COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 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. 2010AP785-CR

Cir. Ct. No. 2008CF5664

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RALPH S. STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Judgment affirmed; order affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Vergeront, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Ralph S. Stewart appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. Stewart argues on appeal that he received ineffective

assistance of trial counsel, that the circuit court erred when it denied his motions to strike the jury panel and for a mistrial, that he is entitled to a new trial in the interests of justice, and, in the alternative, that the gun used in the crime should be tested for DNA. We conclude that the circuit court did not err when it denied his motion for a mistrial and the postconviction motion for DNA testing. We conclude, however, that Stewart is entitled to an evidentiary hearing on whether he received ineffective assistance of trial counsel. Consequently, we affirm the judgment of conviction, we affirm in part and reverse in part the order denying the motion for postconviction relief, and we remand the matter to the circuit court for a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).[1]

¶2 Stewart was convicted after a jury trial of being a felon in possession of a firearm. The underlying facts are not complicated. Stewart and another man were driving in a car when they were stopped by the police. One of them was driving and the other was sitting in the passenger seat. When the police stopped the car, both men got out of the car and ran. It was dark outside and the two men were wearing similar clothing. At trial, Officer Bublitz testified that he saw Stewart, who was the driver of the car and the second man to get out of the car, drop a gun as he was trying to climb over a fence. It is not contested that Stewart was then a felon prohibited from possessing a firearm. The jury convicted Stewart. Stewart brought a motion for postconviction relief alleging that he received ineffective assistance of trial counsel, and that the recovered gun should

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[1] We affirm the judgment of conviction at this time because Stewart has not established that it should be reversed. If the circuit court determines after the hearing that Stewart did receive ineffective assistance of appellate counsel, the judgment would, of course, be reversed at that time.

be tested for his DNA. The circuit court denied both motions without holding a hearing.

¶3 We first consider whether the circuit court erred when it denied Stewart's motions to strike the jury panel and for a mistrial. Stewart initially was charged with two crimes: felon in possession of a firearm and battery to a police officer. He was charged with the second crime for having bitten Officer Bublitz's arm. During voir dire, the jury was told about both charges. After the jury had been selected, Stewart pled no contest to the battery charge. Stewart's counsel moved to strike the impaneled jury on the grounds that the jury was prejudiced from having heard information about the battery charge. The court denied the motion, stating that to grant the motion would create an incentive for defendants to go through jury selection and make a strategic decision to plead to a charge to delay the trial or get a more favorable jury. Later during the trial, one of the witnesses referred to the fact that Officer Bublitz had been bitten on his arm. The defense did not object or move to strike the comment at that time. After the jury returned the verdict, Stewart's counsel moved for a mistrial on the basis that this comment was prejudicial. The court denied the motion.

¶4 Stewart argues that he is entitled to a new trial because the extraneous evidence about the arm biting was prejudicial. We conclude that the circuit court properly denied Stewart's motions to strike the jury panel and for a mistrial. A motion for a mistrial is within the circuit court's discretion. ***State v. Ford***, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. Generally, when there is no "structural error," the circuit court must decide "in light of the entire facts and circumstances whether the defendant can receive a fair trial." ***Id.***, ¶29. The court examines the claimed error to see if it was sufficiently prejudicial to warrant a

mistrial. ***Id.*** We will reverse the denial of a mistrial motion only for a clear showing of an erroneous exercise of discretion. ***Id.***

¶5 We are not convinced that the discussion of the battery charge during voir dire and the biting reference by one witness at trial was prejudicial. Citing ***State v. Poh***, 116 Wis. 2d 510, 529, 343 N.W.2d 108 (1984), Stewart argues that this is comparable to other acts evidence being introduced. We disagree that the effect of these two references equates to other acts evidence. The comments were not unfairly prejudicial in their impact.

¶6 Unfair prejudice results when "the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (citations omitted). We are not convinced that the comments about the biting incident were unduly prejudicial. We do not believe that the jury would have been overly confused by the fact that the biting incident was mentioned during voir dire, but no evidence of this incident was actually introduced. We also are not convinced that the single and rather indirect comment by one witness that Officer Bublitz had been bitten would have improperly influenced the jury in deciding whether the State proved beyond a reasonable doubt that Stewart possessed the gun. Neither of these comments was unfairly prejudicial. Further, the defense could have requested a curative instruction, but did not. In light of all of these circumstances, the circuit court properly denied Stewart's motion for a mistrial.

¶7 Stewart argues that the circuit court erred when it denied his motion for additional DNA testing under WIS. STAT. § 974.07 (2007-08).[2] We conclude that the circuit court correctly denied the motion because the affidavit submitted by counsel in support of the motion was inadequate. The affidavit contains hearsay and conclusory statements about what the attorney was told by a professor of Biological Sciences, but does not provide concrete facts, such as an affidavit from an expert, about the specifics of his or her relevant qualifications and addressing the reliability and potential results of specific requested testing. We affirm the circuit court's decision.

¶8 Next we consider whether Stewart was entitled to an evidentiary hearing on his claim of ineffective assistance of trial counsel. In his brief to this court, Stewart frames the issue as whether he received ineffective assistance of counsel. The State asserts that the question before this court is whether Stewart was entitled to an evidentiary hearing on his ineffective assistance claim, and that Stewart's failure to argue that he was entitled to a hearing in his brief constitutes an abandonment of the issue. We agree that the correct issue at this point is whether the circuit court erred when it denied the motion without holding a hearing. Stewart's argument that he received ineffective assistance of counsel was sufficient, however, to preserve that issue. Stewart's motion to the trial court asked for a new trial or an evidentiary hearing on whether he received ineffective assistance of counsel.

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

¶9 The standard of review applicable to an order of the circuit court denying a request for an evidentiary hearing has two parts. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law which we review de novo." ***Id.*** (citations omitted). Only facts material to the claim are to be considered. ***State v. Allen***, 2004 WI 106, ¶22, 274 Wis. 2d 568, 682 N.W.2d 433. "A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'" ***Id.*** The motion should allege "who, what, where, when, why, and how" "within the four corners of the document itself." ***Id.***, ¶23.

¶10 We conclude that Stewart's motion was sufficient to warrant an evidentiary hearing. The motion argued that the central issue in the case was whether Stewart or the other man in the car had dropped the gun found by the police. At trial, Officer Bublitz testified that Stewart was the driver and the one who dropped the gun. Another officer, who had interviewed Officer Bublitz shortly after the incident, testified that Officer Bublitz had told him that it was the passenger who dropped the gun. The jury was presented with these conflicting statements.

¶11 Stewart argued in his postconviction motion that there was additional impeachment evidence available that his trial counsel did not present to the jury. This evidence included a statement by another officer, Detective Wiesmueller, in the criminal complaint that Officer Bublitz had said that the first of the two subjects dropped the dark object said to be the handgun found at the scene, which would apparently contradict Officer Bublitz's trial testimony that the second of the two dropped it. In addition, the motion argued that there were

statements by three other officers that Stewart was not the driver of the car. The motion further argues that these statements would have undermined Officer Bublitz's credibility and supported the statements that contradicted his testimony. The motion argues that, to the extent there may have been other explanations for the inconsistent statements, the jury should have been allowed to decide which version to believe.

¶12 The circuit court denied the motion, finding that trial counsel had adequately brought out the discrepancies in Officer Bublitz's statements. The court also ruled that the statements in the criminal complaint were not evidence and could not have been used as impeachment, that the other statements were either hearsay or unnecessary, and that there was no reasonable probability that further testimony on the issue would have altered the outcome of the trial.

¶13 To maintain an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant must show that counsel's representation fell below objective standards of reasonableness to establish deficient performance. ***Id.*** at 687-88. To establish that the deficient performance caused prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶14 We conclude that the motion stated sufficient facts to warrant an evidentiary hearing on whether Stewart received ineffective assistance of counsel. We are not deciding that Stewart established that he received ineffective assistance of counsel. We decide only that the motion was sufficient to require an

evidentiary hearing. For example, while a criminal complaint is ordinarily not admissible evidence, we see no reason on the record before us why an officer's statement reflected in the criminal complaint could not be used as a basis for substantive impeachment at trial. *See* WIS. STAT. § 908.01(4)(a)1.

¶15 The State argues that the motion was conclusory because, among other things, it does not allege why counsel did not present the additional evidence. However, Stewart is not required at this stage to explain in his motion or in his brief to this court why his counsel performed deficiently. The reasons why counsel took or avoided particular actions can be determined at the hearing.

¶16 The State also argues that Stewart did not state how this evidence would have affected his defense, and that it is "speculative to suggest that additional impeachment would have suddenly led the jury to not believe" Officer Bublitz. We disagree. The motion states that the main issue at trial was whether Stewart dropped the gun, and that the testimony on this issue came from Officer Bublitz. Stewart asserts that the additional evidence would have affected the officer's credibility. Since the officer's testimony was the only evidence specifically identifying Stewart as the person who possessed the gun, the motion is sufficient for both the deficient performance and the prejudice prongs of ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687.

¶17 Stewart's motion stated sufficient facts under the two-part ***Bentley*** test to warrant an evidentiary hearing.[3] Consequently, we affirm the judgment of

[3] Stewart also argued that he is entitled to a new trial in the interests of justice. He bases this argument, in part, on his claim that his trial counsel was ineffective. Because we are remanding for an evidentiary hearing on the ineffective assistance of counsel claim, we do not address his claim for a new trial in the interests of justice.

conviction, affirm in part and reverse in part the order denying the motion for postconviction relief, and remand the matter to the circuit court for an evidentiary hearing.

By the Court.—Judgment affirmed; order affirmed in part; reversed in part and cause remanded for further proceedings.

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