COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1427-CR **Cir. Ct. No. 2003CF1630**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BEN D. NAPIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Ben Napier appeals a judgment convicting him of first-degree intentional homicide, with use of a dangerous weapon, armed robbery and felon in possession of a firearm, all as an habitual criminal. He also appeals an order denying his motion for postconviction relief. He argues that: (1) he

received ineffective assistance of trial counsel; (2) the circuit court erred in failing to suppress statements he made to the police, failing to instruct the jury on the defense of coercion, and failing to instruct on the lesser-included offense of felony murder; (3) he was denied his right to a fair trial; and (4) the State improperly failed to turn over to him notes taken by Detective Robert Hale. We affirm.

¶2 Napier first argues that he received ineffective assistance of trial counsel in four ways. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his trial counsel's performance was deficient and that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "[T]he burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Whether a defendant has received ineffective assistance of counsel presents a mixed question of law and fact. ***Id.*** "[T]he trial court's findings of fact, 'the underlying findings of what happened,' will not be overturned unless clearly erroneous." ***Id.*** "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***Id.*** at 128.

¶3 First, Napier claims that his trial attorney provided ineffective assistance of counsel because his attorney failed to offer jail records at the suppression hearing that would have shown that Napier was housed in segregation in the jail prior to the police interview in which he confessed. Napier contends that the jail records would have called into question the credibility of Robert Hale, the police detective who took Napier's confession, because Hale testified that he did not recall where Napier had been housed in the jail. The fact that Napier was held in segregation does not contradict the detective's testimony because the

detective testified that he could not recall whether Napier had been held in segregation. The detective said it was possible that Napier had been held in segregation, but he did not remember. Because the jail records would not have called the detective's testimony into question, counsel did not perform deficiently when he failed to offer the jail records at the suppression hearing.[1]

¶4 Second, Napier argues he received ineffective assistance of counsel because his attorney should have called an expert witness to testify about coercive confessions. Napier contends that the expert would have helped the jury to better understand his confession to the police and his claim that his initial denial to the police was accurate, while his subsequent admission to the crime was not accurate.

¶5 Even if we assume that counsel's failure to call an expert constituted deficient performance, Napier is not entitled to relief because he is not able to show that he was prejudiced by the absence of the expert testimony. At the postconviction motion hearing, Dr. Larry White, an expert on coerced confessions, testified that he did not have an opinion as to whether Napier's interrogation was coercive. He also testified that he was not aware of Napier having any innate factors that made him vulnerable to police pressure, such as low intelligence or a mental disorder. While White testified that the fact that one of the officers may have yelled at Napier was potentially coercive, Napier testified during the suppression hearing that he had not felt threatened prior to making his confession, just confused. We thus conclude that failure to introduce the expert's testimony

[1] We note that Napier testified at the suppression hearing that he had been held in segregation for two days prior to his interview by the police. The jail records show that he was held for only six or seven hours before the interview. Because Napier claimed that he had been held in segregation for a much longer time period than he was actually held, introduction of the jail records may have actually discredited Napier's testimony.

was not prejudicial because there is not a reasonable probability that, had it been introduced, the result of the proceeding would have been different. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (an error is prejudicial where the defendant shows "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). We reject this claim of ineffective assistance of counsel.

¶6 Third, Napier contends that he received ineffective assistance of counsel because his attorney failed to call two witnesses, Damon McDuffy and Ezequiel Ramirez-Marin. These two witnesses lived in the area where the crime occurred and were interviewed by police, along with many others, about their observations. Napier contends that his attorney should have called McDuffy because McDuffy told police that he saw four people in the parking lot near the truck in which the victim was killed. Napier argues that McDuffy's testimony would have undermined the State's contention that three people had been present at the scene of the crime—Napier, Napier's co-defendant Tekeith Tate, and the victim. Counsel explained at the postconviction motion hearing that he did not think the exact number of people present at the scene was particularly exculpatory because this case was primarily dependent on Napier's confession and the physical evidence. Given the deference we are to give to counsel's judgment on how to conduct the defense, we conclude that deciding not to call McDuffy was a reasonable strategic decision. *See* ***id.*** at 637 ("counsel is strongly presumed to have … made all significant decisions in the exercise of reasonable professional judgment").

¶7 As for Ramirez-Marin, he told police that after he heard gunshots he looked out his window and saw a person run across the parking lot, enter the driver's side of a waiting blue vehicle, and rapidly leave the area. Napier contends

that this testimony would have discredited the testimony of Femala Flemming, one of the State's witnesses. She testified that after the first shot, Tate ran toward her waiting red car, which she was driving, and jumped in the car; she then drove away. We conclude these slight discrepancies in the testimony as to the color of the waiting vehicle and the side of the car the running person entered were inconsequential and would not have undermined the credibility of Flemming's testimony. We therefore reject the assertion that failure to call Ramirez-Marin constituted deficient performance.

¶8 Fourth, Napier argues that he received ineffective assistance of counsel because his attorney should have introduced evidence showing that Carnell Shorter, a witness for the State, believed the police would assist him if he provided assistance in this case. Napier contends that Shorter had testified at the revocation hearing of Cornell Brown, held before Napier's trial, that he had asked for help from the police in transferring his parole supervision. There is no basis for concluding that trial counsel knew or should have known that Shorter testified at Brown's revocation hearing that he had asked for police help in transferring his parole supervision. Moreover, Detective Hale, who interviewed Shorter, testified that Shorter did not ask for help until "well after" he provided information to police about the gun Napier used to shoot the victim. Shorter's assistance to the police was thus not premised on an expectation that he would receive help from the police. We reject this claim.

¶9 We next address Napier's contentions of trial court error. First, he argues that the circuit court erred when it refused to suppress his statement to police. "The ultimate determination of whether a confession is voluntary under the totality of the circumstances … requires the court to balance the personal characteristics of the defendant against the pressures imposed upon him by police

in order to induce him to respond to the questioning." ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). We will uphold the circuit court's findings of fact unless they are contrary to the great weight and clear preponderance of the evidence. ***Id.*** at 235. Whether the facts as found constitute coercion is a question of law that we review independently. *See* ***id.***

¶10 As previously mentioned, Napier testified during the suppression hearing that he had not felt threatened prior to making his confession, just confused. Napier's own expert testified that he was not aware of Napier having any innate characteristics that made him more vulnerable to police pressure. The interview was not overly long, lasting a little over two hours and, according to the detective present, Napier was polite and cordial, if a bit upset with himself. Based primarily on Napier's testimony and that of his expert, we conclude that Napier has not shown that his confession should have been suppressed.

¶11 Second, Napier argues that the circuit court erred by refusing to instruct the jury on the defense of coercion. Napier contends that an instruction on coercion was warranted because in his statement Napier had said that Tate ordered him to shoot the victim. Coercion is "[a] threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor … and which causes him or her so to act." WIS. STAT. § 939.46(1) (2005-06).[2] Here, there was no evidence to support a conclusion that Napier faced *imminent* death or great bodily harm if he did not shoot the victim. As aptly explained by the trial

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court, while "[t]here is some evidence in the record that somewhere in the future [Napier] might have been harmed by Mr. Tate or Mr. Tate's soldiers or friends or gang members … there's nothing in the record that would make that imminent." Under the plain language of the statute, threat of future harm is insufficient to support a coercion defense. The trial court properly refused to instruct the jury on coercion.

¶12 Third, Napier contends that the circuit court should have given the jury an instruction on the lesser-included offense of felony murder. "The submission of a lesser-included offense is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317 (1989) (emphasis in original). There was no reasonable basis in the evidence for a jury to conclude that Napier was guilty of felony murder but not guilty of first-degree intentional homicide. Napier admitted that he shot the victim at close range until his gun was empty. We conclude that the felony murder instruction was not warranted by the evidence and thus was properly not given to the jury.

¶13 Napier's argument that he was denied the right to a fair trial is based on his contention that the State should have turned over a tape of a telephone conversation that his co-defendant Tate had with Femala Flemming, Tate's girlfriend, while in jail. The State's failure to do so, Napier asserts, violates his due process right under ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), to receive from the prosecutor upon request material evidence favorable to him. During the taped conversation, Tate implies that he had a gun when the victim was shot, which Napier contends would have bolstered his claim that he was coerced by Tate. We disagree. The reference to the gun in the phone conversation is ambiguous at best and there is nothing in the transcript of the phone conversation

that is inconsistent with the State's theory that Napier was the shooter. Because there was nothing exculpatory, the State was not required to turn over the tape. *See* ***id.***

¶14 Finally, Napier contends that the State improperly failed to turn over Detective Hale's handwritten notes of Napier's interview. Hale testified that he had destroyed his handwritten notes after his report was typed, as was his usual practice. Napier presents no authority for the proposition that a police officer must preserve notes of an interview that becomes the subject of a typewritten police report. In addition, Napier has not presented any persuasive argument that the notes were exculpatory. We therefore reject this claim.

By the Court.—Judgment and order affirmed.

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