COURT OF APPEALS
DECISION
DATED AND RELEASED

September 13, 1995

Nos. 94-2015-CR
94-2016-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY W. HOLZEMER,

Defendant-Appellant.

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

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. In these consolidated appeals, Jeffrey W. Holzemer appeals from judgments convicting him of numerous crimes arising from a string of armed robberies and from an order denying his postconviction motions. On appeal, Holzemer argues that he did not receive effective assistance from his trial counsel and that the trial court misused its sentencing discretion. We disagree and affirm.

Holzemer and a codefendant, Matthew DeRosch,[1] were tried together for armed robbery while masked of one motel,[2] two book stores, three video stores and an individual. They were also tried on two counts of conspiracy to commit armed robbery while masked, one count of possessing a firearm as a felon and one count of possession of a short-barrelled shotgun.[3] In total, Holzemer was convicted of four counts of being party to the crime of armed robbery while masked, two counts of conspiracy to commit armed robbery while masked, one count of being party to the crime of being a felon in possession of a firearm and one count of being party to the crime of possession of a short-barrelled shotgun, all as a repeater. Holzemer was acquitted and DeRosch was found guilty of the motel robbery. Holzemer and DeRosch were acquitted of one of the book store robberies.

INEFFECTIVE ASSISTANCE

Holzemer argues that his trial counsel was ineffective because he: (1) failed to seek severance; (2) failed to pursue an alibi defense; (3) failed to give an opening statement; (4) failed to effectively cross-examine witnesses; (5) failed to give a meaningful closing argument to the jury; (6) failed to use an investigator available through the state public defender's office; (7) failed to request a limiting instruction each time a witness testified solely about DeRosch's conduct; and (8) failed to make a meaningful presentation at sentencing.

To establish that trial counsel was ineffective, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth

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[1] We affirmed Matthew DeRosch's convictions in ***State v. DeRosch***, Nos. 94-0131-CR, 94-0132-CR and 94-0133-CR, unpublished slip op. (Wis. Ct. App. Nov. 23, 1994).

[2] DeRosch was charged with an additional motel robbery.

[3] DeRosch was also charged with armed robbery while masked of a hair design studio and a liquor store. Holzemer was not charged in these crimes.

Amendment. ***Id.*** In reviewing counsel's performance, we strive to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). We view the case from counsel's perspective at the time of trial, and the defendant has to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 127, 449 N.W.2d at 847-48. We assess trial counsel's performance under the prudent-lawyer standard which requires that "strategic or tactical decisions must be based upon rationality founded on the facts and the law" as they existed at the time of trial counsel's conduct. ***State v. Felton***, 110 Wis.2d 485, 502-03, 329 N.W.2d 161, 169 (1983).

Even if counsel performed deficiently, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced the defense. ***Johnson,*** 153 Wis.2d at 127, 449 N.W.2d at 848. The 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. ***Id.*** at 129, 449 N.W.2d at 848. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (quoted source omitted). In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

We conclude that trial counsel's decisions regarding severance, alibi, reservation of opening statement, cross-examination and closing were a function of counsel's trial strategy. At the postconviction motion hearing, trial counsel testified that his strategy was to minimize Holzemer's involvement in

the charged crimes.[4] Trial counsel sought to "show that there was just as much evidence against the [co-actors] to create reasonable doubt that [Holzemer] committed a good number of the crimes." Counsel emphasized that this was his strategy even before co-actors Arthur Gerth and Onwar Armahad agreed to enter pleas and testify against DeRosch and Holzemer. The testimony of Gerth and Armahad tied DeRosch and Holzemer to the robberies and conspiracies.

(1) Severance

On the question of whether Holzemer's trial should have been severed from DeRosch's, trial counsel testified that he discussed severance with Holzemer but believed that "the better strategy was to try this case with DeRosch."[5] Trial counsel conceded that once Gerth and Armahad agreed to enter pleas shortly before trial which obligated them to testify at the Holzemer-DeRosch trial, he should have moved to sever Holzemer's trial from DeRosch's.[6] However, counsel also stated that the proximity of the co-actors' plea agreements to the start of trial made it unlikely that the trial court would have granted a motion to sever. The trial court confirmed it would not have granted a severance motion. The trial court also found that trial counsel's strategy of having Holzemer assume a diminished role in contrast to DeRosch would not have been served by severing Holzemer's trial from DeRosch's.

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[4] The criminal complaint named Holzemer and three codefendants, Onwar Armahad, DeRosch and Henry Watson. Gerth was charged in a separate complaint. Watson was granted immunity and agreed to testify against DeRosch and Holzemer. The week before trial, Armahad agreed to enter guilty pleas.

[5] Holzemer filed a pro se motion to sever while he was represented by counsel and complains on appeal that the motion was never scheduled for a hearing. We need not address this claim because a defendant does not have a constitutional right to appear pro se when he or she is represented by counsel. ***State v. Debra A.E.***, 188 Wis.2d 111, 138, 523 N.W.2d 727, 737 (1994).

[6] Although counsel conceded at the postconviction motion hearing that he should have filed a motion to sever, we look to the entire record to determine if counsel's performance was deficient and, if so, whether Holzemer was prejudiced thereby. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Such a concession is not binding in our analysis.

Even if counsel acted outside professional norms vis-a-vis severance, we conclude that Holzemer has not established that he was prejudiced thereby. *See* ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. He has not shown that but for counsel's error, the outcome at trial would have been different. *See* ***id***. at 129, 449 N.W.2d at 848.

Holzemer claims three types of evidence would have been inadmissible had he been tried separately: (1) evidence regarding counts with which he was not charged; (2) evidence regarding matters concerning only DeRosch; and (3) admissions by DeRosch. However, the fact that evidence applicable to only one defendant will be offered at a joint trial is not automatic grounds for severance, particularly if the matter can be addressed by cautioning the jury that evidence against one defendant may not be used against another. ***Butala v. State***, 71 Wis.2d 569, 580, 239 N.W.2d 32, 37 (1976). In these situations, giving a cautionary instruction, which we assume the jury will follow, *see* ***State v. Edwardsen***, 146 Wis.2d 198, 210, 430 N.W.2d 604, 609 (Ct. App. 1988), serves largely the same purpose as severance—preventing the jury from becoming confused as to which evidence applies to which defendant. ***Butala***, 71 Wis.2d at 579-80, 239 N.W.2d at 37.

As the verdicts demonstrate, the jury heeded the various cautionary instructions it received and was able to segregate evidence applicable only to DeRosch from evidence applicable to Holzemer. We see no evidence of jury confusion such that Holzemer was prejudiced by counsel's failure to seek severance.

(2) Alibi Defense

With regard to his decision not to call Holzemer's fiancee, Kris Boehm, to testify as an alibi witness, trial counsel testified that he explored that possibility but decided against it because he did not believe her testimony would provide Holzemer with an alibi. Prior to trial, Boehm told trial counsel that on August 22, 1992, Holzemer picked her up at work at approximately 1:00 a.m. and that it took at least one-half hour to reach her house from her employment. The Crossroads Book Store robbery occurred on August 23 at approximately 2:00 a.m. Trial counsel testified that he investigated the time it would have taken Holzemer to travel from Boehm's job to her house at a slow rate of speed and concluded that Boehm's testimony did not provide Holzemer with an alibi because there was time for him to pick her up, drop her off, borrow her car to meet with the co-actors and participate in the robbery. Boehm and Holzemer parted company before the robbery and Holzemer had sufficient time to participate in the robbery thereafter.

At the postconviction motion hearing, Boehm gave different times for Holzemer's movements on the night of August 22 and the early morning hours of August 23. Holzemer argues that this testimony provided him with an alibi. However, the trial court properly focused on what Boehm told trial counsel prior to trial, when he had to decide whether Boehm could provide an alibi. The trial court found that based upon the information Boehm provided trial counsel prior to trial, trial counsel "took great care to investigate this possible alibi" but found that it would not be successful. These findings are not clearly erroneous. *See* ***Knight***, 168 Wis.2d at 514 n.2, 484 N.W.2d at 541. "An attorney's strategic decision based upon a reasonable view of the facts not to call a witness is within the realm of an independent professional judgment." ***Whitmore v. State***, 56 Wis.2d 706, 715, 203 N.W.2d 56, 61 (1973).

(3) Opening Statement

Holzemer faults his trial counsel for not giving an opening statement. Counsel reserved his opening statement because he would have largely repeated the statement made by DeRosch's counsel and he desired to hear the testimony of the co-actors in the State's case before making an opening statement. After hearing the testimony, trial counsel did not feel that an opening statement at the start of the defense's case would have been helpful.

The trial court found that trial counsel's strategy was sensible for several reasons. First, it allowed trial counsel to avoid making commitments to the jury regarding evidence which might later prove troublesome. Second, an opening statement "would have deflated what I thought was [trial counsel's] very effective closing." Finally, trial counsel's decision dovetailed with his strategy that DeRosch's counsel take the lead in defending the joint case and buttressed his theory that Holzemer's involvement in the crimes was minimal. The trial court's findings are not clearly erroneous. *See* ***Knight***, 168 Wis.2d at 514 n.2, 484 N.W.2d at 541. These findings do not support a conclusion that counsel's strategic decision to forego an opening statement fell outside the prudent-lawyer standard. *See* ***Felton***, 110 Wis.2d at 502-03, 329 N.W.2d at 169.

(4) Cross-examination

Holzemer also complains that his trial counsel did not effectively cross-examine witnesses. Trial counsel testified that his decisions regarding cross-examination were guided by his overall trial strategy of seeking to minimize Holzemer's involvement. He and DeRosch's counsel had agreed that the latter would cross-examine first. Holzemer's trial counsel did not want to "rehash incriminating questions" and instead focused his efforts on impeaching the co-actors (Gerth, Watson and Armahad) who testified against Holzemer.[7] Although Holzemer makes numerous suggestions as to how trial counsel should have conducted cross-examination, trial counsel was not questioned

[7] Although the robberies were established by the victims, the co-actors' testimony tied Holzemer to them.

about these matters at the postconviction hearing. In the absence of a record on these claims, we will not address them. *See* ***State v. Krieger***, 163 Wis.2d 241, 253-54, 471 N.W.2d 599, 603 (Ct. App. 1991) (trial counsel's testimony is necessary to support an ineffective assistance claim).

(5) Closing Argument

Holzemer challenges the efficacy of trial counsel's closing argument. Trial counsel began his closing argument by informing the jury that his "remarks will be brief." He stated that had he "not [been] playing second fiddle to [DeRosch's counsel] throughout this trial, I would have asked many of the same questions he did, cross-examined the witnesses in a manner similar to the way he did." Counsel stressed that he was not going to "rehash" matters already addressed by DeRosch's counsel in his closing argument. Counsel also noted that DeRosch's counsel had carefully reviewed the inconsistencies in the State's case. Trial counsel asked the jury not to convict Holzemer of offenses he did not commit and focused the jury's attention on the witnesses who had incriminated Holzemer and his impeachment of them. Trial counsel urged the jury to consider each charge against Holzemer and determine whether the State had shown him guilty beyond a reasonable doubt.

At the postconviction motion hearing, trial counsel testified that his goal in closing argument was to supplement for Holzemer's benefit DeRosch's counsel's closing. The trial court found that Holzemer's counsel's closing argument was "riveting" and drew attention to his strategy of minimizing Holzemer's involvement and suggesting that DeRosch was the primary actor.

On appeal, Holzemer chides the trial court for characterizing his trial counsel's closing argument as riveting and effective. Holzemer contends trial counsel should have reviewed every count and the evidence presented by the State in support of each count to demonstrate that the evidence was insufficient. Holzemer believes trial counsel conceded his guilt rather than argued his innocence.

Making a brief closing argument does not give rise to a presumption of ineffectiveness. *See* ***State v. Wise***, 879 S.W.2d 494, 524 (Mo. 1994), *cert. denied*, 115 S. Ct. 757 (1995). Trial strategy may support a decision to be brief. *See* ***id***. In assessing counsel's performance, we review the totality of the record to assess whether counsel acted reasonably within professional norms. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847-48. The trial court's finding that trial counsel's closing argument was a function of his overall trial strategy is not clearly erroneous. *See* ***Knight***, 168 Wis.2d at 514 n.2, 484 N.W.2d at 541. With regard to closing argument, Holzemer has not overcome the "strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847-48.

When viewed in the context of counsel's trial strategy, counsel's decisions regarding severance, an alibi defense, opening and closing statements and cross-examination are sustainable as strategic or tactical decisions based upon a reasoned trial strategy rationally based upon the facts and the law. *See* ***Felton***, 110 Wis.2d at 502-03, 329 N.W.2d at 169.

(6) Use of Investigator

Holzemer criticizes trial counsel for failing to use an investigator available through the public defender's office. At the postconviction motion hearing, trial counsel gave contradictory testimony regarding his use of an investigator. Although trial counsel initially testified that he did not use a private investigator, shortly thereafter he stated that he used the services of investigator Terry O'Brien. However, trial counsel then testified that he personally interviewed individuals in this case and did not need a private investigator to assist him. The inconsistencies in trial counsel's testimony were not explored at the postconviction hearing. The trial court implicitly found that trial counsel need not have used an investigator if one was not necessary.

We need not consider whether counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Holzemer has the burden to demonstrate prejudice. *See* ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848.

Holzemer posits that the number of witnesses called to testify (thirty-nine) ought to have led trial counsel to use an investigator. In particular, Holzemer suggests that using an investigator to prepare the defense's case would have enhanced trial counsel's cross-examination. However, as we have already discussed, trial counsel's approach to cross-examination was governed by his overall trial strategy. Furthermore, the postconviction hearing record does not indicate the type of cross-examination questions further investigation might have suggested. Simply observing that counsel did not use funds allotted for an investigator does not establish prejudice. *See* ***United States v. Asubonteng***, 895 F.2d 424, 428-29 (7th Cir.) (no prejudice from counsel's failure to use court-appointed investigator where there was no indication of which witnesses would have been discovered or what they would have said), *cert. denied sub nom.* ***Rivers v. United States***, 494 U.S. 1089 (1990).

(7) Limiting Instructions

Holzemer makes contradictory arguments regarding limiting instructions. He first contends that trial counsel failed to request limiting instructions when necessary. He then argues that there were too many limiting instructions, relying on the trial court's comment at the postconviction motion hearing that it had never tried a case with so many limiting instructions. From this comment, Holzemer reasons that "so many limiting instructions [were given] that they simply became redundant and at times forgotten." Therefore, Holzemer contends, trial counsel should have sought severance of Holzemer's trial from DeRosch's. Holzemer does not cite any authority for the proposition that the frequent use of limiting instructions is prejudicial. Furthermore, we have already rejected Holzemer's argument that trial counsel was ineffective for not seeking severance.

Holzemer's argument that trial counsel was ineffective for not insisting on a limiting instruction for each witness who testified about a count with which Holzemer was not charged is inadequately briefed. He does not adequately argue why limiting instructions were necessary or why some of the instructions actually given were inadequate.[8] Therefore, we will not consider

[8] We note that at the postconviction motion hearing, Holzemer asked trial counsel whether there was confusion as to which defendant witnesses were testifying about. Trial counsel said he did not

this issue. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

Even though we do not address Holzemer's limiting instructions argument in detail, we note that courts assume juries follow the instructions given to them. ***Edwardsen***, 146 Wis.2d at 210, 430 N.W.2d at 609. Here, the jury was instructed on several occasions that it was not to consider evidence of crimes with which Holzemer was not charged. Furthermore, we note that the jury acquitted Holzemer on two charges (the Budgetel Motel and Crossroads Bookstore robberies) and convicted DeRosch of the Budgetel robbery. The verdict demonstrates that the jury sorted the evidence and was able to distinguish between evidence which implicated Holzemer in a charged crime and evidence which did not. *See* ***State v. Bettinger***, 100 Wis.2d 691, 699a, 303 N.W.2d 585, 590 (1981). We see no prejudice to Holzemer. *See* ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848.

(8) Representation at sentencing

Holzemer contends that his trial counsel did not adequately represent him at sentencing because he failed to bring to the trial court's attention the positive aspects of Holzemer's life as set forth in the presentence investigation report. In particular, Holzemer points to references in the report that he did not have any major violations of his parole supervision and his adjustment appeared to be good, there was no alcohol or drug use during his supervision, he was employed throughout his supervision, attended school, was engaged to be married and cooperated with the probation agent.

As we stated earlier, a defendant challenging the effective assistance of counsel must preserve trial counsel's testimony in the trial court. *See* ***Krieger***, 163 Wis.2d at 253, 471 N.W.2d at 603. Here, trial counsel's testimony regarding his approach to sentencing is not preserved.

(..continued)
believe there was such confusion. Furthermore, the attorneys generally asked witnesses to identify which actor they were referring to.

Notwithstanding the absence of counsel's testimony on this point, we conclude that Holzemer's contention that trial counsel did not highlight the positive aspects of his character is not borne out by the record. Trial counsel referred to Holzemer's progress since being paroled and mentioned that he had obtained employment and was enrolled in college. Trial counsel stuck to his strategy of minimizing Holzemer's culpability by arguing that the robberies were committed while armed and that Holzemer's prior criminal record did not include offenses involving weapons. He further argued that DeRosch was the ringleader. Counsel acknowledged the nature of the crimes for which Holzemer was convicted and that his prior record would probably result in a sentence commensurate with the seriousness of the offenses.[9] However, trial counsel urged the trial court to give Holzemer a chance "to redeem himself." Based on this partial record, we do not agree that trial counsel performed deficiently at sentencing.

SENTENCING

Holzemer argues that his eighty-five year sentence was excessive and the trial court did not refer to the sentencing guidelines. We review whether the trial court misused its sentencing discretion. ***State v. J.E.B.,*** 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied,* 112 S. Ct. 1484 (1992). We presume that the trial court acted reasonably, and the defendant must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.*** The weight given to each of the sentencing factors is within the sentencing judge's discretion. ***Id.*** at 662, 469 N.W.2d at 195. Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. ***State v. Teynor,*** 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987). We conclude that the trial court properly exercised its discretion in sentencing Holzemer and that its sentence does not shock public sentiment. *See* ***id.***

[9] Holzemer's counsel was present when DeRosch was sentenced and heard the trial court's perspective on the crimes and the defendants' culpability. At Holzemer's sentencing, trial counsel seemed to acknowledge the trial court's views but attempted to distinguish his client's culpability from that of DeRosch.

The primary factors to be considered by the trial court in imposing a sentence are the gravity of the offense, the offender's character and the need to protect the public. ***State v. Borrell,*** 167 Wis.2d 749, 773, 482 N.W.2d 883, 892 (1992). At the sentencing hearing,[10] the trial court commented upon the gravity of the offenses, Holzemer's character and history of criminal conduct, and the need to protect the public. The trial court noted that Holzemer had been unable to control his behavior even after previous prison experiences.

Holzemer argues that the trial court sentenced him without referring to the presentence investigation report. However, at the postconviction motion hearing, the trial court affirmed that it had read the presentence investigation report. The court also observed that it could have sentenced Holzemer to 212 years, the maximum possible sentence.

We discern no misuse of the trial court's sentencing discretion. Holzemer has not shown that the trial court relied upon an unreasonable or unjustifiable basis in sentencing him to eighty-five years in prison. *See* ***J.E.B.***, 161 Wis.2d at 661, 469 N.W.2d at 195.

Holzemer complains that the trial court did not consider the sentencing guidelines. A defendant cannot challenge a sentence based on the use or nonuse of the sentencing guidelines. ***State v. Halbert***, 147 Wis.2d 123, 129-33, 432 N.W.2d 633, 636-37 (Ct. App. 1988). While the supreme court considered this aspect of ***Halbert*** in ***State v. Speer***, 176 Wis.2d 1101, 501 N.W.2d 429 (1993), only three of the six justices hearing ***Speer*** agreed that ***Halbert*** was wrongly decided on this point. *See* ***Speer***, 176 Wis.2d at 1122-23, 501 N.W.2d at 436. A majority must agree on a particular point for it to be considered the court's opinion. *See* ***State v. Dowe***, 120 Wis.2d 192, 194, 352 N.W.2d 660, 662 (1984). Thus, ***Halbert*** remains the law and Holzemer may not appeal his

[10] Immediately after the jury returned its verdicts, the trial court sentenced Holzemer to eight years, the maximum term, for possessing a short-barrelled weapon while a felon. The trial court sentenced Holzemer immediately on this least serious count so that he could be moved to prison from the overcrowded jail. Trial counsel objected on the grounds that he was not prepared to argue regarding a sentence. However, the trial court did not deny trial counsel an opportunity to argue regarding the sentence and Holzemer did not avail himself of the opportunity given him by the trial court to make a statement prior to sentencing on the weapon possession charge.

sentence on the basis that the trial court did not consider the sentencing guidelines.

By the Court.—Judgments and order affirmed.

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