COURT OF APPEALS
DECISION
DATED AND RELEASED

February 28, 1996

No. 95-0828-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EARL GORDON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

BROWN, J. Earl Gordon appeals from an order denying his motion for postconviction relief. He alleges ineffective assistance of counsel on the grounds that his attorney failed to object to testimony offered at trial, despite an agreement with the State prohibiting such testimony. We

affirm, finding that even if Gordon's attorney was deficient in her performance, that deficiency did not cause prejudice sufficient to warrant a reversal.

On March 17, 1993, an assailant robbed the North Main Express, a gas station and quick mart in Racine. Gordon was stopped by police after a citizen observed him acting suspiciously, matched his description with that of the robber being broadcast over police scanners and pointed him out to police. Both the store clerk and a customer, who was approaching the store as the robber fled, identified Gordon as the robber. Another citizen, who knew Gordon from previous contacts, identified him as the man who stopped at her home near the robbery site and asked to use the telephone. All four witnesses described a blue denim coat which was either worn or carried by the subject. When stopped, Gordon was carrying a large amount of cash in his pockets.

Gordon was charged with armed robbery in violation of § 943.32(1)(b), STATS. Before trial, his attorney made an agreement with the State concerning statements made by Gordon to an investigator, Michael Erdmann. The trial court, in summarizing the agreement, noted that the State would not use any statements made by Gordon to Erdmann in its case in chief and that these statements generally indicated where Gordon got the money he had when arrested and that he had not been involved in the robbery. If the statements were to be used, there would be notification among the attorneys and a hearing outside the jury's presence.

During Gordon's case in chief, the defense attempted to cast doubt on the diligence of police in investigating the case. Police officers were called to

the stand and questioned about matters such as the quantity and quality of fingerprinting done at the scene. As part of this strategy, Erdmann was called to the stand and Gordon's attorney questioned him regarding a discrepancy between the amount of cash reported missing by North Main Express and the amount recovered from Gordon. During this phase of questioning, the following exchange occurred between Gordon's attorney and Erdmann:

Q: You weren't curious about what happened to the differing amount of money?

A: He had stated that he gave some of it away to people that he owed money to.

Gordon's attorney made no objection to this answer. On cross-examination, the State asked Erdmann:

Q: Now, you said there's several, in your mind as a police officer, logical explanations for why the defendant doesn't have the exact amount on him?

A: Yes.

Q: And in this particular case he stated that he had given some away?

A: Yes, he did.

Again, Gordon's attorney did not object. On redirect examination, Gordon's attorney probed Erdmann further regarding the money:

Q: Barring any testimony from any witness in this Court that they saw anything happen to any of the money, you don't have any knowledge as to where that money went, correct, specific knowledge?

A: Mr. Gordon told me he gave some of it away.

Gordon's attorney objected at this point. Outside the jury's presence, the court instructed the witness not to discuss statements made by the defendant in response to any further questions. The court ruled that the answers already given would not be struck and that the State had not violated its agreement with Gordon because the information came out in the defense's case in chief.

Gordon contends that he suffered ineffective assistance of counsel in that his attorney failed to object to the testimony of Erdmann concerning Gordon's statements. To prove ineffective assistance, a defendant must satisfy the two-part test established by ***Strickland v. Washington,*** 466 U.S. 668 (1984). Gordon must show both that his attorney's performance was deficient and that that deficiency prejudiced his defense. ***Id.*** at 687. Although the performance and prejudice questions present mixed questions of law and fact, and findings of fact will not be overturned unless clearly erroneous, the ultimate determinations of whether counsel's performance was deficient and prejudicial are questions of law which we review independently. ***State v. Giebel,*** ___ Wis.2d ___, ___, 541 N.W.2d 815, 819-20 (Ct. App. 1995).

Because both elements of the test must be satisfied for an ineffective assistance claim to succeed, an appellate court may address the two components in any order it chooses. ***Strickland,*** 466 U.S. at 697. For that reason, we will assume *arguendo* that Gordon's attorney was deficient in questioning Erdmann about the differing amounts of money and will proceed

directly to the question of whether this deficiency prejudiced the defense.[1] We hold that it did not.

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. ***Id.*** at 691. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. ***Id.*** at 691-92. Not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. ***Id.*** at 693. Rather, the essence of an ineffective assistance claim is that the counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. *See* ***Nix v. Whiteside***, 475 U.S. 157, 175 (1986).

Gordon must show that as a result of his attorney's error, the outcome of the proceeding is suspect. The suspicion must be sufficient to undermine our confidence in the outcome. ***Strickland***, 466 U.S. at 694. A court hearing an ineffective assistance claim must consider the totality of the evidence before the judge or jury. ***Id.*** at 695. Having examined the record in this case, our confidence in the outcome remains intact, despite Gordon's counsel's error.

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[1] We realize that this is not the deficiency asserted by Gordon. We cannot, however, see any basis on which Gordon's attorney could successfully have objected. The answer was responsive to her question. The deficiency, if any, was in pursuing this line of questioning at all.

Gordon was identified as the robber by two witnesses: the store clerk and a customer who saw him shortly after he exited the store. The clerk had ample time to observe Gordon's face because he asked her about beer and brought items to the counter for purchase. Two additional witnesses, one of whom knew Gordon personally, placed Gordon near the scene of the crime, wearing or carrying clothing matching that worn by the robber, and acting suspiciously. The testimony of the four witnesses is consistent and convincing. It identifies Gordon and traces his movements from the store to the yard of one citizen witness, on to the home of another witness, and eventually to the spot where he was stopped by police. This evidence has been fairly characterized by the State as overwhelming, and for that reason Gordon's counsel's error cannot be said to have prejudiced the outcome.

By the Court. – Judgment and order affirmed.

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