told his mother only that Joseph did not commit the crime and did not confess to committing the crime himself.

thought the other statements were hearsay. The circuit court found that none of the statements would have been admitted because they were not corroborated. The court stated: "Simply making a statement to more than one person does not corroborate that statement." The court concluded that since it would not have admitted the statements, then there was no prejudice to the defendant.

¶7 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. We will not "second-guess a trial attorney'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 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) (citations omitted). To meet the prejudice test, the defendant must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶9 The first issue to consider is whether trial counsel's conduct was deficient. The court agrees with both the State and Guerard that some of the reasons offered by trial counsel at the ***Machner*** for not introducing these various statements are nonsensical. The trial transcript, however, offers a more reasonable explanation for counsel not offering these statements. When counsel had Joseph testify about his interactions with Daniel on the day of the crime, counsel was careful not to have Joseph testify about any statement Daniel made admitting to the crime. The record indicates that counsel did this because he did not want to let the State introduce the statement Daniel made to the police denying that he had committed the crime. As the State argues, the same reason could very well apply to the statements Daniel made to his sister and the investigator. Since the jury did not hear Daniel's denial, trial counsel was able to argue during closing that the witnesses had the wrong brother.

¶10 We need not decide whether counsel's performance was deficient, however, because we agree with the circuit court's conclusion that Joseph is unable to establish that he was prejudiced by any alleged errors of counsel. Joseph is not able to establish prejudice for two reasons. First, we agree with the circuit court that the statements were not corroborated. Second, Joseph is not able to show that but for trial counsel's errors, the outcome would have been different.

¶11 Joseph argues that the statements made by Daniel to these various people were admissible as an exception to the hearsay rule. If a declarant is unavailable to testify as a witness, WIS. STAT. § 908.04(1) (2001-02),[3] then a

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

statement against interest made by that witness may be admitted as an exception to the hearsay rule. WIS. STAT. § 908.045(4). If such a statement tends to expose the declarant to criminal liability and to exculpate the defendant, it is not admissible unless corroborated. ***Id.*** "[T]he standard of corroboration is corroboration sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true." ***State v. Anderson***, 141 Wis. 2d 653, 660, 416 N.W.2d 276 (1987). A statement is not required to be admitted if the corroboration is debatable. ***State v. Johnson***, 181 Wis. 2d 470, 483, 510 N.W.2d 811 (Ct. App. 1993). "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Id.*** at 484 (citations omitted).

¶12 As the trial court concluded, simply making a statement to more than one person does not corroborate it. The circuit court concluded that it would not have admitted the statements for this reason. The State points out that in ***Chambers v. Mississippi***, 410 U.S. 284, 300 (1973), the Supreme Court suggested that making a statement to more than one person provided some corroboration. The court stated: "The sheer number of independent confessions provided additional corroboration for each." ***Id.*** In ***Chambers***, however, the Court found additional reasons for concluding that the hearsay statements offered there were reasonable. The Court specifically found that the statements were corroborated "by some other evidence in the case." ***Id.*** Further, the Court found that the person making the confession "stood to benefit nothing" by making it. ***Id.*** at 301.

¶13 In this case, however, there was no independent evidence to corroborate Daniel's statements. In fact, there were inconsistencies between the statements made by Daniel and the victim's testimony. For example, the victim

asserted that the person who robbed her used a knife to cut the glass on the gun cabinet. She also stated that he was careful not to cut his hand and that she did not observe any blood. In Daniel's statements, he said that he broke the glass with his fist and cut his hand. In addition, Joseph testified that he knew what Daniel was going to do and tried to talk him out of it. In his statement to the investigator, Daniel said Joseph did not know what he was going to do. There were other inconsistencies as well.

¶14 More importantly, however, we conclude that Joseph cannot establish that but for counsel's errors, the result of the trial would have been different. As the circuit court found, both the victim and her mother, who witnessed the crime, gave compelling testimony that they were certain Joseph was the person who had committed the crime. For example, when the victim testified about the procedure the police used to have her identify Joseph, she described in detail her reaction when she saw Joseph's picture. She said, "I went through, and they told me to look at each one very carefully. And when I came to this picture everyone in the room can tell you – that was in the room that day can tell you I just stopped dead. And that was – I got cold and clammy and sick to my stomach …." She was then asked if she had to think about it and she said, "My initial gut reaction was that's him. At that point in time, I was very afraid of identifying someone that it wasn't." She also testified that she was certain Joseph was the person who had committed the crime when she saw him in a lineup. The victim's mother also identified Joseph from the photographs and she had "no doubt" that it was him. She, too, stated that she was careful to pick the right person because she had a son about his age and she wanted to be sure she had the right man.

¶15 Given the inconsistencies between the various statements allegedly made by Daniel and the victim's testimony, and in light of the witnesses' testimony that they were certain Joseph had committed the crime, we cannot conclude that even had the jury heard Daniel's statements, the result of the trial would have been different. Consequently, we agree with the circuit court that Joseph has not established that he received ineffective assistance of trial counsel. We affirm.

By the Court.—Judgment and order affirmed.

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