COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1819-CR **Cir. Ct. No. 2008CF5173**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. BRINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Robert L. Brinson appeals the judgment convicting him of conspiracy to commit identity theft, contrary to WIS. STAT. §§ 939.31 and

943.203(2)(a) (2007-08).[1] He also appeals the order denying his postconviction motion. Brinson contends that the trial court erred in denying his postconviction request for an evidentiary hearing[2] and in denying a new trial because his postconviction motion sufficiently alleged that his trial counsel was ineffective. Specifically, Brinson argues that trial counsel was ineffective for: (1) failing to move *in limine* to exclude evidence of Brinson's criminal record at trial; (2) asking a witness an open-ended question, the answer to which referred to Brinson's probation or parole agent; (3) failing to move for a mistrial each time "Brinson's record or status with the corrections department was brought up"; (4) failing to strike Juror No. 15; and (5) failing to adequately investigate defenses and failing to allow Brinson to participate in his defense. He also contends that the trial court committed reversible error by permitting the jury to hear testimony regarding his criminal record. Brinson further argues that we ought to grant him a new trial in the interests of justice. We disagree with Brinson's contentions and affirm.

I. BACKGROUND.

¶2 A jury convicted Brinson of conspiring to commit identity theft in August 2009. The charge stemmed from his involvement in a scheme to file state and federal income tax returns containing fraudulent W-2 forms, whereby Brinson would obtain undeserved tax refunds.

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

[2] Brinson first requested an evidentiary hearing, pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) in his reply to the State's brief in opposition to his motion for a new trial. Although we generally do not consider arguments brought up for the first time on appeal, *see* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998), we consider it here in the interests of justice.

¶3 Before trial, on the date of the final pretrial hearing, Brinson's trial counsel filed a motion *in limine* to exclude "for use at trial any evidence of [Brinson]'s prior conviction." The trial court deferred ruling on this motion until Brinson made his decision whether or not to testify. The trial court then asked the prosecutor whether the State intended to offer evidence of Brinson's prior criminal record for anything other than impeachment purposes, should he testify. The prosecutor explained that a State witness might refer to Brinson's earlier criminal history to explain why she recanted her earlier statement that Brinson was involved in a fraudulent tax-refund scheme. The court allowed the testimony.

¶4 At *voir dire*, Brinson's trial counsel asked the jury if anyone would hold it against Brinson if he did not testify. Juror No. 15 responded that he would. The trial court and Juror No. 15 engaged in the following colloquy:

> [TRIAL COUNSEL]: Is there anyone on this panel who feels that if Mr. Robert Brinson does not take the witness stand that he's trying to hide something? Okay. I don't see any hands. So no one on the – I'm sorry. Juror number fifteen.
>
> [JUROR NO. 15]: I would – I personally, I guess, would want to defend myself and have my – I like to talk, I guess, too, so – I'd want to have my voice heard, in my opinion, so –
>
> [THE COURT]: But if I was to tell you –
>
> [JUROR NO. 15]: I – I understand why I might be advised not to, though, as well, so –
>
> [THE COURT]: Do you agree – Do you promise to abide by that instruction?
>
> [JUROR NO. 15]: Yeah. Uh-huh.

> [THE COURT]: If Mr. Brinson makes the decision I don't want to testify, you can't go back in the jury room and say, well, the only reason he didn't testify is 'cause he's guilty. You can't do that. Absolutely forbidden. Can you do that?
>
> [JUROR NO. 15]: Yeah.

Trial counsel did not move to strike this juror from the panel and Juror No. 15 ended up on the jury. Brinson did not testify at trial.

¶5 Of the twelve witnesses who testified at trial, four gave testimony from which the jury could infer that Brinson had a criminal history. For example, during the cross-examination of Vern Barnes, a special agent with the Wisconsin Department of Revenue, Brinson's attorney asked an open-ended question about how Barnes knew of a co-conspirator's relationship with Brinson; the resulting answer ended with Barnes referring to Brinson's probation or parole agent. Following a sidebar discussion, the court instructed the jury to disregard Brinson's probation or parole status when determining his guilt in this case. Brinson's trial counsel moved for a mistrial on the grounds that Barnes's testimony regarding Brinson's probation or parole unfairly prejudiced him. The trial court denied this motion.

¶6 Additionally, Teresa Howard, a State witness who knew about the tax refund scheme, alluded to Brinson's record. When asked by the State what role she believed Brinson played in the crime, Howard responded, "He just – He was just going along with the flow. That was [Dickerson's] man.[3] He had just got out of jail or – Oh, excuse me. Well, you know." The trial court immediately ordered the testimony stricken from the record.

[3] Baszonia Dickerson was Brinson's then-fiancée.

¶7 In addition, another State witness, Akiyyah Jones, testified that she gave inconsistent information to Brinson's probation or parole agent and investigators regarding Brinson's role in the fraudulent tax-refund scheme. She explained that Dickerson "kept coming by my house when my kids were there, saying something." When asked if Dickerson threatened her—in other words, if she changed her story because of something Dickerson said to her—Jones said yes. Jones testified that Dickerson told her that Brinson, "did 14 years in prison, he ain't going to go back." As noted, the prosecutor had indicated before trial that a State witness might refer to Brinson's prior criminal record in this manner. The trial court considered Jones's testimony relevant and admissible to explain why Jones felt threatened enough to lie to Brinson's probation and parole agent about Brinson's involvement in the crime. The trial court noted that Brinson's trial counsel had asked for a sidebar again, but it was denied as the court felt that the statement was relevant because it provided a reason why a witness had lied and outweighed any prejudice to the defendant. Brinson's trial counsel moved to strike the testimony pertaining to the time Brinson spent in prison, but the trial court denied the motion.

¶8 Finally, Baszonia Dickerson, Brinson's wife—his fiancée at the time of the scheme—testified that another man, not Brinson, involved her in the fraud. Describing her role in the fraud, Dickerson referred to the fact that Brinson had been incarcerated at the time. Brinson's trial counsel did not object to her testimony.

II. ANALYSIS.

¶9 On appeal, Brinson argues that the trial court erred when it denied his ineffective assistance of counsel claim without holding a ***Machner***[4] hearing. He also argues that the trial court committed reversible error by permitting the jury to hear testimony alluding to his criminal record. Brinson further argues that we ought to grant him a new trial in the interests of justice. We address each argument in turn.

A. The trial court did not err in denying Brinson's ineffective assistance of counsel claims.

¶10 The specific question before this court is whether the trial court properly denied Brinson's ineffective assistance claim without first holding an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."). In ***State v. Allen***, 2004 WI 106, ¶¶12-24, 274 Wis. 2d 568, 682 N.W.2d 433, our Wisconsin supreme court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing. Relying on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the ***Allen*** court repeated the well-established rule:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory

[4] *See* ***Machner***, 92 Wis. 2d at 804.

> allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Id., 274 Wis. 2d 568, ¶9 (emphasis added; citations omitted).

¶11 Brinson must also allege a *prima facie* claim of ineffective assistance of counsel, showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To establish deficient performance, Brinson must show facts from which a court could conclude that trial counsel's representation was below the objective standards of reasonableness. *See* ***id.*** To demonstrate prejudice, Brinson "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." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). If a defendant fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶12 With these standards in mind, we consider Brinson's arguments concerning trial counsel's ineffectiveness. Brinson argues that his trial counsel was ineffective for the following reasons: (1) failing to move *in limine* to exclude evidence of Brinson's criminal record at trial; (2) asking a witness an open-ended question, the answer to which referred to Brinson's probation or parole agent; (3) failing to move for a mistrial each time "Brinson's record or status with the corrections department was brought up"; (4) failing to strike Juror No. 15; and (5) failing to adequately investigate defenses and failing to allow Brinson to participate in his defense.

¶13 First, because Brinson's argument regarding trial counsel's failure to move to exclude of Brinson's criminal record is unsubstantiated by the record, we will not consider it. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (we "may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record."). The record shows that trial counsel *did* in fact move to exclude evidence of Brinson's criminal history prior to trial. Specifically, as the State points out, and Brinson does not dispute,[5] trial counsel moved, prior to trial, "for an order excluding for use at trial any evidence of [Brinson]'s prior conviction on the grounds that the probative value of [Brinson]'s criminal record is substantially outweighed by the danger of prejudice."

¶14 Second, because Brinson does not sufficiently develop his arguments regarding trial counsel's failure to strike Juror No. 15 and counsel's alleged failure to "adequately investigate defenses and failing to allow Brinson to participate in his defense," we will not consider them. *See* ***id.*** Brinson's argument regarding Juror No. 15 does not explain why his trial counsel's decision not to strike a juror who had been properly rehabilitated was deficient. *See* ***Wesley***, 321 Wis. 2d 151, ¶23. Nor does Brinson explain, beyond stating "Brinson was prejudiced by this error because he did not testify and was later found guilty," how having Juror No. 15 on the panel undermines confidence in his trial's outcome. *See* ***Strickland***, 466 U.S. at 694. Brinson similarly does not sufficiently explain what steps trial counsel might have taken to "adequately investigate defenses" or "allow Mr.

[5] Brinson did not file a reply brief in this appeal.

Brinson the opportunity to participate in his defense," beyond asserting that trial counsel did not properly communicate with him.[6] Nor does he explain how such alleged deficiencies prejudiced him at trial.

¶15 Third, because Brinson's remaining claims—namely, his claims that trial counsel asked a witness an open-ended question, the answer to which referred to Brinson's probation or parole agent, and that his trial counsel failed to move for a mistrial each time "Brinson's record or status with the corrections department was brought up"—do not establish prejudice, he has failed to establish that trial counsel was ineffective. *See* ***id.*** at 697. Brinson argues regarding both claims that evidence of his criminal record constitutes "prior acts" evidence which was more prejudicial than probative, and therefore, should have been inadmissible pursuant to WIS. STAT. §§ 904.04(2) and 904.03. He further explains that because the jury heard evidence of his record, and because it found him guilty, this evidence prejudiced him at trial.

¶16 We disagree. The trial court instructed the jury several times that it could not consider Brinson's possible status as a probationer or parolee, or the fact that he spent time in jail, when determining his guilt or innocence. We presume that juries follow properly given instructions. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490; ***State v. Sigarroa***, 2004 WI App 16,

[6] Regarding this particular argument, Brinson "alleges that trial counsel did not adequately investigate defenses and failed to allow Mr. Brinson the opportunity to participate in his defense because his trial counsel did not properly communicate with the defendant. However without a hearing to make a record, it is not possible to establish from the record deficient performance on this last point." This argument is not only unsubstantiated, but is also circular in its reasoning. We will therefore not consider it. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (we "may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record.").

¶24, 269 Wis. 2d 234, 674 N.W.2d 894 ("Where the trial court gives the jury a curative instruction, this court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition."). Brinson does not point to anything outside of the jury's verdict to suggest that the jury disregarded the trial court's instructions.

¶17 Moreover, Brinson has not shown that, had the jury not heard testimony regarding his background, there is a reasonable probability that the outcome would change. *See* ***Strickland***, 466 U.S. at 694. Evidence of Brinson's guilt was overwhelming. The State established Brinson's romantic connection with Dickerson, the instigator of the tax-refund scheme, and also established his active participation in the scheme. For example, Andre Childs testified that Brinson's involvement included distributing fraudulent W-2 forms and acting as Dickerson's "enforcer." Howard testified that Brinson and Dickerson solicited her participation in the scheme, that Brinson spoke with participants about the scheme and the division of money, and also that Brinson and Dickerson provided another participant, Lathell Rodgers, with fraudulent W-2 forms. Rodgers in turn testified that Brinson drove him to the H&R Block to file his fraudulent tax return. Jones testified that Brinson provided her with fraudulent forms, accompanied her to H&R Block to pick up her check, accompanied her to a check cashing business to cash the check, and then divided the proceeds. Cecelia Brown testified to seeing Brinson and Dickerson splitting up the refund money in the H&R Block parking lot, and Melinda Brock testified that Brinson divided the proceeds of a fraudulent tax refund with her.

¶18 In sum, the record conclusively demonstrates that Brinson had no basis for relief on his claims of ineffective assistance of counsel. We therefore

conclude that the trial court properly denied Brinson's claims without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶¶9, 12.

B. The trial court did not erroneously exercise its discretion in its rulings regarding testimony about Brinson's criminal history.

¶19 We turn, next, to Brinson's argument that "it was reversible error for the trial court to permit the jury to hear on multiple occasions that the defendant was previously convicted of a crime or under supervision of the department of corrections." Citing WIS. STAT. §§ 904.04(2) and 904.03, Brinson argues that even though the trial court instructed the jury to disregard testimony alluding to Brinson's criminal record at various points during trial, the testimony was so prejudicial that the only remedy is a new trial.

¶20 We review the trial court's decisions to admit or exclude evidence under the erroneous exercise of discretion standard. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771 (other acts evidence); ***State v. Huntington***, 216 Wis. 2d 671, 696, 575 N.W.2d 268 (1998) (evidence objected to as more prejudicial than probative). We will sustain the trial court's evidentiary rulings if we find that the trial court examined the relevant facts, applied a proper legal standard, and rationally reached a conclusion that a reasonable judge could reach. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). Evidentiary errors also require a harmless error analysis. In other words, such errors warrant reversal or a new trial "only if the improper admission of evidence has affected the substantial rights of the party seeking relief." ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). We consider an error harmless when no reasonable probability exists that the error contributed to the conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985). A reasonable probability is a probability sufficient to undermine our confidence in the outcome. ***Id.*** at 545.

¶21 While various witnesses did give potentially prejudicial testimony alluding to Brinson's criminal history at four points during trial, we conclude that, because the trial court made reasonable evidentiary rulings, *see* ***Sullivan***, 216 Wis. 2d at 780-81, and because the introduction of potentially prejudicial testimony in this case did not affect Brinson's rights, *see* ***Britt***, 203 Wis. 2d at 41, reversal was not required. First, when Barnes referenced Brinson's "probation or parole agent," the trial court properly instructed the jury to disregard Brinson's status when determining guilt in this case. *See, e.g.*, ***Delgado***, 250 Wis. 2d 689, ¶17. The trial court also properly denied trial counsel's motion for mistrial, determining that the State did not maliciously present the evidence. Second, when Howard referenced Brinson's having gotten "out of jail," the circuit court immediately struck the comment and told the jury not to consider it. As noted, we presume the jury followed the trial court's instructions. *See* ***id.*** Third, in response to Jones's testimony that Dickerson told her that Brinson "did 14 years in prison, he ain't going to go back," the trial court reasonably deemed the evidence relevant and admissible to explain why Jones originally lied to Brinson's probation and parole agent about Brinson's involvement in the fraudulent tax-refund scheme. *See* ***Sullivan***, 216 Wis. 2d at 780-81. The trial court correctly identified the relevant considerations and relevant statutes and reasoned its way to a reasonable decision. *See* ***id.*** Fourth, in response to Dickerson's testimony that at one point during the scheme Brinson "was still incarcerated," the trial court properly cautioned Dickerson to "wait for a question." At this point, trial counsel abandoned this line of questioning.

¶22 Moreover, in none of these instances has Brinson shown that any prejudice would have required a new trial. As we explained in Part A above, even if the jury had *not* heard this testimony, it would have found Brinson guilty based on the overwhelming evidence of guilt in this case—evidence of guilt that Brinson does not dispute.

C. Brinson does not require a new trial in the interests of justice.

¶23 As a final matter, Brinson argues that we ought to grant him a new trial in the interests of justice. In support of this contention, Brinson reiterates his argument that because the jury heard testimony alluding to his criminal record, its verdict was tainted. For all of the reasons we stated above, we disagree. This is not a case where, but for the jury's knowledge that Brinson was previous involved in the criminal justice system, it would have found him innocent of the charged crime. As Brinson himself does not dispute, ample evidence supported his conviction.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.