COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2341-CR **Cir. Ct. No. 2002CF5625**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN GAMIAL LILLY, JR.,
A/K/A WARREN GAMALIEL LILLY, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Warren Gamial Lilly, Jr., a/k/a/ Warren Gamaliel Lilly, Jr.,[1] *pro se*, appeals from an order that denied his postconviction motion seeking a new trial pursuant to WIS. STAT. § 974.06 (2007-08).[2] A jury convicted him in 2003 of substantial battery by use of a dangerous weapon. The overarching issue is whether Lilly received ineffective assistance of counsel from the second trial attorney he retained to defend him against the charge. Lilly asserts that his trial counsel was ineffective for: (1) representing Lilly at trial despite inadequate time for trial preparation; (2) failing to develop the defense that Lilly did not intend to commit a crime; (3) examining Lilly improperly at trial about his prior criminal conviction; (4) failing to demonstrate that the victim drank alcohol before the battery; (5) failing to obtain transcripts from an earlier proceeding for use at trial; (6) failing to investigate "other matters and witnesses"; (7) failing to argue that the State wrongly prosecuted him for violating an unconstitutional statute; and (8) failing to argue that the State improperly charged him with using a dangerous weapon. We reject his arguments and affirm the order of the circuit court.

[1] The circuit court caption used in proceedings up to and through entry of the judgment of conviction in this case identifies the defendant as "Warren Gamial Lilly, Jr." In several postconviction motions, including the postconviction motion underlying this appeal, Lilly spelled his name: "Warren Gameal Lilly, Jr." In the caption of his appellate briefs and procedural motions in this court, Lilly identified himself as "Warren Gamaliel Lilly, Jr." While this appeal was pending, Lilly wrote a letter to the clerk of this court, objecting that the appellate case caption incorrectly spelled his middle name "Gamial," and he asked that the caption be amended to show that his middle name is "Gamaliel." The caption was amended in response. On our own motion, in the interest of maintaining consistency in the circuit court and appellate court records, we now direct the clerk of this court to amend the caption of this matter to reflect that the appellant is "Warren Gamial Lilly, Jr., a/k/a Warren Gamaliel Lilly, Jr."

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

BACKGROUND

¶2 The State charged Lilly in October 2002 with causing substantial bodily harm to his wife with intent to cause her substantial bodily harm, in violation of WIS. STAT. § 940.19(3) (2001-02). The State later filed an amended information charging that Lilly committed the offense while armed with a dangerous weapon. *See* WIS. STAT. § 939.63 (2001-02). Lilly was taken into custody in November 2002, and the court set bail at $10,000.

¶3 Although Lilly stated that he wanted to hire an attorney, the circuit court found that he waived the right to counsel by his conduct after he failed to pay the attorney he retained and then failed to cooperate with the attorneys subsequently appointed to represent him. When trial began on March 26, 2003, Lilly appeared *pro se* but with standby counsel available to assist him.

¶4 The jury was unable to reach a verdict. The circuit court declared a mistrial on March 28, 2003, and scheduled a new trial to begin on June 3, 2003. Lilly again asserted that he wanted to hire an attorney. The circuit court discharged standby counsel and explained to Lilly that he should have an attorney present for the next court date of May 13, 2003.

¶5 Lilly posted bail on April 4, 2003. He appeared in court on May 13, 2003, without an attorney. In response to questions about his timetable for retaining counsel, he told the circuit court that he had "at least two other attorneys to interview." The circuit court reminded Lilly that the second trial date was approaching, and the circuit court scheduled a status hearing for Friday, May 30, 2003, stressing the court's "strong hope ... that [Lilly would] retain this attorney well before this date."

¶6 On May 30, 2003, Lilly appeared with Attorney Lee Jones. Jones stated that he "was retained by Mr. Lilly yesterday," but that the two had not reached an agreement about fees. Further, Jones moved to adjourn the trial because he had another matter that conflicted with the June 3, 2003, trial date. The circuit court met with the attorneys in chambers and then advised that it would permit Lilly to assign a portion of his bail to Jones. Lilly told the circuit court that he approved this plan, and agreed to an assignment of $4000 to pay Jones's attorney's fees.

¶7 The circuit court next addressed the request to adjourn the trial. The circuit court considered the request in the context of the history of the proceedings, particularly emphasizing a recorded telephone call that Lilly placed from the House of Corrections shortly before the start of the first trial. The recording, which the State had played for the court, captured Lilly's statements indicating that he planned to disrupt the trial.[3] After discussing the recorded call and taking into account that the case had "been pending for quite awhile," the court made a finding that Lilly was engaged in an ongoing attempt to manipulate and delay the proceedings. The circuit court therefore denied the motion to adjourn.

¶8 A three-day jury trial began on June 3, 2003. The jury found Lilly guilty as charged. The circuit court imposed the maximum fifteen-year term of imprisonment, bifurcated as ten years of initial confinement and five years of extended supervision. Lilly did not appeal.

[3] Although the recorded telephone call is discussed and described at several points in the transcripts and written submissions, the recording itself is not in the appellate record.

¶9 In 2007, Lilly filed a postconviction motion *pro se* pursuant to WIS. STAT. § 974.06. The circuit court made a discretionary appointment of counsel for Lilly, and conducted a hearing on his allegations that he received ineffective assistance from Jones.[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (defendant must preserve trial counsel's testimony to maintain a claim of ineffective assistance of counsel). After hearing testimony from Jones and Lilly and reviewing written submissions, the circuit court concluded that Jones did not perform ineffectively. The circuit court discharged appointed counsel, and Lilly appeals *pro se*.

DISCUSSION

¶10 The two-pronged test for ineffective assistance of counsel claims requires a convicted defendant to prove both deficient performance by counsel and prejudice to the defense as a consequence. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. If a defendant

[4] The circuit court denied many of Lilly's postconviction claims in a written order entered before the ***Machner*** hearing. Lilly does not renew those claims on appeal and we do not address them. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised in circuit court but not raised on appeal are deemed abandoned).

fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. ***Id.*** at 697.

¶11 A claim that counsel was ineffective presents mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** Whether the attorney's performance was deficient and whether any deficiency prejudiced the defendant are questions of law that we review *de novo*. ***Id.*** at 128. With these principles in mind, we turn to Lilly's claims.

1. Inadequate trial preparation time.

¶12 Lilly argues that on May 30, 2003, Jones either knew or should have known that he did not have enough time to prepare for a June 3, 2003, trial date, and therefore Jones should have walked away from the proceedings when the circuit court denied an adjournment. Lilly's position has no support in the law. Whether retained trial counsel may withdraw rests in the circuit court's discretion. *See* ***State ex rel. Dressler v. Circuit Court***, 163 Wis. 2d 622, 632, 472 N.W.2d 532 (Ct. App. 1991). Thus, although an attorney may move to withdraw from a criminal case, the attorney is not at liberty to abandon a client without leave of the court. *See* ***State v. Coleman***, 2002 WI App 100, ¶38, 253 Wis. 2d 693, 644 N.W.2d 283. Here, Jones explained during the ***Machner*** hearing that "if [he] could have gotten off the case ... [he] would have gotten off the case. But the judge made it clear that was not an option."

¶13 Lilly asserts, however, that he and Jones did not have an attorney-client relationship when the two first appeared together in court, and Lilly emphasizes that they had not reached a fee agreement before the May 30, 2003, court appearance. The circuit court, however, determined at the ***Machner*** hearing

that Lilly retained Jones on May 29, 2003. That finding is supported by the law and the evidence.

¶14 First, a fee agreement does not necessarily mark the start of the attorney-client relationship. "An attorney-client relationship is not formed simply because one of the parties knows that the other is an attorney. Such knowledge, however, coupled with legal advice being sought and provided, ordinarily is enough to establish the relationship." ***OLR v. Kostich***, 2010 WI 136, ¶16, No. 2009AP287-D. Here, of course, the relationship is reflected by Jones's assistance in court, including the motion Jones made to adjourn Lilly's trial. Second, the record supports a finding that Jones and Lilly understood they had formed an attorney-client relationship when they appeared together on May 30, 2003. Jones told the circuit court near the outset of the hearing that he had been retained the previous day, although he had not yet been paid.[5] Lilly told the circuit court that he wanted Jones as trial counsel.

¶15 Lilly points to other parts of the record to support his argument that Jones was, in effect, a stranger to the case when he appeared with Lilly on May 30, 2003. We, however, are not a fact-finding court. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). The circuit court, not this court, resolves conflicts in the evidence. ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). We therefore defer to the circuit court's conclusion that Jones came to court on May 30, 2003, in his capacity as Lilly's trial attorney.

[5] The record reflects that Lilly similarly retained his first trial attorney in this matter without paying the fee. That attorney moved to withdraw as a consequence, and the circuit court granted the motion.

¶16 Thus, Jones could not abandon the case after Lilly sought representation and the two forged an attorney-client relationship on May 29, 2003. *See* ***Coleman***, 253 Wis. 2d 693, ¶38. Jones is not at fault because Lilly decided to retain counsel four days before the scheduled trial, or because the circuit court denied Lilly's last minute efforts to delay the case with an adjournment. Jones's limited time for trial preparation stems from Lilly's choices, not Jones's.

2. Failure to develop a defense that Lilly lacked intent to commit a crime.

¶17 Lilly faults his trial counsel for failing to investigate or develop the defense that he was not guilty because he lacked intent to commit a crime. Lilly believes that such investigation "could have suggested a strong defense."

¶18 Intent to cause substantial bodily harm is an element that the State must prove to secure a conviction for substantial battery. *See* WIS. STAT. § 940.19(3) (2001-02); WIS JI—CRIMINAL 1223. Intent, however, "may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances." ***State v. Stewart***, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988). Here, Lilly's wife testified that Lilly grabbed a telephone, smashed it across her face, knelt on top of her, and used the telephone to hit her repeatedly in the head until she nearly lost consciousness. She testified that she required fourteen stitches to repair a laceration over her eye and an additional seventeen staples to close the gashes in the back of her head.

¶19 Lilly testified on his own behalf. He told the jury that he and his wife struggled and fell on the floor after his wife bit him. Trial counsel asked: "[w]hat happened after that?" Lilly said "I think I must have started hitting her with the telephone, then I heard my daughter Erin say, 'Daddy, stop.'" On

cross-examination, Lilly admitted that his wife was doing nothing to him while he was on top of her hitting her on the back of the head with a telephone. Additionally, the State asked Lilly if he "wanted to hurt [his] wife because [he] w[as] angry," and he replied, "I would assume, yes."

¶20 The jury could reasonably infer from Lilly's conduct and admissions that he intended to cause substantial harm. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990) (jury's findings may be based on reasonable inferences drawn from the evidence). Lilly does not explain what an investigation would have uncovered that would have undermined his own inculpatory testimony and furthered a theory that he did not intend to harm his wife. *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272 (defendant alleging that counsel was ineffective by failing to take certain steps must show with specificity what the actions would have revealed). Instead, Lilly points to the first trial and speculates that "intent may have been the issue" that the first jury could not resolve. Such speculation is unavailing. Because many factors, standing alone or working together, may result in a jury's inability to reach a verdict, no meaning may be ascribed to that outcome. *See* ***Yeager v. United States***, 129 S. Ct. 2360, 2368 (2009). Accordingly, this claim fails.

3. Inquiry regarding Lilly's prior criminal conviction.

¶21 Jones asked Lilly near the end of his direct examination whether Lilly had a prior criminal conviction, and Lilly responded affirmatively. Lilly now asserts that the question was improper. The circuit court concluded, however, that the question reflected sound strategy. The record supports the circuit court's conclusion.

¶22 Outside of the jury's presence, Lilly admitted to the circuit court and to both attorneys that he had one prior conviction. The State advised that it intended to impeach Lilly with that prior conviction if he testified. *See* WIS. STAT. § 906.09(1). Jones explained at the ***Machner*** hearing that he questioned Lilly about the prior conviction before the State had a chance to pose the question in order to "minimize the effect" of Lilly's answer. Wisconsin courts have long recognized that this is "the usual trial strategy." *See* ***State v. Pitsch***, 124 Wis. 2d 628, 631, 369 N.W.2d 711 (1985). Strategic decisions made after a reasonable investigation will not support a claim of ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 690.

¶23 Lilly complains, however, that trial counsel's investigation of the facts was insufficient because counsel did not submit a discovery demand to find out about the prior conviction. A discovery demand was unnecessary. When the relevant facts are "generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." ***Strickland***, 466 U.S. at 691. Here, Lilly disclosed his prior conviction on the record. He shows no deficiency in Jones's performance.

¶24 Lilly insists nonetheless that Jones could have persuaded the circuit court to exclude the evidence of the prior conviction if Jones had gathered evidence to show that the conviction "was more than six years old for 'disorderly conduct.'" Lilly argues that, if Jones had this information, he could have demonstrated to the circuit court that "[t]he conviction was irrelevant to the case." Lilly misunderstands the concept of relevance in this context. "[U]nder Wisconsin law, all prior convictions are relevant to a witness' character for truthfulness." ***State v. Gary M.B.***, 2004 WI 33, ¶23, 270 Wis. 2d 62, 676 N.W.2d 475. Thus, Lilly fails to offer any legally cognizable reason that the circuit court would have

granted a motion to exclude evidence of his prior conviction.[6] Accordingly, he shows no prejudice arising from the absence of such a motion. *See* ***Strickland***, 466 U.S. at 694.

4. Lack of transcripts from first trial.

¶25 Jones did not have transcripts from the March 2003 trial, and Lilly asserts that Jones performed ineffectively by failing to obtain them for the June 2003 trial. In support, Lilly points to Jones's testimony at the ***Machner*** hearing that the lack of transcripts prevented Jones from identifying inconsistencies in the testimony. Jones explained, however, that he did not obtain transcripts because he lacked the time to do so.

¶26 Courts do not assess the reasonableness of counsel's performance in a vacuum, but rather "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." ***Strickland***, 466 U.S. at 690**.** Further, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Id.*** at 691. Here, Lilly retained Jones only a few days before trial, and Lilly did not establish that Jones could have obtained the transcripts in the

[6] The record belies Lilly's contention that Jones lacked information about the age and nature of Lilly's prior conviction. The trial court and the lawyers discussed Lilly's prior conviction during the May 30, 2003, proceeding. During that discussion, the circuit court stated: "[t]here is a judgment of conviction relating to case ending 2-70652. The conviction is under the amended charge of disorderly conduct, but the allegations are that on May 25th, 1997, the defendant did slap the same victim in this case, Ms. Patricia Lilly, in the back of her head and punch her, choke her, and kick her several times ...." Nothing in Lilly's submission suggests that the circuit court misstated the background of the criminal conviction. Accordingly, the record shows that, not only did Lilly admit his prior conviction, but also that Jones became aware of the details of the matter the day after he was retained.

abbreviated time available. Thus, Lilly demonstrated no deficiency in Jones's performance under the circumstances.

¶27 Further, Lilly fails to discuss any significant inconsistencies—indeed, any inconsistencies at all—in the two sets of transcripts that would have assisted his defense at the second trial. This court generally will not comb the record to find support for a litigant's contentions. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. Rather, Lilly has the burden to show prejudice from the lack of transcripts. *See* ***Strickland***, 466 U.S. at 687. He has failed to carry that burden.

5. Testimony about the victim's alcohol consumption.

¶28 Jones elicited the victim's denial that she drank alcohol on the night of the crime. Lilly believes that this "lowered [his] credibility." Lilly does not explain how the victim's one-word denial that she drank alcohol before he beat her diminished his own credibility. Further, the thrust of his argument is that Jones could have and should have demonstrated that the victim was "under the influence of alcohol" during the beating. Jones testified at the ***Machner*** hearing, however, that a litigation strategy of attacking the alleged victim can damage a defendant's case, and he explained that he made a strategic decision not to "charge hard" at the victim in Lilly's trial. "An appellate court 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.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

¶29 Moreover, we agree with the State that trial counsel did not rob Lilly of the opportunity to impeach the victim's testimony on the issue of her alleged alcohol consumption. Trial counsel asked Lilly at the end of the direct testimony

whether he wanted to tell the jury any "facts or details" that might have been left out, and Lilly responded "I can't think of anything." Trial counsel is not at fault for Lilly's failure to respond to the question by stating that the victim drank alcohol before the beating.

6. Counsel's failure to take unspecified actions.

¶30 Lilly complains that his trial counsel performed ineffectively by failing to investigate or explore "other matters and witnesses." Lilly's appellate brief does not identify those other matters or witnesses or explain how the outcome of the proceeding would have been affected by the investigation and exploration he believes should have occurred. Therefore, this complaint does not entitle him to any relief. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Moreover, we do not address arguments that are not fully developed in a party's appellate brief. ***Id.*** at 58.

7. and 8. Failure to claim that the State pursued unlawful or otherwise improper charges against Lilly.

¶31 Lilly asserts that Jones performed ineffectively by failing to challenge the State's decision to continue to prosecute him under WIS. STAT. § 940.19(3) after the legislature repealed the provision.[7] He also asserts that Jones performed ineffectively by failing to object to the penalty enhancer, WIS. STAT. § 939.63, on the ground that Lilly was not "armed with a dangerous weapon" when he battered his wife with a telephone. The State points out that Lilly makes these allegations against his trial counsel for the first time on appeal, an argument

[7] The legislature repealed WIS. STAT. § 940.19(3), pursuant to 2001 Wis. Act 109, § 606. The repeal first applied to offenses committed on February 1, 2003, a date after Lilly battered his wife but before either trial began. *See* ***id.***, §§ 9359, 9459.

that Lilly does not refute in his reply brief. Thus, the State's point is conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded). We ordinarily do not address issues raised for the first time on appeal. ***State v. Long***, 2009 WI 36, ¶43, 317 Wis. 2d 92, 765 N.W.2d 557. No reason exists to depart from that rule here.[8]

By the Court.—Order affirmed.

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

[8] We also decline to entertain Lilly's request that we strike the State's response brief because it is authored by one assistant attorney general but signed by another. The request is contained in Lilly's reply brief, and therefore we will not consider it. *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188 (we do not address issues raised for the first time in a reply brief). Requests for procedural orders must be made by motion pursuant to WIS. STAT. RULE 809.14(1), assuring the opponent notice and an opportunity to be heard in response. Moreover, were we to consider Lilly's request, we would deny it. Lilly fails to identify any way in which the signature on the brief has prejudiced him.