COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1895-CR **Cir. Ct. No. 2008CF306**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEWAYNE HARMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dewayne Harmon appeals from a judgment of conviction of five crimes and from an order denying his postconviction motion alleging ineffective assistance of trial counsel. He argues that his trial counsel was ineffective in four ways. We reject his claims and affirm the judgment and order.

¶2 After a four-day trial the jury convicted Harmon of second-degree recklessly endangering safety using a dangerous weapon, carrying a firearm into a public building, carry a concealed weapon, obstructing an officer with use of a dangerous weapon, and disorderly conduct with use of a dangerous weapon. The crimes arise out a confrontation Harmon had with Virgil Robertson in the gym at the Village of Pleasant Prairie recreational center in March 2008. Harmon and Robertson had a history punctuated by prior oral confrontations since Harmon had a brief relationship with Robertson's wife. Robertson testified that in the summer of 2007 Harmon had sent him some text messages referring to Harmon's possession of a "Glock" and stating that Harmon was not afraid of Robertson. After a December 2007 conversation between Robertson and Harmon at the center, a third person, Isaac Kirkwood, told Robertson that Harmon had a weapon in his bag. On the day that the crimes were committed, Harmon had been watching Robertson in the weight room at the center. Robertson later observed Harmon leaving the washroom and gesturing toward Robertson by pounding on his chest and putting his hands in the air. Although Robertson prepared to leave the center, he decided not to and he stood by the doors to the gym. Harmon walked past him onto the basketball court. When Robertson spoke to Harmon about what he might be planning, Harmon pulled a gun and pointed it at Robertson stating "This is what the [f- - -] I'm planning." When the police arrived, Harmon fled. He exited the center toward an open field and threw the gun toward a lake where it slid out onto the ice.

¶3 The trial court conducted a ***Machner***[1] hearing on Harmon's postconviction motion and trial counsel was the only witness. The trial court determined that trial counsel was not deficient in any of the ways Harmon alleged. The postconviction motion was denied.

¶4 To support a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). Whether counsel's performance was ineffective presents a mixed question of fact and law. ***Maloney***, 281 Wis. 2d 595, ¶15. The trial court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See* ***id.*** However, the ultimate determination of whether counsel's conduct constituted ineffective assistance is a question of law. ***Id.***

¶5 Harmon first argues that trial counsel should have obtained a transcript of the preliminary hearing to impeach Robertson during cross-examination. Harmon identifies potential missing points of impeachment as: Robertson's trial testimony that Harmon exited the washroom pounding his chest and throwing hand signals when his preliminary hearing testimony never said

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

anything about Harmon coming out of the washroom and said at one point he lost visual contact with Harmon; Robertson's trial testimony that when he went to exit the center Harmon stood up from the couch and remained standing compared with his preliminary hearing testimony that Harmon remained seated and Robertson sat down just outside the doors and watched Harmon; Robertson's trial testimony that as he stood at the entrance to the gym, Harmon walked past him compared to his preliminary hearing testimony that upon abandoning his plan to exit, he went looking for Harmon and saw him on the basketball court and followed him; and Robertson's trial testimony that Harmon pulled the gun from his waistband compared to his preliminary hearing testimony that Harmon pulled the weapon from inside his hooded sweats. Harmon contends that these were "monster inconsistencies" which are extremely important because Robertson was the sole witness to seeing the gun.

¶6 The trial court found that characterizing the points of potential impeachment as "'monster inconsistencies' is a monster exaggeration." We agree that Harmon has failed to demonstrate prejudice from the lost opportunities of impeachment. The points he identifies are of no substantial consequence to the elements of the offense so as to undermine our confidence in the outcome of the trial. Additionally, trial counsel indicated that his strategy was not to pick over small inconsistencies but to create reasonable doubt by demonstrating that Robertson had a bias against Harmon. Counsel also acknowledged that Robertson had a very impressive demeanor as a witness and that he was very skilled at handling difficult questions. Trial counsel's strategy was to limit Robertson's time in front of the jury. This was reasonable strategy. By not attempting to impeach Robertson on minor inconsistencies or omissions from his preliminary hearing testimony, counsel's conduct was consistent with that strategy. "A strategic trial

decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

¶7 The defense listed Officer Chad Brown on its witness list and subpoenaed him to appear at trial; the prosecution did not. However, during its case in chief the prosecution called Officer Brown as a witness. Although the defense objected, the trial court permitted him to testify. Harmon contends trial counsel was ineffective for bringing Officer Brown to the trial when counsel had not even interviewed Officer Brown and did not truly intend to call him as a witness. Harmon argues he was prejudiced because Officer Brown was the only police officer to testify that another officer walked through the gym and asked if anyone had seen anything and no one came forward. Harmon also contends that trial counsel was ineffective for not objecting to that testimony as inadmissible hearsay.

¶8 The trial court found that trial counsel named Officer Brown to protect against not being able to call him as a witness if the evidence at trial made it necessary to have Officer Brown testify. Again this was reasonable strategy that is not converted to deficient performance simply because the prosecution also utilized Officer Brown as a witness. The failure to interview Officer Brown before naming him as a witness was reasonable because the need to call Officer Brown as a witness had not yet been established.

¶9 Trial counsel also indicated that as a matter of trial strategy he did not object to Officer Brown's revelation that no one came forward in response to

an inquiry for eye witnesses by another officer.[2] Indeed it was in the defense's favor that not one of the 150 people in the gym at the time of the crimes saw Harmon with the gun. Not only was trial counsel's failure to object reasonable strategy, but also Harmon was not prejudiced by the admission of evidence that helped the defense argue the absence of any corroborating evidence that Harmon pulled out a gun.

¶10 Isaac Kirkwood, the man who months before the crimes reported to Robertson that Harmon had a weapon in his gym bag, was called as a rebuttal witness at trial.[3] On direct examination he testified that in the incident months earlier he saw Harmon "going into the bag, it was an object in there. I don't know what it was. And I just went back… before I left I went and said to Mr. Robertson you need to be cautious…." When asked if he told Robertson whether he thought Harmon had a weapon in the bag Kirkwood simply replied that, "I thought it could have been something, something that could harm him." On cross-examination the defense asked Kirkwood to be more specific about what he saw. Kirkwood indicated that "it did look like a weapon" and that it looked "like a gun." Further questions established that Kirkwood was startled by the presence of a gun and that it made him retreat from trying to smooth over Robertson's and Harmon's relationship because it was "out of my domain." Harmon contends that his trial counsel was ineffective for eliciting for the first time that Kirkwood saw a gun in Harmon's gym bag in the incident months before the crimes occurred.

[2] We need not decide if Officer's Brown recitation of that inquiry was inadmissible hearsay.

[3] Harmon testified at trial that on the day of his exchange with Robertson in December 2007 he did not have a weapon on him.

¶11 On this claim we move directly to the prejudice prong of the ineffective counsel test because we conclude that Harmon could not have been prejudiced by his trial counsel's performance.[4] The trial court found that as a result of Kirkwood's direct examination there was already a strong reasonable inference that the object in the bag was a gun. That finding is not clearly erroneous because the jury had already heard Robertson's testimony that Harmon sent text messages purporting to have a "Glock" and that Kirkwood had said Harmon had a weapon in his bag on that December 2007 day. Consequently, the admission that Kirkwood believed Harmon had a gun in his bag was no more prejudicial than the evidence already before the jury.

¶12 The final claim of ineffective assistance of counsel is that trial counsel failed to present evidentiary support for the motion to dismiss the prosecution because of the destruction of videotape evidence. In the pretrial motion to dismiss the defense explained that the recreational center had sixty-four cameras which record activity around the center. The defense was provided the videotape surveillance from only four cameras. The motion indicated that views from other cameras had been destroyed. The motion also pointed out that the 911 call from a center staff person indicated that the person could see Harmon on the camera monitors thus suggesting that more video of Harmon's presence in the gym was available. The trial court denied the motion to dismiss concluding that it failed to present anything beyond trial counsel's hearsay account of the historical facts. Harmon contends that if trial counsel had provided witnesses regarding the

[4] Trial counsel testified that he questioned Kirkwood about the object in an attempt to emphasize that Kirkwood was uncertain as to what the object was. We observe that merely because counsel's strategy was unsuccessful does not mean that his performance was legally insufficient. *See* ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987).

videotape processes, the motion to dismiss would have been granted because highly exculpatory evidence was destroyed.

¶13 "A defendant's due process rights are violated by the destruction of evidence (1) if the evidence destroyed was apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means; or (2) if the evidence was potentially exculpatory and was destroyed in bad faith." ***State v. Parker***, 2002 WI App 159, ¶14, 256 Wis. 2d 154, 647 N.W.2d 430. Harmon fails to establish postconviction that dismissal was required under either standard.

¶14 The trial court found that exculpatory videos did not exist. At trial a video technician for the Village of Pleasant Prairie explained that the recreational center had fifty-five cameras which were targeted at entrances, exits, and the childcare facility at the center. He confirmed that there was not 100% coverage of the building and that there was no video coverage of the part of the weight room and the nearby washroom. There was only 5% coverage of the gym. Upon police request he worked back from the arrival of the police to capture video reflecting Harmon's movements. He spent three to four hours reviewing the surveillance video. His testimony established that no exculpatory video was available from the other cameras in the center. Simply, because Harmon was not in the areas covered by the other cameras, no exculpatory video could be captured or destroyed.

¶15 Additionally there is no suggestion on this record that there was any bad faith motivation in the destruction of the video from the other cameras. The video technician assigned to capture the video was not a police employee and was not trained in forensic investigation work. He had no manipulative motive when

asked to review the surveillance videos relating to Harmon's movements through the center.

¶16 Even if trial counsel had subpoenaed the video technician when the motion to dismiss was heard, the motion would have been denied. If the motion would have been unsuccessful, trial counsel is not deficient. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

By the Court.—Judgment and order affirmed.

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