COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3248-CR **Cir. Ct. No. 02CF000218**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMARCUS D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

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

¶1 PER CURIAM. Lamarcus D. Jones appeals from a judgment entered on a jury verdict convicting him of armed robbery, party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2001-02),[1] and from the trial

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

court's order denying his postconviction motion for relief. Jones argues that he is entitled to a new trial because: (1) the trial court erroneously denied his motion to strike a juror for cause, requiring him to use a peremptory strike; (2) he was prejudiced because he was restrained during the jury trial in the presence of the jury; and (3) his trial counsel was ineffective for not objecting to, and introducing testimony concerning, Jones's arrest for a different crime. In addition, he argues that he is entitled to a restitution hearing because the trial court set restitution without a stipulation or hearing. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 Jones was convicted of armed robbery in connection with an incident that took place on December 24, 2001. The victim, Alawn Allen, testified that he, Kevin Lewis, Demarco Rivers and Melvin Tonstall were at Allen's house when there was a knock on the back door. Tonstall answered the door and stepped outside for a few seconds. Allen said he heard a "big boom sound" and saw a man enter the house carrying a semiautomatic weapon. Allen's dog came running into the room. The man with the weapon shot the dog in the head, killing it.

¶3 Allen said that a few seconds later, a second man entered the house, and was also carrying a semiautomatic weapon. The second man told Tonstall to lie on the floor. The second man indicated that he knew Tonstall and that he would kill Tonstall if he told anyone about the robbery. Allen testified that a third man also entered the house, but Allen was not able to see his face and could not identify him. Allen said that he, Lewis, Rivers and Tonstall all lay down on the floor in response to orders from the men. The robbers removed cash from the

victims' pockets. They also took Christmas presents from under the tree and left the house. The robbery took approximately five minutes.

¶4 The police were called to Allen's house. Allen gave Detective Agustin Molina a description of the first two men who entered the house. Three days later, the police received a tip that Jones may have been involved in the robbery. They put Jones's photograph, and photographs of five other men, in a photo array. The array was shown to Allen, Lewis and Rivers. Allen and Lewis both identified Jones as the second man who had entered the house. Rivers was unable to identify anyone in the array. Later, Allen again identified Jones in a line-up.

¶5 Allen also viewed another photo array. He said that one of the men, later identified as Anthony Mays, was the man who first entered the house and who killed Allen's dog.

¶6 Jones was later arrested in another incident during which police found guns and ammunition in his possession. The State charged Jones with the Allen robbery. Mays was also charged with the Allen robbery. Although the two cases were at first tried together, a mistrial resulted in later separate trials.

¶7 At trial, Jones's theory of defense was that he had not been involved in the robbery. He testified that on the day of the robbery he was with his family and friends. He also testified that he did not come to know Anthony Mays until he met him in the county jail after being arrested and held in this case.

¶8 To contradict Jones's contention that he did not know Mays, the State introduced evidence that both Mays and Jones gave the same address as their residence: 3609 West Hampton. Furthermore, the State elicited testimony from

an officer who testified that he found Jones in a car outside that address on January 8, 2002. Finally, the State produced evidence that the gun used to kill Allen's dog was recovered from 3609 West Hampton.

¶9 The jury found Jones guilty of armed robbery and the trial court sentenced him to fifteen years of initial confinement and ten years of extended supervision. Jones filed a postconviction motion alleging numerous trial errors, including ineffective assistance of trial counsel. After reviewing the parties' briefs, the trial court denied Jones's motion without a hearing. This appeal followed.

DISCUSSION

I. Alleged trial errors

A. Failure to strike juror for cause

¶10 Jones argues that the trial court erroneously refused to strike for cause a juror who works as a prosecutor for the State, was a friend of the prosecuting attorney, and said he had a high regard for the prosecuting attorney's work. Specifically, Jones claims that John Chisholm, an assistant district attorney in Milwaukee, was objectively biased and that the trial court should have granted Jones's motion to strike him for cause. Ultimately, Jones used one of his peremptory strikes to remove Chisholm from the jury. Jones contends that he is entitled to a new trial because he was forced to use a peremptory strike to correct the trial court's error.

¶11 Our supreme court rejected this argument in ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. In ***Lindell***, the court overruled ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), which had required an

automatic reversal in any situation where the defendant used a peremptory strike to remove a prospective juror who should have been excused for cause. *See* ***Lindell***, 245 Wis. 2d 689, ¶5. Jones acknowledges that ***Ramos*** is no longer controlling, but argues that ***Ramos*** should not have been overruled. Because we are bound by supreme court precedent, *see* ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984), we cannot grant Jones the relief he seeks. Therefore, assuming *arguendo* that Chisholm should have been struck for cause, we nonetheless see no basis to grant Jones's request for a new trial on this ground.

B. Restraining Jones during the trial

¶12 Jones was restrained during the trial because of an incident that took place during the first trial with co-defendant Mays. The trial court ordered that Mays be put in restraints to control his behavior after he spoke out of turn, rolled his eyes, swore and clapped when the trial court spoke. The next day, the trial court noted that there had been an incident in the bullpen prior to the proceedings. The trial court explained:

> [T]his morning I have been informed by my deputies that in the course of dealing with Mr. Mays, Mr. Mays indicated that if … the deputies were to put the chains on him, they would be putting their lives at risk, he could kill them if they were to take the chains off him. That's unacceptable. … In the course of that exchange with deputies where he was using strong language, threatening their safety, Mr. Jones decides to join in on the action and said that he would get a piece of that as well.
>
> So now it has become clear to the Court that both of them ought to be in chains, both in their wrists and their legs.

Consistent with the trial court's direction, both Mays and Jones were restrained. Ultimately, the trial court granted a mistrial when Mays continued to disrupt the trial.

¶13 The two cases were severed and, at his own trial, Jones was once again shackled. The trial court attempted to hide this fact from the jury by covering the counsel tables with skirting and requiring the parties to remain seated when court was called into session. Jones argues that because he was forced to remain seated to hide the restraints, the jury may have believed he was being disrespectful. He adds that the trial court exacerbated the problem when it took time during a break to share with the jurors the history of the practice of standing as jurors enter a courtroom. The trial court had this exchange with the jurors:

> The Court: You may be seated. Let me just give you a little history lesson about why we stand when the jury comes in. Anybody from the jury want to venture a guess as to why we do that?
>
> Juror: Respect.
>
> The Court: So that you can stretch? Why do you think? Out of respect, yes. This date's back to sort of – actually to ancient Greece when the senate would come into the building, and the Romans during the height of the Roman Empire did it as well, even the – the – president would stand. And in this courtroom the judge stands when the jury – when the body comes in, because of the respect that we – the emphasis we place on the important duty that a jury does. And so it is one of those sort of vestiges that has hung around, I think appropriately and in good fashion, over, you know, hundreds of years from different civilizations, and we have kept it as a part of our criminal justice system. …
>
> And so as a sign of respect to you citizens we all stand, not only for each other, but for you. And so that's why we do it. It's not for show or anything like that, it's just to keep in mind for everybody in this courtroom, including the judge, the important duty that the jury has as you embark on this – on this job that you've sworn on oath to fulfill.

¶14 Although we question the prudence of discussing the historical reasons why jurors stand during a trial under circumstances where the parties have

not been standing, this discussion by the trial court did not unfairly prejudice Jones.

¶15 At trial, the court specifically indicated that *both* parties should remain seated whenever the jurors entered the room to avoid leaving only the defendant seated. In addition, the trial court specifically found in its decision denying Jones's postconviction motion that *both* parties remained seated when the jurors entered. This finding is not clearly erroneous. Thus, to the extent that the jurors may have thought the parties rude for not standing, they likely would have had the same thought with respect to both the defendant and the State. We are unconvinced that there is a reasonable probability that the act of remaining seated contributed to the final result. Therefore, we reject Jones's request for a new trial on this ground.

¶16 Moreover, we conclude that any alleged error with respect to having Jones remain seated as the jury entered was harmless. *See* ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996) (Under a harmless error analysis, we will reverse only where there is a reasonable possibility that the error contributed to the final result). There is no evidence that the jury actually saw Jones's restraints. Thus, the real issue is whether Jones was unfairly prejudiced because he was unable to stand, especially in light of the trial court's comments to the jury about standing as a sign of respect.

¶17 In response to Jones's arguments, the State observes that although Jones complains about being restrained, he does not argue that the trial court lacked a legitimate reason for ordering the use of restraints. We agree. Neither at trial nor on appeal does Jones argue that the trial court lacked a legitimate reason for restraining him. Although restraining a defendant during trial has the potential

to unfairly prejudice a jury, our supreme court has acknowledged that restraints are sometimes necessary for the protection of those in the courtroom. *See* ***State v. Grinder***, 190 Wis. 2d 541, 550, 527 N.W.2d 326 (1995).

C. Ineffective assistance of counsel

¶18 Jones argues that he is entitled to a new trial because his trial counsel provided ineffective assistance by failing to object to the introduction of other acts evidence. Specifically, Jones asserts that the jury should not have heard evidence that Jones was arrested, for possessing a gun and ammunition, after police responded to a report of shots being fired, because this portrayed him as "a person of bad character." The trial court rejected this argument in a single sentence, concluding, "The defendant's ineffective assistance of counsel claim does not establish the prejudice prong; consequently, he has not shown that there is a reasonable probability of a different result at trial."

¶19 In order to establish ineffective assistance, a defendant is required to show both that counsel's performance was deficient and that he or she suffered actual prejudice as a result of the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the movant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the movant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If the movant fails to prove either prong, the claim fails. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶20 At issue in this claim of ineffective assistance is Jones's attorney's failure to object to other acts evidence and the attorney's own questioning of the officer, which yielded even more prejudicial details about Jones's arrest. Here, the State, and even Jones's own attorney, elicited testimony from police officer Ronald Lindsey that Jones was arrested at a house where gunshots had reportedly been fired. The officer testified that he was investigating reports of shots fired at a house at 3609 West Hampton when Jones and another man drove up to the rear of the house. The officer said he approached the vehicle and asked the men why they had come to the house. The driver, Lazaries Ratliff, told the officer that he lived in the house and that he was responding to a call from his wife who told him that someone was shooting at the house. In response to questioning, Ratliff and Jones indicated that they had weapons in the car. The car was searched and two guns and ammunition were found. As a result, both men were arrested.

¶21 Jones acknowledges that the address of the house at which Jones was arrested may have been relevant because it was the same address that both Mays and Jones offered as their own: 3609 West Hampton. However, he contends that the details of his arrest should not have been disclosed to the jury due to their highly prejudicial nature. Even if we assume that Jones's attorney was ineffective for failing to object to the other acts evidence and that the evidence was inadmissible, we nonetheless affirm Jones's conviction because he has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted).

¶22 The crux of Jones's defense was his own credibility. Jones relied on his own testimony to support his claim that he spent Christmas Eve (the night of the robbery) with his friends and family, and that he was not one of the men who robbed Allen. When Jones elected to take the stand in his own defense, the jury learned that he had previously been convicted of five crimes and had been adjudicated delinquent three times. This evidence was admitted pursuant to WIS. STAT. § 906.09, because it was relevant to Jones's credibility as a witness. *See* WI JI-CRIMINAL 327. This evidence, even without the details of his arrest, substantially undermined his credibility.

¶23 Portions of Jones's testimony also cast doubt on his credibility. Jones testified that he did not know Mays until they met in jail after being arrested. When asked how it was that he happened to give police the exact same home address as Mays, Jones explained that he gave that address because he was planning to move in with his friend Ratliff, who already lived there. He stated, "[I]t shocked me when we [Jones and Mays] came into the bullpen together. He was talking about the case and he said the same address." I told him I was going to stay there and that's how we met about our cases." Jones also testified that when he was arrested at 10:25 p.m. outside 3609 West Hampton, he had never actually been inside the house, although he claimed he was planning to move in there that night after attending a party. His own highly improbable testimony makes it doubtful that, but for the admission of evidence disclosing the circumstances of Jones's arrest, the jury would have believed his alibi testimony.

¶24 As we have already seen, the jury heard testimony from two victims who positively identified Jones. The jury also heard evidence that the gun found at 3609 West Hampton was the one that fired the bullet, which killed Allen's dog. Mays and Jones both gave that address to police as their residence, although Jones

admitted he had never been inside the building. We conclude that Jones was not prejudiced by his counsel's failure to object to the other acts evidence or by the additional testimony elicited from the officer by Jones's counsel. Therefore, Jones has not established ineffective assistance of counsel.

II. Challenge to the restitution order

¶25 At sentencing, the trial court set restitution at $900, to compensate Allen for the loss of his property. Jones objects to this amount and argues that he is entitled to a restitution hearing. We disagree. As Jones acknowledges, when a defendant fails to object to "amounts claimed on a court-ordered restitution summary accompanying a pre-sentence investigation, where a defendant has been given notice of the contents of that report and summary, the trial court is entitled to proceed on the understanding that the claimed amount is not in dispute, and so order restitution under sec. 973.20(13)(c)." ***State v. Szarkowitz***, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990).

¶26 Despite the fact that Jones did not object to the proposed restitution amount in the pre-sentence report or speak up when the amount was discussed and ordered at sentencing, he contends that he should be afforded a restitution hearing to determine the proper amount of restitution. He contends that he "was never given the opportunity to object to the amount of restitution ordered" or to present evidence of his ability to pay. The record belies these assertions. He was given an opportunity at the beginning of the sentencing hearing to offer corrections to the pre-sentence report; he offered none. The court also discussed the amount of restitution; Jones's attorney did not raise any objections or ask to be heard on the issue. Having failed to object at sentencing, Jones has waived his right to a

restitution hearing. *See* ***State v. Dugan***, 193 Wis. 2d 610, 624-25, 534 N.W.2d 897 (Ct. App. 1995).

By the Court.—Judgment and order affirmed.

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