COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1844-CR **Cir. Ct. No. 2007CF91**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMIE L. CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tommie Carter appeals a judgment, entered upon a jury's verdict, convicting him of one count of battery by a prisoner. Carter also challenges the order denying his motion for postconviction relief. Carter challenges the sufficiency of the evidence to support his conviction, and claims he

was denied the effective assistance of trial counsel. Carter alternatively urges this court to grant a new trial in the interest of justice. We reject Carter's arguments and affirm the judgment and order.

BACKGROUND

¶2 Following Carter's conviction for battery by a prisoner, the court imposed a five-year sentence consisting of three years of initial confinement and two years of extended supervision, to run consecutive to any other sentence Carter was then serving. Carter filed a motion for postconviction relief alleging he was denied the effective assistance of trial counsel. The motion was denied after a ***Machner***[1] hearing, and this appeal follows.

DISCUSSION

I. Sufficiency of the Evidence

¶3 When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶4 The crime of battery by a prisoner is set forth as follows: "Any prisoner confined to a state prison or other state, county or municipal detention facility who intentionally causes bodily harm to an officer, employee, visitor or

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

another inmate of such prison or institution, without his or her consent, is guilty of a Class H felony." WIS. STAT. § 940.20(1).[2]

¶5 At trial, correctional officer James Finnell testified that on the day of the battery, he escorted Carter back to his cell with the assistance of another officer, Kimberly Phetteplace. The officers stopped in the vestibule outside of Carter's cell to remove his leg restraints and handcuffs. Finnell testified that when they attempted to follow protocol by assisting Carter to his knees in order to remove the leg restraints, he became agitated, yelled several profanities toward Phetteplace, and indicated he did not want the officers to touch him. Although Carter was ultimately assisted to his knees, he remained agitated. Finnell consequently left his knee across the back of Carter's calf so that he could not kick the officers once the leg restraint was removed. Although Carter complained that Finnell was "crushing his leg," Finnell testified that he was not actually kneeling on the back of Carter's leg but, rather, he secured Carter's leg while kneeling on one of his own knees.

¶6 The leg restraints were removed and Carter was assisted back to his feet. After his handcuffed wrists were subsequently freed from the waist restraint belt, Carter ripped off his spit mask, cleared his throat as if preparing to spit, and spun to face the officers. Finnell consequently put his hand up to deflect any spit, and when he simultaneously reached down to unclip his keys from his belt, "Carter grabbed [his] hand and bent it back, and then bent [his] arm out to the side where [Finnell] clocked the doorjamb." Upon freeing his hand, Finnell attempted to close the door while Carter attempted to stop it from closing. The door was

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

eventually closed with Phetteplace's assistance. Finnell testified that he did not give Carter permission to grab him and he suffered harm from the altercation, ultimately missing one month of work due to his injuries.

¶7 During his testimony, Carter conceded that he was "mouthing off" as the officers escorted him back to his cell. Carter, however, denied ripping off a spit mask, turning to face the officers or bending Finnell's hand back. Although there is conflicting testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659.

¶8 Carter argues that no reasonable fact finder could have convicted him because the surveillance video shown at trial proves he did not charge and attack Finnell or prevent the cell door from closing. Any inconsistencies between the video and Finnell's testimony, however, were brought to the jury's attention. Further, due to the angle of the camera, the video did not show the vestibule but, rather, showed only Carter's cell. Carter further emphasizes that in Finnell's initial report of the incident, he claimed Carter came charging out of his cell. Again, inconsistencies between the incident report and Finnell's trial testimony were brought to the jury's attention. In context, a reasonable jury could have interpreted any statements about the "cell" as references to the vestibule or the doorway to the cell. Because both the video and statements from Finnell's incident report could be reconciled with Finnell's testimony, we conclude the evidence submitted at trial was sufficient to support Carter's conviction.

II. Ineffective Assistance of Trial Counsel

¶9 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596

N.W.2d 749 (1999). The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶10 To establish ineffective assistance of counsel, Carter must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We may address the tests in the order we choose. If Carter is unable to show one prong, we need not address the other. ***Id.*** at 697.

¶11 Here, Carter claims his counsel was ineffective by failing to introduce evidence substantiating that the officers had motivation to falsely accuse him. The subject evidence consisted of complaints Carter made against officers other than Finnell or Phetteplace.

¶12 At the ***Machner*** hearing, Carter's trial counsel explained strategic reasons for not introducing evidence of prior incidents between Carter and prison staff. Trial counsel explained that a letter showing that the Grant County sheriff's department had closed its file on a complaint filed by Carter would not have supported Carter's retaliation defense because the letter merely established that "he made a complaint, it was investigated and it [was] done." Trial counsel explained that a report summarizing an incident that occurred a few days before the battery involved in this prosecution would have been "more harmful than helpful" due to Carter's "quite inflammatory" words and "verbally and physically aggressive" behavior. Trial counsel explained that she did not present evidence about a complaint filed by Carter against a correctional officer from an incident a

few weeks before this battery because she did not have enough information about the incident.

¶13 "If tactical or strategic decisions are made on [a rational] basis, [we] will not find that those decisions constitute ineffective assistance of counsel, even though by hindsight we are able to conclude that an inappropriate decision was made or that a more appropriate decision could have been made." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Rather, the court will second-guess counsel's strategic decision only if it is shown to be an irrational trial tactic or if it was based upon caprice rather than judgment. ***Id.*** at 503. Trial counsel's explanations reflect a rational basis and, therefore, Carter cannot show deficient performance.

¶14 Carter's trial counsel also testified that her trial strategy included showing that Carter was poorly treated by staff after the death of his brother. At the ***Machner*** hearing, postconviction counsel pointed to two "Offender Complaints" filed by Carter in the week before this incident that allegedly showed staff's unsympathetic stance. However, those incidents were not discussed during trial and Carter argues that his trial counsel was ineffective for not introducing evidence of those incidents to the jury.

¶15 Although those incidents were not presented to the jury, the jury heard similar evidence. Carter testified that he was seeing the head psychologist at the prison because he was "upset" by his brother's death. Carter also testified that staff members had called him "racial names." Thus, the jury knew that Carter's brother had recently died in prison and that staff verbally mistreated Carter. The evidence that Carter complains about would have been cumulative and, therefore, he cannot not satisfy the prejudice prong. *See* ***Strickland***, 466 U.S. at 694 (a

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).

¶16 Carter also claims the reports would have established motivation for the prison to withhold relevant "video evidence." To the extent Carter intimates that the prison destroyed video from the vestibule, the circuit court found that although there was a camera shell in the vestibule, no camera was installed there until after the subject incident. With respect to the video of Carter in his cell, the prison initially sent defense counsel a video from April 22, 2007—four days before the incident. The District Attorney discovered the mistake on the day before trial, and the correct video was ultimately provided to defense counsel on the day of trial. Again, it is too speculative to conclude that prison officials would have surreptitiously withheld the video based on Carter's past complaints. We therefore conclude counsel was not defective for failing to introduce evidence of those complaints.

¶17 Carter also claims trial counsel was ineffective in her "mishandling of the video evidence in comparison to the officers' witness statements." Specifically, Carter contends that counsel should have sought a continuance in order to more thoroughly review the video, and should have submitted both Finnell's and Phetteplace's incident reports and written statements to the jury to better enable their comparison with the video. Even assuming counsel was somehow deficient, we are not persuaded that her deficiency affected the outcome at trial.

¶18 The record shows that counsel was given an opportunity to review the video with Carter before opening statements at trial. The video was then played at least three separate times at trial, and defense counsel pointed out

inconsistencies between the video and Finnell's pretrial statements, specifically pointing out that the video did not show Carter coming out of his cell or using his foot to prevent the cell door from closing. During cross-examination of Phetteplace, she reiterated her statements that Carter came out of the cell and used his foot to prevent the cell door from closing. On direct examination of Carter, counsel again elicited testimony that the video did not show Carter coming out of the cell or preventing the door from closing. Finally, during her closing argument, defense counsel discussed the video, comparing its inconsistencies with the officers' statements. Counsel reiterated that, despite the claims in the incident reports, Carter did not come out of his cell, "because we all saw him the whole time in there." Carter therefore fails to establish how earlier access to the video or introduction of the actual statements into evidence would have altered the outcome at trial.

¶19 Counsel pointed out inconsistencies between the statements and video through trial testimony and in her closing argument. As the circuit court acknowledged in its oral denial of Carter's postconviction motion, it could not "Monday morning quarterback and find that [counsel's performance] fell below the standard of care. Nor [could the court] find it prejudiced Mr. Carter." As the court noted, counsel "did an adequate job and dealt with this dynamic situation the best she could and she hit all the points she had to make [on] cross-examination … [a]nd then summarized it very briefly in her argument." We therefore conclude that Carter was not prejudiced by any claimed deficiency on the part of his trial counsel.

III. Discretionary Power of Reversal

¶20 Alternatively, Carter seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Carter must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Carter "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶21 Here, Carter argues that the real controversy has not been fully tried and justice has miscarried based on the errors alleged above. We have rejected Carter's various challenges to his conviction, and "[a]dding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Accordingly, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Carter a new trial.

By the Court.—Judgment and order affirmed.

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