COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP319-CR **Cir. Ct. No. 2007CF1116**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GUENTHER HUEBNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Guenther Huebner appeals from a judgment of conviction entered upon a jury's verdict finding him guilty of felony theft and of fraudulent tapping of wires/meters/pipes. He also appeals from an order denying

his motion for a new trial based on ineffective assistance of counsel and newly discovered evidence. His similar arguments also fail on appeal. We affirm.

¶2 In November 2005, Wisconsin Electric Power Company, which does business as We Energies, received an anonymous tip that a natural gas bypass was installed about twenty years ago on Huebner's residential property.[1] We Energies fraud investigator Jeff Meyer questioned him in April 2006; Huebner denied it. Meyer pursued the matter and, in September 2006, We Energies workers unearthed a "T" splice welded into the gas line before it reached the meter, thus permitting gas to bypass the meter. In the basement, Meyer observed gas pipes "going everywhere" and a false wall behind which were a pressure regulator and shut-off valve to allow unmetered gas to flow with metered gas through the bypass. The altered pipes and valves were capped when found. Huebner denied any knowledge of the rigged gas lines. We Energies estimated that, with tax, $24,276 worth of diverted gas was used between 1974 and 2006.

¶3 The State charged Huebner with felony theft and fraudulent tapping of wires/meters/pipes, a misdemeanor. A jury found Huebner guilty on both counts. Huebner filed postconviction motions for a new trial on grounds of ineffective assistance of trial counsel and newly discovered evidence. After a ***Machner***[2] hearing, the trial court denied the motions and set restitution for the theft and We Energies' investigation costs at $147,537.08. Huebner appeals.[3]

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[1] We use "We Energies" throughout the opinion although the entity has had different names over the years.

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

[3] Huebner challenges the restitution determination in a separate appeal. He indicates he may move to consolidate them. We see no compelling reason to do so.

¶4 Huebner first contends that defense counsel provided ineffective assistance. To prevail on this claim, Huebner must show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. If he fails to establish one prong, we need not address the other. *See* ***State v. Manuel***, 2005 WI 75, ¶72, 281 Wis. 2d 554, 697 N.W.2d 811.

¶5 A defendant proves deficiency by showing that counsel's conduct fell below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). He or she proves prejudice by showing that a reasonable probability exists that the result of the proceeding would have been different, but for counsel's unprofessional errors. ***Id.*** at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." ***Id.***

¶6 Ineffective assistance claims present us with mixed questions of fact and law. ***Mayo***, 301 Wis. 2d 642, ¶32. We will uphold the trial court's findings of historical fact unless clearly erroneous; we review de novo its determinations of whether those facts constitute deficient performance or amount to prejudice. ***Id.***

¶7 Huebner first contends that his privately retained defense counsel's representation was constitutionally deficient because he failed to consult an expert regarding the energy calculation the State relied on to determine whether, and how large, a theft of natural gas had occurred. Eric Wall, the energy engineer We Energies hired, used a commercially available computer program and his own calculations to project the energy consumption that should have occurred at the Huebner property. Huebner argues that an expert could have countered Wall's methodology as well as Meyer's testimony about how he believed Huebner tapped into a high-pressure gas line and created a bypass system.

¶8 Indeed, Huebner located and retained for postconviction proceedings Thomas Wilson, a self-employed energy consultant specializing in assessing and upgrading residential energy performance. Wilson, who is not an engineer, testified at the postconviction motion hearing that Wall's report struck him as "very wrong" because even the concept that a computer model can accurately predict energy consumption is "so outside the realm of building science" as to have no place in a courtroom. Wilson conceded that he knew of no way to estimate unbilled usage and that his calculations would be "equally meaningless."

¶9 The trial court found credible counsel's testimony that he urged using an expert at trial but that Huebner declined because of his frugality, his disbelief in the need and his desire to rely on his own expertise, having at one time been employed by a company that installed gas lines for a predecessor entity of We Energies. The court also found that Wilson's credentials were such that it likely would not have declared him an expert and that, in the end, it was Huebner who chose not to hire Wilson or any other expert to testify at trial because his theory of defense was that he was innocent. The record supports these findings.

¶10 Huebner also posits that counsel had other alternatives, such as asking the court to fund an expert, more thoroughly investigating and educating himself about the case, withdrawing, or moving to exclude Wall's testimony as speculative. We are not convinced of the viability of any of these options.

¶11 The court stated that it would not have ordered funding for an expert for a non-indigent defendant. Failing to raise a meritless challenge is not deficient performance. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). Wilson offered no alternative methodology. It is not enough simply to claim a failure to investigate without alleging specifically what the investigation would

have shown. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Huebner does not suggest how counsel's withdrawal would have skirted the problem of having no expert to counter the State's. And in Wisconsin, the admissibility of scientific evidence does not depend on its reliability. ***State v. Peters***, 192 Wis. 2d 674, 687, 534 N.W.2d 867 (Ct. App. 1995). Huebner has not shown that counsel's failure to pursue these strategies was deficient performance.

¶12 Huebner next complains that trial counsel's "inept" cross-examination of State's witnesses invited damaging testimony that Huebner told others about the bypass. Under counsel's questioning, a police detective testified that Richard Marek, Huebner's former brother-in-law, told him that Huebner said he was using the bypass and fraud investigator Meyer testified that he learned from several anonymous sources that he might want to investigate Huebner.

¶13 Marek, who had testified at the preliminary hearing that Huebner told him he had put in a bypass and was getting free gas, was expected to be a witness at trial. Defense counsel testified at the ***Machner*** hearing that he intended to deflate the detective's testimony during Marek's cross-examination by showing that Marek had a motive to accuse Huebner because of hostility between the two men after he and Huebner's sister divorced. As it turned out, the State was unable to secure Marek's appearance. Counsel also testified that he meant to use Meyer's testimony to argue that anonymous sources do not prove wrongdoing. That Marek ultimately never testified at trial or that the anonymity argument did not carry the day does not render either strategy unreasonable.

¶14 Huebner also argues that trial counsel deficiently abandoned efforts to move for sanctions based on spoliation of evidence. The "T" was spliced into a length of pipe about seventy feet long. The "T" was preserved at the police

department until trial but We Energies did not preserve the pipe into which it was spliced. The day before trial, counsel moved to dismiss, arguing that the defense had no opportunity to examine the discarded portion, precluding it from proving its theory that the "T" and the pipe were part of a unit We Energies itself installed in 1969. Counsel renewed the motion the next day. The court denied the motion and invited him to raise it again at the end of the State's case. Counsel did not.

¶15 A defendant's due process rights are violated if the State either: (1) failed to preserve evidence that is apparently exculpatory or (2) failed in bad faith to preserve evidence that is potentially exculpatory. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). Bad faith requires a showing that the State was aware of the potentially exculpatory value of the unpreserved evidence and made a conscious effort to suppress it. ***Id.*** at 69.

¶16 As noted, Huebner's claim is raised in the context of ineffective assistance of counsel, not that the trial court erred in denying the motion. Regardless, we are not persuaded. It was We Energies, not the State, that disposed of the length of pipe to which the "T" was attached. We Energies "[s]aw no reason to" preserve it because the existence and location of the welded splice were unsafe aberrations from its typical installation practice. The discarded pipe was at most only potentially useful to Huebner's case and there is no evidence that We Energies destroyed the pipe due to a conscious effort by the State. Counsel had no obligation to raise a meritless challenge. *See* ***Harvey***, 139 Wis. 2d at 380.

¶17 Together or singly, we are satisfied that counsel provided reasonable explanations for his strategic decisions. We therefore conclude that counsel's performance was not deficient. *See* ***Strickland***, 466 U.S. at 689. Seeing no deficiency, we need not address prejudice. *See* ***Manuel***, 281 Wis. 2d 554, ¶72.

¶18 Huebner next contends he is entitled to a new trial because of newly discovered evidence presented by both sides at the postconviction motion hearing. Huebner presented Wilson's disparagement of We Energies' effort to ascertain the amount of the gas diverted. In response, the State's experts interviewed new witnesses and, Huebner asserts, "completely overhauled" their theories on how the gas was diverted and that the amount could have been much greater.

¶19 A defendant seeking a new trial on the basis of newly discovered evidence must establish, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative to the testimony introduced at trial. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. If the defendant satisfies all four criteria, the court then examines whether it is reasonably probable that, with the evidence, a different result would be reached at a new trial. *See* ***id.*** We review the circuit court's decision on whether to grant a new trial based on newly discovered evidence for an erroneous exercise of discretion. *See* ***id.***, ¶31.

¶20 We agree with the trial court that Huebner failed to satisfy the test. Huebner could have retained Wilson earlier. New information from the State's witnesses came only in response to Wilson's. In addition, neither Wilson's criticism that offered no alternative calculations nor the State's revised projections make a different result at a new trial a reasonable probability.

¶21 Finally, Huebner contends he should be granted a new trial in the interests of justice because there was no expert challenge to the assumptions and conclusions of the State's witnesses, no effective cross-examination of those

witnesses and no objection to the State's "highly speculative theories," such that the real controversy was not fully tried and it is likely that justice has miscarried.

¶22 As an appellate court, we have the authority under WIS. STAT. § 752.35 to grant a discretionary reversal of a conviction in the interests of justice if the real controversy was not fully tried. ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992). We are to exercise this discretionary power of reversal only in exceptional cases. ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Under the "real controversy not tried" standard, discretionary reversal arises either when the jury erroneously was not given the opportunity to hear important testimony bearing on an important issue of the case or the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶23 Our power of discretionary reversal under WIS. STAT. § 752.35 was not meant to enable a defendant to present a new defense at a second trial merely because the one presented at the first trial proved fruitless. *See* ***Hubanks***, 173 Wis. 2d at 29. This claim simply repackages his others. As we determined in addressing those matters, Huebner opted, against his competent attorney's advice, to proceed without an expert. Even accepting, *arguendo*, that the real controversy was not tried, it was Huebner who chose not to try it. Wilson's eventual testimony does not convince us otherwise. We decline to grant discretionary reversal.

By the Court.—Judgment and order affirmed.

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