COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3309 **Cir. Ct. No. 2000CF1680**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFONZO P. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Alfonzo Taylor appeals an order denying relief under WIS. STAT. § 974.06 (2003-04)[1] from a criminal conviction. The August 2000 conviction was the subject of an unsuccessful appeal. In this § 974.06 proceeding, Taylor alleged that he was denied a timely probable cause hearing after his arrest. He also alleged ineffective assistance of trial counsel and that his postconviction counsel was ineffective for failing to pursue the issues he has identified. The trial court denied relief without a hearing, resulting in this appeal. We affirm the trial court's order.

¶2 Following a jury trial, Taylor was convicted as a party to the crimes of first-degree reckless homicide and two counts of first-degree endangering safety. The charges resulted from a shooting incident that caused one death and two injuries. Taylor was not present at the scene of the shooting. The State based its case against Taylor on evidence that he attended the planning session for it, accompanied his stepfather during a trip to get ammunition, knowing its intended use, and loaded a weapon in preparation for the shootings.

¶3 The State's evidence included police reports of inculpatory pretrial statements by three witnesses. Detectives testified that they did not keep their handwritten notes of the interviews with two of these witnesses. Counsel did not elicit testimony from any of Taylor's co-defendants, three of whom he now asserts would testify to his innocence.

¶4 Taylor's first issue concerns the one week delay between his arrest and his probable cause determination. There is no remedy, however, for a delayed

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

probable cause hearing unless the delay is deliberate and results in prejudice to the defendant's ability to prepare a defense. ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). Taylor does not allege any such prejudice. Accordingly, we reject his first claim of error.

¶5 Taylor's remaining claims are that his trial counsel was ineffective in the following ways: (1) counsel failed to object to the prosecutor's improperly prejudicial comments during opening and closing arguments; (2) counsel did not object to the pretrial statements introduced into evidence; (3) counsel took no action on the police failure to keep interview notes; (4) counsel did not call Taylor's co-defendants as witnesses; and (5) counsel failed to obtain and provide Taylor with unspecified exculpatory evidence that allegedly came to light during the trial.

¶6 On an ineffective assistance of counsel claim, the defendant must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance consists of acts or omissions of counsel that fall outside the wide range of professionally competent assistance. ***Id.*** at 690. To prove prejudice, a defendant must show a reasonable probability that the result of the proceeding would have differed had counsel performed effectively. ***Id.*** at 694. If a claim of ineffective counsel is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny a postconviction motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). We will not disturb the trial court's finding of fact on an ineffectiveness claim unless they are clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Whether those facts establish ineffectiveness is a question of law, which we decide de novo. ***Id.***

¶7 Taylor's counsel had no basis to challenge the prior statements of three witnesses. A prior statement by a witness is admissible if the witness testifies at trial, is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness's testimony. WIS. STAT § 908.01(4)(a)1. All three witnesses gave testimony at trial that was inconsistent with their prior statements, and they were subject to cross-examination. Effective representation does not require pointless objections.

¶8 Taylor has failed to show prejudice from the prosecutor's unchallenged remarks during arguments. Taylor first contends that during his opening argument the prosecutor inaccurately stated that Taylor supplied bullets to everyone in the house. This court has reviewed counsel's opening argument, and the statement Taylor now objects to is not there.

¶9 Taylor next objects to a statement in the prosecutor's closing argument that Taylor believes attributed non-existent, inflammatory statements to him, which implied that he was an enthusiastic member of the conspiracy. However, Taylor takes the prosecutor's comment out of context. The prosecutor made the point that Taylor did not have to utter such hypothetical statements to be found guilty. Consequently, instead of attributing the statements to Taylor, the prosecutor was actually informing the jury that Taylor could be found guilty even though he did not make such statements. Again, counsel had no grounds to object.

¶10 Taylor also objects to the prosecutor's statement in closing that one of the co-defendants asked Taylor and his stepfather to go get the ammunition, when in fact the co-defendant did not ask Taylor to go, but only his stepfather. The statement, although erroneous, was a brief, inconsequential remark. Defense counsel noted the prosecutor's error and addressed it in his closing argument. A

competent attorney could reasonably wait and specifically address the error in this manner, rather than object to it immediately and possibly give it more attention than it deserved.

¶11 Finally, Taylor cites the following passage from the prosecutor's closing argument:

> If all you do is go with your stepfather to make darn sure that he can get back in that Trooper, so if he needs to bring the bullets back the car will start, that if the car doesn't start you're gonna help him push it, you're in. If you load up one of the shotguns for him and then they all take off out of the house, as he told the police, you're in, you're involved, you're concerned in the commission of this offense too. That's what the law says.

Taylor's objection seems to be the fact that there was no evidence of his motive in accompanying his stepfather to get bullets. Otherwise, the quoted statement includes nothing that is arguably in error. From the context, it is clear that the prosecutor was speaking hypothetically about Taylor's possible motive for the trip, and no reasonable juror could have understood it otherwise. In any event, the trial court informed the jury that the arguments of the attorneys were not evidence.

¶12 Counsel had no grounds to seek remedies for the destruction or loss of the detectives' notes. Taylor presents no authority for the proposition that a police officer must preserve notes of an interview which becomes the subject of a police report. In any event, Taylor can only speculate that the notes were inconsistent with the subsequent report, and thus helpful to him.

¶13 The record conclusively shows that counsel reasonably chose not to call Taylor's accomplices as witnesses. If the men had testified on Taylor's behalf, each would have been subject to impeachment by prior inconsistent statements implicating Taylor. Counsel's arguments on his motion to sever

Taylor's trial from the other defendants include statements indicating that he considered the co-defendants as potential witnesses. A reasonable attorney could have ultimately chosen not to call witnesses whose impeachment was readily predictable.

¶14 Taylor's final argument, alleging counsel's failure to divulge information to him, concerns the prosecutor's brief reference at trial to some newly discovered exculpatory evidence. The evidence consisted of a statement by a person described as a victim/witness. Taylor's motion provides no information on what exculpatory evidence this person provided to the prosecutor, nor explained how it might have benefited his case. Because the prosecutor described the person as a victim, it appears that her evidence would have pertained to the shootings themselves, not Taylor's participation in the underlying conspiracy.

By the Court.—Order affirmed.

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