COURT OF APPEALS
DECISION
DATED AND RELEASED

February 28, 1996

No. 95-0261-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD J. SAXON,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Ronald J. Saxon appeals from judgments convicting him of kidnapping, second-degree sexual assault and bail jumping, all as a repeater, and from an order denying his postconviction motion. We reject Saxon's claims that his trial counsel rendered ineffective assistance and affirm.

Saxon's claims of ineffective assistance of counsel fall into three categories: (1) counsel failed to request that all proceedings be recorded by the

court reporter; (2) counsel failed to seek severance of the bail jumping charge; and (3) counsel did not adequately advise Saxon regarding a proposed plea agreement.

To establish a claim of ineffective assistance, 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). A judgment will not be reversed unless the defendant proves that counsel's deficient performance prejudiced his or her defense. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). 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.

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 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.***

Approximately four months prior to the jury trial, the prosecutor made a written plea offer to Saxon's counsel in which he offered to dismiss the bail jumping charge in exchange for a guilty plea to false imprisonment and fourth-degree sexual assault as a repeat offender. The State offered to recommend four years of probation and no additional jail time beyond a nine-month term Saxon would be serving in another county on an unrelated obstructing charge. Saxon rejected the plea offer. The circumstances of that decision are the subject of his claim of ineffective assistance of counsel.

The following facts are relevant to Saxon's claim that counsel inadequately assisted him in evaluating the plea agreement proposed by the State. At the postconviction motion hearing, Saxon testified that he learned of the plea offer in a telephone conversation with trial counsel in the middle of June 1993. Saxon stated that he understood the plea offer required a guilty or

no contest plea to fourth-degree sexual assault and that the State would recommend four years of probation and no additional jail time. However, Saxon testified that trial counsel told him the kidnapping charge "was being left open for the State to sentence me on." Saxon believed that trial counsel informed him that he would face a twenty-year sentence on the kidnapping charge but would probably receive probation on the fourth-degree sexual assault charge. Saxon complained that trial counsel never explained the various penalties he faced under either the original charges or the plea bargain and that counsel advised him that they had "a very fightable case." Saxon testified that had he understood that the kidnapping charge would have been reduced to a less serious false imprisonment charge, he would have accepted the plea agreement.

Saxon acknowledged receiving and reading a copy of the prosecutor's written offer. However, he failed to notice the State's kidnapping/false imprisonment proposal. Saxon claimed that he has a learning or reading disability which hinders his comprehension. He also testified that the State's explanation of the terms of the plea agreement the morning of trial and the trial court's attempt to confirm that Saxon understood that he was rejecting an offer which would substantially reduce his possible sentence varied with his understanding of the likely term of imprisonment under the plea agreement. Therefore, he decided to go to trial to give his version of the events leading up to the criminal charges.

On cross-examination, the prosecutor had Saxon read the written offer into the record, which he did without much difficulty, and asked him what portion of it he did not understand. Saxon testified that he did not "catch the phrase false imprisonment" and that he was not "totally attuned to the letter" because it was included with materials he deemed irrelevant and he tends to ignore things he does not think are important or that he thinks he already knows.

Trial counsel testified that he orally communicated the contents of the State's plea offer to Saxon and provided him with a copy of the letter. Counsel and Saxon discussed the plea offer each time they met or spoke, and Saxon "always insisted he did not wish to enter into any plea agreement." Counsel believed Saxon rejected the plea offer and elected to go to trial because he asserted his innocence. Counsel had no indication that Saxon had a learning

disability and considered Saxon's profession, a licensed master electrician, as evidence of his ability to understand important matters. Saxon never indicated that he was willing to enter a plea to a lesser offense or suggested a modification of the plea agreement which would make it more palatable to him.

In its findings of fact, the trial court recalled that shortly before the jury was selected, it attempted to get the parties to settle. The court found that trial counsel conferred with Saxon up to the time of jury selection.

It is implicit in the trial court's ruling that it did not find credible Saxon's claims that he did not understand the plea agreement or that trial counsel did not assist him in understanding it. Where the trial court acts as the finder of fact, it is the court's responsibility to evaluate the credibility of the witnesses. ***State v. Owens***, 148 Wis.2d 922, 930, 436 N.W.2d 869, 872-73 (1989).

There is no evidence that Saxon's alleged learning disability hindered his ability to understand the oral communications from trial counsel, the prosecutor and the trial court regarding the terms of the plea agreement. The transcript of discussions regarding the plea agreement on the morning of trial indicates that Saxon acknowledged the accuracy of the prosecutor's recitation of the plea agreement and understood the trial court's admonition that he faced substantially less prison time under the plea agreement. Finally, there is no showing that counsel was aware of Saxon's claimed disability such that counsel could be deemed ineffective for not having acknowledged the disability.

The record does not support Saxon's claim of ineffective assistance of counsel with regard to the circumstances surrounding the plea agreement. Rather, the record supports an inference that Saxon declined the plea agreement because he believed in his innocence, not because he misunderstood the agreement's terms.

Saxon next contends that trial counsel erred in not having parts of the trial reported. He argues that the deficient record made it impossible to fully evaluate the prejudice resulting from trial counsel's deficient performance or to permit identification and pursuit of additional claims of reversible error.

Trial counsel testified at the postconviction motion hearing that he did not have closing arguments recorded because he had never known the prosecutor to overstep the bounds of proper closing argument, and the prosecutor did not do so in this case. Counsel did not recall objecting at any point during jury selection and stated that there were no problems in that area. Although he did not recall whether he objected during opening statements, counsel did not believe there were any problems in that area either. Counsel did not recall any unreported bench conferences, that he objected to the prosecutor's alleged misstatement of the law regarding kidnapping, or that the prosecutor misquoted Saxon's testimony or referred to Saxon's prior record or pending charges in Jefferson County during closing argument. Counsel stated that had the prosecutor made reference to Saxon's prior record during closing argument, he would have sought a mistrial on the record.

Saxon's recollection differed from trial counsel's. Saxon testified that counsel objected during the prosecutor's closing argument because the prosecutor misstated the law of kidnapping, referred to his "numerous convictions" during closing argument and misrepresented his testimony. Saxon also testified that after the jury retired to deliberate, while trial counsel was out of the room, the prosecutor stated to the court that the jury would want to see the "preliminary transcripts," and the court responded that the jury would not see the transcripts. Saxon also claimed that there were unrecorded bench conferences.

The trial court found that opening statements and closing arguments were not recorded because counsel did not so request. The court did not recall any objections during opening statements, closing arguments or jury selection. However, the trial court noted that the court reporter was available for all phases of the trial and had there been an objection, the court reporter would have been requested to take it down and the court would have resolved the objection on the record. In this case, however, nothing was reported because there were no objections during the unrecorded proceedings. These findings are not clearly erroneous in light of the testimony adduced at the postconviction motion hearing and the trial court's own recollection of the trial.

We reject Saxon's attempt to apply ***State v. Perry***, 136 Wis.2d 92, 401 N.W.2d 748 (1987), to this case because the cases are factually dissimilar. Here, certain portions of the trial were not recorded. In ***Perry***, the court

reporter's notes of portions of the jury trial were lost and could not be reconstructed in their entirety. ***Id.*** at 96, 401 N.W.2d at 750. The ***Perry*** court discussed the importance of a transcript for postconviction proceedings and noted that the lack of a full transcript (or a functionally equivalent substitute) implicates the right to a meaningful appeal. ***Id***. at 99, 401 N.W.2d at 751. However, the court also noted:

> An inconsequential omission or a slight inaccuracy in the record which would not materially affect appellate counsel's preparation of the appeal or which would not contribute to an appellate court's improper determination of an appeal do not rise to such magnitude as to require *ipso facto* reversal. Error in transcript preparation or production, like error in trial procedure, is subject to the harmless-error rule.

Id. at 100, 401 N.W.2d at 752.

The foregoing observation is dispositive of Saxon's claim on appeal. In light of the trial court's finding in this case that no material matters were omitted from the record due to the failure to record opening statements, closing arguments, jury selection and bench conferences, the lack of a complete trial transcript did not materially affect postconviction proceedings. Saxon has not demonstrated that had the full trial been recorded, reviewable error would have been apparent. *See* ***id***. at 101, 401 N.W.2d at 752. We conclude that Saxon has not demonstrated that he was prejudiced by counsel's failure to have all portions of the trial recorded. *See* ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

Finally, Saxon argues that trial counsel should have sought severance of the bail jumping charge from the kidnapping and sexual assault charges for trial. The bail jumping charge arose out of Saxon's commission of kidnapping and sexual assault while on bond for unrelated misdemeanor offenses. We need not address whether counsel's performance was deficient if we can conclude that Saxon was not prejudiced. ***Id.***

In its findings of fact on Saxon's postconviction motion, the trial court found that any prejudice from the failure to sever "was really quite minimal." At trial, the State asked the court to take judicial notice of the facts underlying Saxon's release on bond in Jefferson County for two misdemeanor matters, that he was required not to commit any crime and that the bond was in effect at the time of the offenses in this case. The court did so.

Severance is not warranted if there would be little prejudice resulting from a trial of joined charges. *See* ***State v. Bettinger***, 100 Wis.2d 691, 696, 303 N.W.2d 585, 588 (1981). When evidence on all counts is admissible in separate trials, the risk of prejudice arising from joinder is not significant. ***Id***. at 697, 303 N.W.2d at 588. Here, evidence of kidnapping and sexual assault would have been admissible in a separate bail jumping trial to prove that Saxon committed these crimes while on bond. In the joint trial, the minimum amount of evidence of bail jumping was presented.

We conclude that the bare-bones presentation of evidence supporting the bail jumping charge did not prejudice Saxon. Although the jury learned the nature of the pending misdemeanor charges in its instructions,[1] there was no evidence presented as to the manner in which those crimes were committed. Because no attention was focused on the substance or details of the pending charges, we discern no prejudice arising from counsel's failure to seek severance. *See* ***Moats,*** 156 Wis.2d at 101, 457 N.W.2d at 311.

By the Court.—Judgments and order affirmed.

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

[1] The court advised the jury of the elements of bail jumping and that the bailed offenses were obstructing an officer, criminal trespass to a dwelling and theft.