COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2011

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. 2010AP672-CR **Cir. Ct. No. 2007CF760**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY RODGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

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

¶1 PER CURIAM. A jury found Timothy Rodgers guilty of burglary with intent to steal. Rodgers appeals from the judgment of conviction and from the order denying his motion for postconviction relief. We conclude that trial

counsel was not ineffective, the trial court did not err in denying Rodgers' motion to proceed either with new counsel or pro se, and a new trial in the interest of justice is not warranted. We affirm the judgment and order.

¶2 Homeowner Christopher Christensen testified at trial that he arrived home before his family one evening, left the main door open and the storm door unlocked, and put his keys, wallet and cell phone on the kitchen counter. A few minutes later, he heard the storm door open and thought his wife had come home. He saw the door closing and someone outside on the deck, leaving.

¶3 Christensen confronted the man and asked if he had taken anything. The man, later identified as Rodgers, handed over Christensen's wallet and, with further prompting, Christensen's cell phone. Rodgers allowed himself to be patted down but had nothing else of Christensen's. Rodgers apologized, saying he needed some gas, and begged Christensen not to call the police. His belongings returned, Christensen told Rodgers to "just go." After Rodgers left, Christensen noticed two other men behind some bushes near the end of his driveway, so he called the police. Christensen later positively identified Rodgers from a photo array. Three police officers testified about their subsequent contact with Christensen and Rodgers. The jury found Rodgers guilty.

¶4 Rodgers moved for postconviction relief on grounds that his trial counsel was ineffective, that he should have been allowed to either have new counsel appointed or to proceed pro se. Alternatively, he sought a new trial in the interest of justice under WIS. STAT. § 752.35 (2010-11).[1] After a ***Machner***[2]

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

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

hearing, the court denied his motion. Rodgers appeals. Facts necessary to flesh out the issues will be added as required.

A. Ineffective Assistance of Counsel

¶5 Rodgers first contends that his trial counsel, Attorney Michael Barth, rendered ineffective assistance. He claims Barth's closing argument was the functional equivalent of a guilty plea and that Barth failed to object to other acts evidence and to hearsay testimony.

¶6 To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was both deficient and prejudicial to the defense. ***State v. Moffett***, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989). Whether counsel's performance was deficient and prejudicial are questions of law we review de novo. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). The deficiency prong requires that the defendant show that counsel made such serious errors that he or she no longer is functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The prejudice prong requires that the defendant 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." ***Id.*** at 694. We need not address both prongs if the defendant fails to make a sufficient showing regarding one of them. ***Id.*** at 697.

1. Closing argument

¶7 Rodgers asserts that Barth essentially conceded his guilt during closing argument. Barth argued:

> There was no breaking into the house…. The house was not ransacked as though someone was looking for something to steal.
>
> So what happens at that point? Mr. Christensen sees an individual. He goes outside and says—confronts him. What's going on? You know, he sees a guy that is acting kind of strange standing in his driveway. It's not as though he's running away like a person that has had the mental purpose to do something wrong and flee.
>
> ….
>
> What do you do in cases like this? Well, that's why [the court] read you the various jury instructions …. Now, you know, there is the thing that says the State must prove each and every element beyond a reasonable doubt. Did he enter the dwelling of another without consent with intent to steal? Here, take it back. I don't know. I'm just lost. I want to go home.

¶8 To gain a conviction, the State had to prove beyond a reasonable doubt that Rodgers entered the dwelling without Christensen's consent, knowing he had no consent and with an intent to steal. *See* WIS JI—CRIMINAL 1421. "Intent to steal" requires a mental purpose to take and carry away movable property of another without consent and with an intent to permanently deprive the owner of its possession. ***Id.*** Rodgers claims Barth failed to argue clearly that Rodgers acted without intent to steal and thus conceded that he committed the essential elements of the crime. We disagree.

¶9 According to Barth's ***Machner*** hearing testimony, he and Rodgers discussed three defenses—that the entire charge was untrue, that Christensen framed him or that Rodgers did not intend to permanently deprive Christensen of his property. Barth rejected the first because the evidence against Rodgers was undisputed. Rodgers wanted the second, claiming that Christensen got angry after catching him urinating on the side of the house. Barth rejected that defense because Christensen denied it and Rodgers refused to testify.

¶10 Barth testified that he chose to go with the third option and to achieve it through his closing argument. Barth tried to argue to the jury that while Rodgers unquestionably entered the home and took Christensen's property, Rodgers promptly and cooperatively relinquished the stolen items to their owner. He tried to minimize the seriousness of the crime by emphasizing that Rodgers did not break into or ransack the house or turn violent or flee when confronted and by highlighting the fact that Rodgers gave the property back. Barth also asked whether the other two men at the end of the driveway "sent the slow guy in to go ask for gas money" and then "cut Mr. Rodgers loose."

¶11 Barth did the best he could with, as the trial court described it, the "overwhelming" evidence presented. The flavor of Barth's closing argument as a whole was that Rodgers was more pitiable than bad. He tried to garner jury sympathy for Rodgers by arguing mitigating factors. We will not second-guess counsel's professional judgment. ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel. ***Id.*** at 464-65.

2. Other-acts evidence

¶12 Rodgers also contends it was ineffective assistance for Barth not to object to other-acts evidence involving Rodgers' contact with police earlier that evening. Officer Dale Swart testified that dispatch alerted him to the Christensen "home invasion burglary" as he was responding to a 911 call about a suspicious black male going through backyards in the Christensen neighborhood. Swart spotted Rodgers walking there and stopped him. Swart reminded Rodgers that they had had contact with each other less than an hour before when Swart responded to an "unwanted party call" at a senior citizen home. He said Rodgers

and four others said they went to the home to try to get money for gasoline. Swart said he identified the men then told them to "go on their way."

¶13 WISCONSIN STAT. § 904.04(2)(a) governs the admissibility of "other-acts" evidence:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶14 Thus, other acts evidence first must be offered for an acceptable purpose. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). It also must be relevant. ***Id.*** Finally, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. ***Id.*** at 772-73.

¶15 Rodgers concedes that the senior home evidence could have been offered for motive, intent or absence of mistake because he was desperate to get money for gas to get out of a neighborhood in which, as Barth put it, "he kind of sticks out." Having been rebuffed in his requests for money at the senior citizen home, he concedes the evidence also could have been relevant to an alleged intent to steal the money he needed. Rodgers argues, however, that the evidence's probative value was substantially outweighed by the danger of unfair prejudice because it would cause the jury to punish him not just for the Christensen incident but for preying upon vulnerable residents of a retirement home.

¶16 Even assuming for argument's sake that the danger of unfair prejudice substantially outweighed its probative value, it was not constitutionally prejudicial. The evidence of Rodgers' guilt was overwhelming even without that

evidence. There is no reasonable probability that, but for Barth's failure to object to it, the trial would have turned out differently. *See* ***Strickland***, 466 U.S. at 694.

3. Hearsay testimony

¶17 Rodgers' last claim of ineffectiveness is that Barth failed to object to hearsay testimony from an investigating police officer who testified to what Christensen told him about the crime. He contends the testimony was unduly prejudicial because it allowed in twice the testimony of Christensen, who may have had "incentive to deceive in one way or another" and thus bolstered Christensen's credibility and version of events. Again we disagree.

¶18 We will assume for this discussion that the testimony was hearsay. Although Rodgers asserts that the trial hinged solely on credibility, Christensen's never was in dispute. Rodgers points to nothing that cast doubt on the truth or accuracy of Christensen's account or the motive behind it. Rodgers chose not to testify and offer the urination version, which would have placed him on Christensen's property in any event. Therefore, even if Barth had objected and the officer's corroborative testimony had been excluded, the jury still would have had before it Christensen's plausible and uncontradicted rendition of the episode. The alleged hearsay thus was not prejudicial under ***Strickland***.

B. New Counsel or Self-Representation

¶19 Rodgers argues that the trial court should have granted his request for new counsel. Whether counsel should be relieved and a new attorney appointed is a matter within the trial court's discretion. ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). The trial court must be satisfied that there is good cause to permit the withdrawal, ***State v. Cummings***, 199 Wis. 2d

721, 748-49, 546 N.W.2d 406 (1996), and the defendant must present a "substantial complaint," *see* ***State v. McDowell***, 2004 WI 70, ¶66, 272 Wis. 2d 488, 681 N.W.2d 500. A trial court properly exercises its discretion if it applies a correct view of the law and makes a decision that a reasonable judge would make. *See* ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

¶20 At a status hearing the day before trial, Barth—Rodgers' third appointed attorney—advised that the defense was "in trial posture." On the morning of trial, Rodgers told the court he was not prepared to go forward because he had not read or discussed with counsel the preliminary hearing transcript. The court noted that there still was ample time, as the transcript was just six pages long. Rodgers then stated that, like his prior two attorneys, Barth was "reluctant to represent me effectively" and had not filed motions on "quite a few issues" Rodgers thought he should have.[3] Pressed for specifics, Rodgers complained that he did not want a misdemeanor bail-jumping charge tried along with the felony. The court ordered it severed. Rodgers' only other specific complaint was that he did not have the input regarding his defense and trial strategies that he thought he should have. The court found that no basis existed to adjourn the trial.

¶21 Later, as the jury was about to be brought in, Rodgers asked that Barth withdraw due to their irreconcilable differences. The court noted that the case was filed in June 2007, fifteen months earlier, that the withdrawal of two other appointed counsel and the subsequent appointment of Barth all led to delays and that "all of a sudden irreconcilable differences arise" on the day of trial with

[3] Barth said Rodgers wanted a further discovery demand and a motion to dismiss on the basis that the State had no evidence. Barth said he declined the first because they already had all police records and the second because he did not deem it "available in this case."

the witnesses present and potential jurors waiting. Rodgers did not establish good cause or present a "substantial complaint." The court's denial of his request reflects a proper exercise of discretion.

¶22 Rodgers also challenges the court's refusal to allow him to represent himself. When a criminal defendant wishes to proceed pro se, the trial court first must ensure that he or she has knowingly, intelligently and voluntarily waived the right to counsel. *See* ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40. To prove a valid waiver of counsel, the trial court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) is aware of the difficulties and disadvantages of self-representation, (3) is aware of the seriousness of the charge or charges, and (4) is aware of the general range of penalties that could be imposed. ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Without a valid waiver, the court must prevent the defendant from self-representation. *See* ***Imani***, 326 Wis. 2d 179, ¶21. Whether a person has validly waived the right to counsel is a constitutional question that we review independently. ***Id.***, ¶19.

¶23 Rodgers' entreaty came on the heels of his failed request for Barth's withdrawal and just as the jury was about to be called in. He declined the court's offer to allow him to proceed with Barth as standby counsel and instead requested a sixty- to ninety-day adjournment to prepare. The court refused because the case had "a legal issue or two" and going pro se would not be helpful to Rodgers.

¶24 Rodgers' request hardly could be said to be "a deliberate choice to proceed without counsel." *See* ***id.***, ¶28. Further, the court's reasons for denying his request embrace implicit findings that Rodgers was not aware of the difficulties and disadvantages of self-representation or the seriousness of the

charge against him. *See* ***Klessig***, 211 Wis. 2d at 206. A waiver is not valid unless the defendant satisfies all four inquiries. *See* ***Imani***, 326 Wis. 2d 179, ¶23.

¶25 In addition, whether to grant or deny a request to proceed pro se made on the day of trial is a matter within the trial court's discretion. ***Hamiel v. State***, 92 Wis. 2d 656, 673, 285 N.W.2d 639 (1979). The determinative question is whether the request is made merely to secure delay or tactical advantage. ***Id.*** The trial court must weigh the defendant's constitutional guarantee to a fair trial against the convenience of the witnesses, jurors and the court's schedule. *See* ***id.***

¶26 The adjournment request prompted the court to remark that Rodgers "ke[pt] trying to stall the matter." Ample evidence supports that conclusion. The case was pending for over a year. Rodgers had fallings-out with three lawyers. He had said nothing the previous day about conflict with Barth or being unready for trial. Instead, at the very brink of trial, he asked for a several-month adjournment. We are satisfied that Rodgers did not validly waive his right to counsel. We also are satisfied that the trial court properly balanced Rodgers' right to a fair trial with the rights of the victim, the orderly administration of justice and preserving the integrity of the trial process.

C. New Trial in the Interest of Justice

¶27 Rodgers seeks a new trial in the interest of justice under WIS. STAT. § 752.35. He contends that changing any one of the aforementioned issues as he argues they should be could foster a different result and the "deprivation of these elements" caused the real controversy not to be fully tried.

¶28 We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct.

App. 1992). We have determined that no reversible error occurred on any of the issues Rodgers raised on appeal. We therefore conclude that no basis exists to order a new trial under WIS. STAT. § 752.35.

¶29 Finally, Rodgers' counsel has falsely certified that the appendix meets the requirements in WIS. STAT. RULE 809.19(2)(a). The appendix does not include the portion of the transcript containing the court's findings or opinion. *See* ***State v. Bons***, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 367. Counsel therefore is sanctioned $150 for providing a false appendix certification and a deficient appendix. *See* ***id.***, ¶25. Counsel shall pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgment and order affirmed.

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