COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP186 **Cir. Ct. No. 2000CF3672**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. David E. Thompson appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. Thompson claims that

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

the trial court erred in summarily denying his postconviction motion alleging ineffective assistance of counsel. Because Thompson failed to establish that he was prejudiced by any alleged instances of deficient performance by counsel, we affirm.

BACKGROUND

¶2 On July 14, 2000, the victim, Richard McGowan, was driving a brown 1986 Chevrolet Caprice Classic, four-door car with gold seventeen-inch spoke wheels. He was stopped at a red light at the intersection of North 20th Street and West Capitol Drive, Milwaukee, Wisconsin; his four-year-old son was in the front passenger seat. McGowan observed two black males running toward his vehicle. McGowan stated that one of the black males, later identified as Thompson, pointed a black revolver directly at him through the passenger-side front window and ordered him to get out of the car.

¶3 McGowan complied with the directive and went around to the other side of the car to remove his son from the passenger seat. After he removed his son from the car, the two men sped off in the vehicle.

¶4 The next day, McGowan's car was observed in the parking lot of Warehouse Electronics located at 1400 West North Avenue. Milwaukee Police Detective Timothy Zens was called to the store to investigate. Zens spoke with the store's owner, Rafik F. Imseitef. Imseitef stated that three black males in their late teens/early twenties came into the store asking how much it would cost to switch chrome rims from one vehicle to another vehicle. Imseitef walked out with these three males to the parking lot where he observed two vehicles. One of the vehicles was McGowan's 1986 Chevrolet Caprice, which contained gold-spoked

rims. The second vehicle was an early to mid-eighties, dark gray, four-door automobile with chrome thirty-spoke Kregar rims.

¶5 The black males wanted to switch the tires and rims on both vehicles. Imseitef told them it would cost about $150. Imseitef then went back into the store, but was subsequently informed by one of his employees that the lug nuts had to be replaced and the black males did not have enough money. The black males left in the dark gray car to get more money, leaving the Caprice parked in the lot.

¶6 A short time after the black males left, an older black male (McGowan) entered the store and asked for the keys to the Caprice, explaining that it had been stolen from him a day earlier. Imseitef told McGowan that he did not have the keys, but that the men who did would be returning shortly to pay for the tire change.

¶7 When the three black males returned, the police arrested Thompson, who was a passenger in the returning car. Police found McGowan's house keys and radio in the suspect's car. McGowan identified Thompson as the carjacker from the day before and identified his house keys and a radio that had been taken from his car.

¶8 Thompson was arrested and charged with armed robbery and being a felon in possession of a firearm. After a trial by jury, Thompson was found guilty and sentenced to forty years, with twenty years of initial confinement, followed by twenty years of extended supervision on the armed robbery count, and five years, concurrent, with initial confinement of two years, followed by three years of extended supervision on the gun count.

¶9 Thompson filed a direct appeal arguing that he was denied his right to confrontation based on the State's failure to offer substantive evidence of Thompson's out-of-court prior inconsistent statement, which the State had cross-examined Thompson about. This court rejected the claim on the basis that Thompson waived his right to challenge this issue by failing to object.

¶10 Subsequently, Thompson filed the postconviction motion here, alleging that postconviction counsel was ineffective for failing to challenge the ineffective assistance of trial counsel. Specifically, Thompson claimed his trial counsel was ineffective for failing to: (1) object, on confrontation grounds, to the State's cross-examination concerning Thompson's incriminating statement; (2) subpoena Thompson's sister, Cassandra, to corroborate his alibi defense; and (3) demand inspection of surveillance tape from Warehouse Electronics. The trial court summarily denied the motion on the basis that Thompson could not establish prejudice. Thompson now appeals.

DISCUSSION

¶11 Thompson claims that the trial court erred in summarily denying his postconviction motion alleging ineffective assistance of counsel. We reject his contention.

¶12 In order to establish that he or she did not receive effective assistance of counsel, a defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶13 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶14 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to

relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶15 Here, Thompson asserts three specific instances, which he claims constitute deficient performance. He claims counsel failed to: object when the State cross-examined Thompson about an out-of-court statement he made to a third-party admitting that he committed the crime; subpoena Thompson's sister, Cassandra; and demand inspection of surveillance tapes from Warehouse Electronics. The trial court concluded that Thompson failed to demonstrate that any of these allegations resulted in prejudice, based on the record as a whole. We conclude that the trial court's determination in this regard did not constitute an erroneous exercise of discretion.

A. Failure to object during cross-examination.

¶16 During Thompson's cross-examination, the following exchange occurred:

> Q So if Keith Lee were to come and say on July 14th, 2000, one, you called him and told him when you called him on that cellular number that I gave you and said that you just robbed someone and stole a car --
>
> [Defense counsel]: Objection. This is facts not in evidence.
>
> THE COURT: Sidebar.
>
> (Whereupon, discussion held off the record at sidebar.)
>
> THE COURT: Rephrase the question.

> [Prosecutor]: Sure.
>
> By [Prosecutor]:
>
> Q You called Keith Lee on July 14th, 2000, didn't you?
>
> A I didn't call Keith.
>
> Q And in fact, you told Keith that you had actually just stolen a car and robbed someone?
>
> A I didn't say that.
>
> Q And the number that you called was 617-7871?
>
> A I never called -- called Keith, never talked to Keith on his cell phone. Not that I recall.

¶17 After Thompson's testimony, the defense rested. The State called only McGowan in rebuttal. During closing arguments, the State never referenced the telephone conversation between Thompson and potential witness Keith Lee. However, defense counsel did refer to the State questioning McGowan about the Lee phone call:

> I want to point out that at one point [the prosecutor] asked my client on the stand that if somebody said that you had admitted doing this, they would be lying, right? There is no evidence anywhere in the trial. That was a question. The Judge will instruct you that questions are not evidence. There is no evidence that my client said to anyone including [the district attorney] that he did this.

¶18 In analyzing this issue, the trial court concluded that Thompson was not prejudiced by defense counsel's failure to object to the State's questions posed to Thompson about phoning Lee and admitting committing the car-jacking. The trial court reached this conclusion on the basis that the record contained overwhelming evidence of Thompson's guilt.

¶19 We agree that the trial court reached the right conclusion. First, as pointed out in the State's brief, the three cases Thompson cites in support of his

argument, ***Lee v. Illinois***, 476 U.S. 530 (1986), ***Douglas v. Alabama***, 380 U.S. 415 (1965), and ***Lanier v. State***, 533 So. 2d 473 (Miss. 1988) are all distinguishable on the facts from Thompson's case. Second, if defense counsel had objected to the questioning, the State would have called Lee, who was ready to testify at the trial with respect to this evidence. This would have provided the defense with an opportunity to question Lee, but would have eliminated the defense's ability to point out to the jury that there was no evidence to support the State's claim that Thompson made the phone call to Lee admitting the crime. Accordingly, if defense counsel had objected, forcing the State to call Lee to testify, the jury would have heard direct testimonial evidence from Lee regarding the phone call and Thompson's admission. This certainly would not have altered the outcome of this case, as this direct evidence would have strengthened the State's case.

¶20 Third, any error based on this allegation was cured by the trial court's jury instruction advising the fact finder that the remarks of the attorneys do not constitute evidence and that the jury should base its decision only on the evidence and inferences drawn therefrom. Here, defense counsel emphasized to the jury that there was no evidence that Thompson told Lee that he had stolen a car. The jury was instructed that remarks of counsel are not evidence. We presume this jury followed the trial court's instructions. *See* ***State v. Sarinske***, 91 Wis. 2d 14, 30 n.2, 280 N.W.2d 725 (1979).

¶21 Based on the foregoing, we conclude that Thompson has failed to establish that he was prejudiced based on the trial court's failure to object to the State's cross-examination in this regard.

B. Alibi witnesses.

¶22 Next, Thompson asserts that his trial counsel provided ineffective assistance when he failed to subpoena Thompson's sister, Cassandra. Thompson argues that Cassandra's testimony would have corroborated his own testimony that he was at Cassandra's house watching cartoons all day on the date of the car-jacking. Thompson supports this claim with a letter from Cassandra, wherein she states that Thompson was at her house the entire day of the offense and that he could barely move because he had been shot in the leg and had just had the cast removed. Cassandra stated that she had appeared on the original trial date, but did not appear for the rescheduled trial date because she feared she would be arrested based on an outstanding traffic warrant.

¶23 Thompson's postconviction counsel did discuss this particular issue with trial counsel and advised Thompson:

> According to your trial attorney, Joe Reback, your sister did speak with him about her concern over the warrants. However, he does not recall her telling him that she had been threatened with arrest by the detectives. Rather, she recalls her telling him that she was aware of the warrants and that she was worried about coming back to testify because of their existence. He informed me that he advised her she could take care of the warrants with a single court appearance and probably would not have to appear at all had she paid the tickets. My belief is that the court, should this issue be raised, would find that you were not prejudiced by what the detectives apparently said to your sister, but rather by your sister's decision not to take care of her warrant in time so that she could appear on your behalf.

¶24 Based on this accounting, we cannot conclude that defense counsel was deficient in failing to subpoena Cassandra for trial. Defense counsel made reasonable efforts to secure her presence at trial. Cassandra did not appear based

on her personal concerns that she would be arrested on outstanding warrants. There is nothing in the statement Cassandra provided that indicates she would have complied with a subpoena had one been issued. Moreover, even if she had testified, we are not convinced that this would have resulted in a different outcome. Cassandra's statement directly contradicts the part of Thompson's testimony that he walked over to his mother's house when he left Cassandra's house. Cassandra states that Thompson "could barely move" because of the injury to his leg. In any event, the other evidence demonstrating Thompson's guilt was overwhelming. Accordingly, we cannot conclude that defense counsel's failure to subpoena Cassandra constituted ineffective assistance of counsel.

C. Surveillance tape.

¶25 Thompson also contends trial counsel provided ineffective assistance by failing to obtain the surveillance tapes from Warehouse Electronics. He contends that these tapes "may" show everyone who entered the store and "may" not show Thompson inside the store or could show the person who actually committed the robbery. We reject this contention.

¶26 Although the police report notes that Warehouse Electronics had four separate surveillance cameras throughout the store, the report also noted that the camera located in the garage area did not cover the entire garage area. In viewing the garage tape, the detective was unable to locate the Caprice or the suspects in the store. The trial court rejected Thompson's assertion that the surveillance tape would have affected the jury's verdict. The trial court reasoned:

> [T]he defendant alleges that trial counsel was ineffective for failing to demand inspection of a surveillance camera tape or to call Detective Timothy Zens as a witness to introduce evidence that the tape did not show the defendant inside Warehouse Electronics, where he and his co-actors

> inquired about changing the vehicle's tire. Zens told police that he was unable to observe the auto or the suspects in the store from the videotape; however, he also stated that the surveillance camera did not cover the entire garage area. Such evidence does not undermine confidence in the outcome of this case because it does not exculpate the defendant from responsibility for this crime. The fact that the defendant does not appear in the videotape does not mean that he was not at the store. Moreover, the court finds that there is no reasonable probability that such evidence would have affected the jury's verdict given the powerful eyewitness identification of the defendant.

¶27 We agree with the trial court's assessment. The tape does not show everyone who entered the store. Therefore, the fact that Thompson does not appear on the tape does not prove that he was not in the store. Based on the limitations of the tape, it was reasonable for trial counsel to elect not to subpoena or offer the surveillance tapes.[2]

D. Evidentiary hearing.

¶28 Thompson makes a separate argument that he should have been afforded an evidentiary hearing. We cannot agree. A defendant who files a postconviction motion is not automatically entitled to an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 310. A hearing is required only if the motion alleges facts which, if proven true, would entitle the defendant to relief. ***Id.*** Based on our review of Thompson's claims, we conclude that the record conclusively demonstrates that he is not entitled to relief. He has failed to allege facts which, if

[2] Thompson also claims an evidentiary hearing was necessary to determine whether his counsel was ineffective for failing to raise the issue that he was denied due process when the State failed to preserve potential exculpatory evidence. Thompson claims the surveillance tape was exculpatory. We cannot agree. Thompson's claim is based on his mistaken belief that the tape showed everyone who entered the store. There is no evidence to support Thompson's claim. Accordingly, we summarily reject his argument.

true, would entitle him to relief. Accordingly, the trial court did not err in summarily denying his postconviction motion.

E. Postconviction motion for discovery.

¶29 Finally, Thompson contends the trial court erred in summarily denying his request for postconviction discovery. We reject his contention.

¶30 "[A] party who seeks postconviction discovery must first show that the evidence is consequential to an issue in the case and had the evidence been discovered, the result of the proceeding would have been different." ***State v. O'Brien***, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999). Thompson failed to satisfy this requisite. Rather, he makes conclusory allegations. Thompson's contentions fail to establish the materiality of the surveillance tapes. As noted above, the tapes did not cover the entire garage and thus, the fact that Thompson does not appear in the videotape does not mean he was not at the store.

¶31 Based on the foregoing, we conclude that Thompson failed to satisfy the requisite standard necessary to conduct an evidentiary hearing or for us to conclude that his counsel provided ineffective assistance. Accordingly, we affirm the order of the trial court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.