COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-1346-CR
99-1519-CR
99-2116-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID R. MESSNER,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Sheboygan County: L. EDWARD STENGEL and JAMES J. BOLGERT, Judges. *Affirmed.*

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

¶1 PER CURIAM. David R. Messner's appeals have been consolidated for briefing and disposition by this court. In appeal no. 99-1346-CR,

Messner appeals from a judgment convicting him of burglary while armed with a dangerous weapon and obstructing an officer and from an order denying his postconviction motion. In appeal no. 99-1519-CR, Messner appeals from a judgment convicting him of felony bail jumping and aggravated battery and from an order denying his postconviction motion. In appeal no. 99-2116-CR, Messner appeals from an order denying postconviction motions in the burglary case.

¶2 On appeal, Messner contends that trial counsel[1] was ineffective in the burglary case for not seeking dismissal relating to the "while armed" element of the charge. *See* ***State v. Norris***, 214 Wis. 2d 25, 28, 571 N.W.2d 857 (Ct. App. 1997) (being armed with a weapon is an element of burglary while armed). He also contends that trial counsel was ineffective in both the burglary and battery cases for not obtaining and presenting a mental health evaluation to the court at sentencing. We conclude that counsel was not ineffective in either respect and affirm.

¶3 A claim of ineffective assistance of trial counsel has two components for which the defendant has the burden of proof: counsel must have performed deficiently and the deficient performance must have prejudiced the defendant. *See* ***State v. Smith***, 207 Wis. 2d 258, 274, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is

[1] Messner had the same counsel in both the burglary and the bail jumping/aggravated battery cases.

a question of law which we review de novo. *See* ***id.*** at 236-37. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶4 Messner was charged in the information with burglary while armed with a dangerous weapon contrary to WIS. STAT. § 943.10(1)(a) and (2)(b) (1997-98)[2] (burglary of a building and becoming armed with a dangerous weapon while in the burglarized premises). At trial, Messner's counsel conceded that Messner did not have a defense to the burglary charge because he was found in a school in the middle of the night after police responded to an alarm. When police encountered Messner in the school, Messner did not immediately respond to the officer's command to show his hands. Rather, Messner made a motion as if he were tossing something away or about to flee. Messner then turned and walked toward the officers. The officers found a butcher knife with a nine-inch blade ten to fifteen feet from Messner. The butcher knife bore Messner's fingerprint. Postconviction, Messner complained that his trial counsel should have sought dismissal relating to the "while armed" element because the knife was used to break into the building, not as a weapon.

¶5 WISCONSIN STAT. § 939.22(10) defines dangerous weapon as "any device designed as a weapon and capable of producing death or great bodily harm; … or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." Messner contends that the State was required to prove that the knife was used in a

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

manner which was likely to produce death or great bodily harm. He argues that the testimony at trial indicated that he used the knife to pry open various doors and other openings but did not use it as a weapon. Therefore, there was insufficient evidence that Messner was armed in the course of the burglary, and trial counsel should have sought dismissal of that aspect of the charge.

¶6 Messner applies the wrong analysis to the knife for purposes of the burglary while armed charge. The State need not prove a nexus between the burglary and the knife. *See* ***State v. Gardner***, 230 Wis. 2d 32, 45, 601 N.W.2d 670 (Ct. App. 1999), *review denied*, 2000 WI 2, 231 Wis. 2d 375, 607 N.W.2d 291 (Nov. 17, 1999) (No. 98-2655-CR) (citing ***Norris***). The ***Norris*** court noted that "[i]n a burglary, there is always an increased chance of danger where a person arms himself with a gun. It is irrelevant if there is no intent to use the gun to facilitate the burglary; its presence nonetheless enhances the prospect of danger." ***Norris***, 214 Wis. 2d at 29. ***Norris*** applies with equal force to possessing a knife in the course of a burglary, and the State had only to prove that Messner armed himself with the knife. Because a knife is capable of producing death or great bodily harm, it falls within the definition of a dangerous weapon under WIS. STAT. § 939.22(10). The statutes and case law compel us to reject Messner's attempt to portray the knife as a mere burglarious tool. *See* WIS. STAT. § 943.12 (burglarious tool is a device used in breaking into a building).

¶7 Because there was no basis for challenging the "while armed" element of the burglary charge, Messner's trial counsel was not ineffective.[3] *See* ***State v.***

[3] At the hearing on Messner's ineffective assistance of counsel claim, Messner's trial counsel testified that she did feel the facts would have supported a dismissal motion. The circuit court agreed and lauded counsel for foregoing a motion which would have failed.

Cummings, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").[4]

¶8 We turn to Messner's claim that trial counsel was ineffective for not obtaining and presenting a mental health evaluation to the court at sentencing. The presentence investigation report (PSI) prepared in both cases refers to mental health assessments conducted while Messner was in prison in 1994. Messner was diagnosed with an antisocial personality disorder with paranoid features. He refused medication, did not complete any treatment in prison and did not seek any treatment when released to the community. The PSI author opined that an antisocial personality disorder "is not a major mental illness and does not respond to medication. It is incurable."

¶9 At the sentencing in the burglary case, the court observed that Messner's repeated contacts with the criminal justice system might relate to the illness referred to in the PSI or to his substance abuse problems. The court noted that Messner had been offered but declined numerous treatment resources. The court found that it was not unusual for prisoners to resist prison programming. The court considered the nature of the offense, the need to protect the public and Messner's lengthy criminal record in sentencing him.

[4] We note that there was sufficient evidence from which the jury could infer that Messner possessed the knife in the course of the burglary. The knife was found near Messner and bore his fingerprint, and Messner was observed tossing something away when he was spotted by police. This evidence, viewed most favorably to the State and the conviction, cannot be said to be "so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (quoted source omitted).

¶10 At the sentencing in the battery case, counsel suggested that the PSI author was not qualified to assess the severity and treatable nature of an antisocial personality disorder. In its sentencing remarks, the court noted that Messner had refused treatment in prison but could be treated. The court found that Messner was dangerous and considered his criminal record and the need to protect the public.

¶11 Postconviction, counsel testified that she was aware that Messner's mental health had been evaluated while he was imprisoned and that he had been diagnosed with an antisocial personality disorder with paranoid features. Counsel explained that she reviewed information from the prison system regarding mental health evaluations performed in 1994 and 1995, but that Messner was not exhibiting these mental health issues in 1997 when he was charged with burglary and battery. Counsel did not believe that the prison records supported a request for a mental health evaluation for sentencing purposes and that such an evaluation would not be helpful for sentencing. Counsel also testified that it is not her practice to argue the existence of an antisocial personality disorder to a sentencing court because the disorder has been deemed untreatable and is not an illness.

¶12 The court found that counsel made a strategic decision regarding her strategy at sentencing and that the decision was appropriate in light of the facts and circumstances.

¶13 A defendant who contends counsel failed to investigate an aspect of the case must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Here, Messner did not offer the postconviction court any evidence of what a mental health evaluation would have

revealed. A showing of prejudice requires more than speculation. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). The defendant must affirmatively prove prejudice. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 641, 369 N.W.2d 711 (1985). Messner has not done so here.

¶14 Messner suggests that if counsel had had Messner evaluated, counsel could have argued for a sentence structure which would have taken into account Messner's treatment needs. However, in the burglary case, counsel testified that Messner instructed her to request a sentence of time served. In the battery case, counsel did not argue a specific sentence and advised that Messner maintained his innocence. Therefore, we question how a mental health evaluation would have affected sentencing because Messner had made his preferences known to counsel.

By the Court.—Judgments and orders affirmed.

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