COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2007

A. JOHN VOELKER
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP888 **Cir. Ct. No. 2002CF2058**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS L. LEVY, JR.,

DEFENDANT-APPELLANT.

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

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

¶1 WEDEMEYER, P.J. Curtis L. Levy, Jr. appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] postconviction motion. He

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

claims that the trial court erred in summarily denying his claims of ineffective assistance of postconviction and trial counsel. Because Levy failed to establish that he received ineffective assistance of counsel, we affirm.

BACKGROUND

¶2 The complaint against Levy alleged that on April 6, 2002, Lawrence Mathias was checking on a building he owned located at 1134 North 21st Street, Milwaukee, Wisconsin, which was a home to individuals with mental and/or emotional disabilities. Mathias indicated that he noticed Levy coming up from the basement area and asked what he was doing there. Levy indicated he was visiting his cousin who lived at the residence. Mathias went to check to see if that information was correct and was told by the resident that he was not related to Levy in any way. When Mathias returned to ask Levy to leave the building, he found Levy leaving the building with a blue plastic tub filled with food from the downstairs storage room. When Mathias grabbed at the tub and demanded Levy give it back, Levy asked Mathias if he wanted to get shot and acted as though he had a weapon in his coat. Mathias then let go of the tub and called 911.

¶3 On December 4, 2002, a jury found Levy guilty of burglary. In January, he was sentenced to twelve years in prison, consisting of six years' initial confinement and six years' extended supervision. Judgment was entered. Levy filed a postconviction motion alleging ineffective assistance of trial counsel, which was denied. He then filed a direct appeal to this court from the order denying that motion. We affirmed the judgment of conviction and postconviction order in April 2005.

¶4 On March 23, 2006, Levy filed a *pro se* postconviction motion asserting that his postconviction counsel was ineffective for failing to raise

additional viable claims for relief, including that trial counsel provided ineffective assistance: (1) by failing to object to testimony elicited by the prosecutor from Mathias during direct examination; (2) by failing to secure the presence of Jimmie L. Solfest, a witness Levy claims would have testified in favor of Levy; and (3) by failing to file a motion arguing that the State did not prove the defendant entered the building without consent. The trial court summarily denied the motion, ruling:

> The court has reviewed Lawrence Mathias's testimony and finds that any objection would have been overruled and, therefore, postconviction counsel was not ineffective for failing to raise this issue previously.
>
> The defendant next contends that postconviction counsel was ineffective for failing to demonstrate trial counsel's ineffectiveness when he failed to ensure the presence of a defense witness, Jimmie L. Solfest, at the defendant's trial. Defense counsel apprised the court that the witness was not willing to come to court and that he was unable to secure the presence of the witness for that purpose.… Under the circumstances, the record demonstrates that trial counsel did what he could to secure Solfest's presence but was unable to do so. Moreover, even if he could have done more, there is no showing what Solfest would have testified to (only defendant's conclusory opinions about what his testimony would have produced) or that his testimony would have altered the outcome of the trial given that Lawrence Mathias was the person in lawful possession of the building and whose consent to enter the premises the defendant did not have.
>
> Finally, the defendant contends that postconviction counsel should have raised trial counsel's ineffectiveness to file a motion arguing that the State failed to prove the defendant entered the building without consent. This argument fails for the same reasons set forth in defendant's last argument.

Levy now appeals from that order.

DISCUSSION

¶5 Levy raises the same issues in this court that he did in his postconviction motion—that is, his postconviction counsel provided ineffective assistance for failing to allege that his trial counsel was ineffective for the three instances referenced above. We reject his contentions.

¶6 In order to establish that he or she did not receive effective assistance of counsel, the 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); ***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).

¶7 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, 548 N.W.2d at 76. 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.

¶8 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.

¶9 Levy has failed to satisfy the burden necessary to prevail on his ineffective assistance claims. Levy alleges that his postconviction counsel provided ineffective assistance for failing to allege that trial counsel provided ineffective assistance in three instances: (1) trial counsel failed to object to the testimony of Mathias regarding an earlier break-in at the property; (2) trial counsel performed deficiently when he failed to subpoena witness Solfest for trial; and (3) trial counsel should have moved to dismiss the case when the State failed to

meet its burden with respect to the element of burglary that Levy entered the premises without consent. We address each in turn.

A. Mathias Testimony.

¶10 Levy argues that trial counsel erred in not objecting to Matthias's testimony referencing a break-in at his building six weeks prior to the April 6, 2002 break-in with which Levy was charged. The testimony related the following:

> [PROSECUTOR]: Was there any type of concern that you were having at that time with unauthorized people in the building?
>
> [MATTHIAS]: Well, yes. I had an incident, about six weeks previous to this day, where someone went down in my basement and kicked the door in, stole food out of the freezer.
>
> [PROSECUTOR]: And just to be fair, you don't know who did that --
>
> [MATTHIAS]: No.
>
> [PROSECUTOR]: -- on that particular day?
>
> [MATTHIAS]: No, I did file a police report, though.

Levy contends his trial counsel should have objected and that this constituted unnecessary, irrelevant "other acts" evidence that would have been excluded had his trial counsel objected. We are not convinced. The testimony does not implicate Levy and was presented for the purpose of explaining why Mathias wanted Levy to leave when he encountered him on April 6, 2002. The evidence was admitted to explain why Mathias asked Levy to leave the building—that Mathias did not want unknown visitors entering because of a prior break-in. The evidence was not admitted as character evidence. The State did not argue that Levy committed the earlier break-in and Levy was not charged with committing the earlier crime. Thus, we agree with the trial court that any objection to this

testimony would have been overruled. Accordingly, trial counsel cannot be found ineffective for failing to object to testimony that was not objectionable.

B. Solfest Subpoena.

¶11 Next, Levy argues trial counsel was ineffective for failing to subpoena Solfest to testify on behalf of Levy at trial. Levy contends that Solfest's testimony would have been helpful to Levy. If called to testify, Solfest would have confirmed that he opened the outside door and allowed Levy to enter into the locked lobby area of the building. Again, we are not convinced that trial counsel provided ineffective assistance in this area. The record reflects a discussion with respect to Solfest prior to commencement of the trial:

> DEFENDANT: Yes, Your Honor, I would like to say something on the record.
>
> I had [asked] counsel [to] try and contact the witness.
>
> ….
>
> DEFENDANT: My counsel, attorney, I had gave [sic] a list of people to subpoena --
>
> ….
>
> DEFENDANT: … to testify in my behalf?
>
> And for some reason (indicates) they wasn't [sic] contacted.
>
> THE COURT: Okay.
>
> [Defense counsel] he is complaining, I guess, about ineffective assistance of counsel before the trial.
>
> [DEFENSE COUNSEL]: Your Honor, I had an investigator go out in an attempt to contact his witnesses, he was unable to do that.
>
> He did that on several occasions, both by phone and in person at the residence.

> He simply could not get their cooperation to come out.
>
> He can't basically enter the house if they don't want to come out and we couldn't contact 'em. We tried.
>
> THE COURT: It's the most your attorney can do, what can he do?
>
> He can't drag 'em in here. He tried to subpoena 'em, he had his investigator go out there, sir.
>
> DEFENDANT: (Nods head up and down.)
>
> THE COURT: So you are not going to have those witnesses here.

¶12 We conclude, based on the foregoing, that Levy has failed to demonstrate that trial counsel's conduct in this regard was deficient or prejudicial. The facts show that trial counsel made substantial efforts to secure Solfest's testimony at trial. This is not a case where trial counsel failed to make any attempt to subpoena witnesses suggested by the defendant. Solfest was not willing to come to court. Thus, trial counsel's attempts to secure the witness cannot constitute deficient performance.

¶13 Moreover, as the State points out, Levy fails to make a specific showing as to what Solfest's testimony would be or that Solfest's testimony would have been material to the case. Levy alleges generally that Solfest would have testified that he let Levy into the lobby and that Levy indicated he was going to visit a resident of the building named Michael Goins. The jury, however, was provided with this information from other witnesses. Likewise, even if Solfest did consent to allow Levy to enter the lobby, there is no evidence or allegation that Solfest consented to allow Levy to enter the basement where the burglary occurred. Failure to subpoena an immaterial and irrelevant witness cannot constitute ineffective assistance of counsel. ***State v. O'Brien***, 214 Wis. 2d 328,

350, 572 N.W.2d 870 (Ct. App. 1997), *aff'd*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). Accordingly, we reject Levy's contention that trial counsel's conduct in this regard constituted ineffective assistance of counsel.

C. Consent to Enter Element.

¶14 Levy argues that the State failed to satisfy the element of burglary of "entering without consent." Levy argues that Solfest consented to entry by voluntarily letting him into the lobby of the building. Levy contends that trial counsel should have moved to dismiss the case on the grounds that the State failed to establish this element, and that failure to do so resulted in ineffective assistance of counsel. We are not convinced.

¶15 The record reflects that trial counsel did move to dismiss the case. The trial court denied the motion, ruling that a reasonable jury could find Levy guilty on both counts. On this basis alone, Levy's claim fails.

¶16 Moveover, the record demonstrates sufficient evidence from which a jury could conclude that Levy entered the basement without consent of the person in lawful possession. Therefore, the evidence was sufficient to sustain the conviction. ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. Here, Mathias testified that he owned the building which Levy entered and that Levy did not have his permission to be in the building. The jury could have concluded from this testimony that the "entry without consent" element had been proven.

¶17 In addition, even if the jury believed Levy's testimony that Solfest answered the front door and voluntarily admitted Levy into the lobby of the building, there was still sufficient evidence to support the burglary charge. At

best, Levy had consent to enter the lobby. The jury could have concluded that Levy went from the lobby into the basement of the building without receiving consent to do so. Thus, the lawful entry into the lobby became unlawful when Levy exceeded the scope of the consent. *See* ***Levesque v. State***, 63 Wis. 2d 412, 415-16, 217 N.W.2d 317 (1974); ***State v. Karow***, 154 Wis. 2d 375, 384, 453 N.W.2d 181 (Ct. App. 1990). Solfest's consent to permit Levy to enter the lobby cannot reasonably be construed to grant permission to go into the basement and steal food. Accordingly, there is sufficient evidence to support the burglary element of "entering without consent." Thus, this claim fails as well.[2]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[2] To the extent that Levy contends the trial court erred in denying his postconviction motion without conducting an evidentiary hearing, such is also rejected. There is no merit to any of Levy's contentions and therefore no need to conduct a hearing. Levy failed to allege sufficient facts necessary to require a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.