

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2009

David R. Schanker
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. 2008AP1162

Cir. Ct. No. 2005CF1027

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIONNY L. REYNOLDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Dionny L. Reynolds appeals his conviction, based on a jury verdict, for first-degree reckless homicide while armed. He also appeals an order which denied, without a hearing, his postconviction motion alleging ineffective assistance of trial counsel. We affirm for the reasons discussed below.

BACKGROUND

¶2 Because the issue on appeal involves an element of alleged prejudice based on counsel's performance at trial, we will set forth the relevant facts in more detail than we otherwise would. On the night of July 28, 2003, two witnesses who were at the northbound bus stop on 60th Street near North Avenue (Gregory Johnson and Tracy Robinson) saw a man wearing a hooded sweatshirt or jacket and a man wearing a white T-shirt approach a third man with a backpack (Marcus Parks) at the southbound bus stop across the street.¹ Shortly thereafter, Johnson saw the hooded man shoot Parks and run north across North Avenue, then turn east into an alley behind a bar running parallel to North Avenue. The T-shirt clad man crossed 60th Street toward the northbound bus stop before running past Johnson and heading east on North Avenue, but Johnson did not pay much attention to where that man went because Johnson's attention was focused on the shooter.

¶3 Robinson did not see the shot fired, but watched first the man in the white T-shirt and then the hooded man appear to argue with Parks. The hooded man then directed Parks behind some bushes, where Parks reluctantly went just before Robinson heard the shot. Parks ran across 60th Street toward the northbound bus stop, yelling for help, before he collapsed and died. Robinson saw the hooded man head north across North Avenue, before crossing 60th Street and heading east. She said the T-shirt clad man ran east across 60th Street toward the northbound bus stop and looked at the victim before he ran off to the intersection.

¹ 60th Street serves as a municipal boundary, with Wauwatosa to the west and the City of Milwaukee to the east.

Robinson did not see the man in the T-shirt cross North Avenue, and did not know which way he went from there.

¶4 Two more witnesses in a car stopped in the eastbound lane of North Avenue at the intersection with 60th Street (Leah McMillian and Tracey Baker) heard the shot and watched both the hooded man and the man in the white T-shirt running away. They each testified that the hooded man crossed North Avenue directly in front of their car and was illuminated by the headlights as he looked in their direction before he crossed 60th Street and headed eastbound into the alley behind the bar. Baker said he saw the T-shirt clad man running east on the south side of North Avenue, then crossing to the north side of the street midblock between 60th and 59th. McMillian said the T-shirt clad man ran eastbound and stayed on the south side of North Avenue until about 57th Street. She did not see the T-shirt clad man cross over to the north side before she and Baker turned north onto 56th. However, moments later, as she was about to be dropped off at home, McMillian saw both suspects standing together in the alley running east/west just north of North Avenue, around 57th Street. By the time McMillian and Baker had circled the block, the men were gone.

¶5 An additional witness in another car stopped at the intersection of North and 60th heading east (Nathan Weissgerber) also heard the shot. Weissgerber never saw the hooded man, but drove parallel to the man in the white T-shirt as he ran east on North Avenue. After passing the man in the white T-shirt, Weissgerber looked in his rearview mirror and saw the man get into a car that had pulled up next to him. Weissgerber briefly followed that car and watched the car turn north on 58th or 59th and then east on Meinecke.

¶6 A week after the shooting, Robinson said that a photo of a man named Marquis Davis “favored” the T-shirt clad man, but she could not make a positive identification. At about the same time, Baker also made what he characterized as a “low percentage” identification of Marquis Davis, and Baker could not “rule him out” as the T-shirt clad man based on a photo. None of the other witnesses made any identification based on the initial set of photo arrays the police assembled in August of 2003, and no in-person lineups were performed at that time.

¶7 In November of 2004, the police questioned Reynolds and a man named Anthony Bolden regarding their joint involvement in a series of crimes committed in 2004, including a homicide, that were unrelated to the 2003 bus stop shooting. In June of 2003, Bolden lived in a duplex adjacent to the alley where McMillian had last seen the suspects after the bus stop shooting. During separate interviews, Reynolds and Bolden each stated that they had met one another in June of 2004. When an officer told Bolden during one of his interviews regarding the 2004 crimes that the officer also had information that Bolden was present at a shooting incident that occurred in July of 2003, Bolden responded that he wanted to talk to the officer about the incident, but that he wanted to talk to his attorney first.

¶8 After the Bolden interview, police assembled separate photo arrays that included Reynolds and Bolden and also conducted in-person lineups with each man. Johnson positively identified Reynolds as the hooded man who shot Parks based on the photo array presented to him in January of 2005 and he reaffirmed that identification in court, but Johnson did not identify anyone from the Bolden array. Although Johnson indicated to the officer conducting the photo array that he did not see the light-skinned man who had crossed over to look at the

victim, Johnson admitted in court that he probably did not get a good enough look at the T-shirt clad man to be able to recognize him.

¶9 Robinson picked out Reynolds as the hooded man during the first lineup she viewed in November of 2004, and initially reaffirmed that identification in court. However, after viewing a second lineup that same day, Robinson stated that she thought Bolden “looked the same as” Reynolds, apparently meaning that she thought Bolden could be the shooter. Robinson also testified that she still believed the picture of Davis she saw in August of 2003 most resembled the T-shirt clad man, although she thought Davis and Bolden could be brothers and admitted that Bolden’s light complexion in one of his pictures was more like that of the suspect. Robinson ultimately admitted on re-cross-examination that too much time had passed for her to be able to positively identify anyone.

¶10 McMillian positively identified Reynolds as the hooded man during a lineup conducted in November of 2004, and reaffirmed that identification in court. McMillian saw two people in the Bolden lineup who she thought could have been the T-shirt clad man. Although she circled Bolden, she explained she could not be sure because she had only seen the T-shirt clad man from a distance running away.

¶11 Baker also positively identified Reynolds as the hooded man during a lineup conducted in November of 2004, and reaffirmed that identification in court. Baker, who had previously been unable to rule out Davis as the T-shirt clad man, tentatively identified Bolden as the T-shirt clad man, but said he was only 90 to 95% sure.

¶12 Finally, Weissgerber viewed both a picture of Bolden and a lineup in which Bolden was included and stated that Bolden was not the man in the T-shirt.

¶13 There was no testimony presented at trial to explain how either Reynolds or Bolden first became suspects, and there was no physical evidence linking either one to the crime. The State introduced Reynolds' statement that he claimed to have met Bolden in June of 2004, without mentioning that the statement had been made during questioning related to another homicide. The officer who related Reynolds' statement further testified that he did not know if it was true that Reynolds and Bolden had met in June of 2004.

¶14 After the jury found Reynolds guilty, Reynolds filed a postconviction motion alleging ineffective assistance of trial counsel. Reynolds claimed that counsel should have introduced Bolden's statement that he did not meet Reynolds until June of 2004, as well as testimony about the circumstances under which both Reynolds' and Bolden's statements about when they met were made. The circuit court denied the motion without a hearing on the grounds that Bolden's statement about when he met Reynolds would not have been admitted without also admitting into evidence highly prejudicial contextual information about the homicide investigation in which the statement was given. Reynolds appeals.

STANDARD OF REVIEW

¶15 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *See State v. Allen*, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. We review the sufficiency of a postconviction motion *de novo*, based on the four corners of the motion. *Id.*, ¶¶9, 27. If the facts alleged are conclusory or otherwise insufficient to warrant relief, or if the record conclusively demonstrates that the defendant is

not entitled to relief, the court has discretion to deny the motion without a hearing. *Id.*, ¶9.

DISCUSSION

¶16 Reynolds' motion sets forth a claim for ineffective assistance of trial counsel based on the failure to introduce Bolden's statement that he did not meet Reynolds until June of 2004, nearly a year after the shooting. Reynolds argues that leaving the jury with the impression that Bolden and Reynolds knew one another at the time of the crime allowed the State to improve the odds that the jury would find that Reynolds was one of the two men if it believed that Bolden was the other man. Reynolds further contends that if witnesses were mistaken in their identifications of Bolden, it was more likely that they were also mistaken in their identifications of Reynolds.

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

¶17 Here, we will assume for the sake of argument that counsel should have attempted to introduce Bolden's statement, and that the statement would have

been admissible under one or more evidentiary theories. We are satisfied, however, that the record conclusively demonstrates that the omission of Bolden's statement from trial does not render the resulting conviction unreliable.

¶18 In its opening argument, the State told the jury that the significance of Bolden's name being mentioned as the second suspect was that Bolden and Reynolds were friends. The State also indicated that the connection between Reynolds and Bolden would be one of the things for the jury to consider as it heard the evidence, along with the opportunities of the witnesses to observe the suspects and the certainty of their identifications. The State then devoted a considerable amount of time at trial trying to establish that Bolden was actually the second suspect, by attempting to rehabilitate shaky identifications of Bolden and explain away non-identifications. For instance, various comments and lines of questioning by the State suggested that the reason Johnson was unable to identify Bolden was simply that Johnson did not get a good enough look at the man in the T-shirt; that the reason Robinson had identified both Reynolds and Bolden as the shooter was that the passage of time had simply confused the two images she had in her head; that the reason McMillian and Baker were more tentative in their identifications of Bolden than Reynolds was that the man in the T-shirt had been running away from them, whereas they looked directly at the hooded man in front of their car; and that the reason Weissgerber did not identify Bolden as the man in the T-shirt was that Weissgerber had just come from a bar where he had been drinking. During closing argument, the State acknowledged that "there's some evidence, but certainly not proof beyond a reasonable doubt that [the man in the T-shirt was] Anthony Bolden." The State nonetheless went on to suggest that the reason the suspects just disappeared from the alley "into thin air" was perhaps that they had gone into Bolden's house.

¶19 Given the way the case was tried, we agree with Reynolds that the characterization in the State’s appellate brief of the evidence at trial as showing that “no eyewitness positively identified Bolden” is disingenuous at best. There was evidence presented from which the jury could have concluded that the second suspect was, in fact, Bolden. We simply have no way of knowing whether the jury made that determination or not, given the significant impeachment of the witnesses in relation to their identifications of the second suspect. The problem for Reynolds is that our confidence in the outcome of the trial is not dependent upon the identification of the second suspect as Bolden.

¶20 There were only four viable theories of the crime arising from the evidence at trial. The two suspects could have been: (1) Reynolds and Bolden; (2) Reynolds and an unknown man; (3) Bolden and an unknown man; or (4) two unknown men. The jury obviously accepted either the first or second scenario when it found Reynolds guilty. We agree with Reynolds that additional information that Reynolds and Bolden did not know one another at the time of the murder would tend to undermine the State’s primary theory that Reynolds and Bolden acted together. That same information, however, would actually strengthen the second theory, because it would help explain why so many witnesses either identified Reynolds but not Bolden, or were more certain of their identification of Reynolds than Bolden.

¶21 Reynolds argues that the second theory would involve an “incredible coincidence” that the two suspects were last seen in an alley just outside Bolden’s house, if Bolden were not one of the men involved. No one saw the suspects enter any house from the alley, however. We do not see why it is inherently improbable that the suspects might have run along or met up in an alley near the crime scene, regardless whether either one of them actually lived along the alley.

¶22 We are also not persuaded that additional information that Reynolds and Bolden did not meet until nearly a year after the murder would make a jury any more likely to find either that Bolden acted with another man or that neither Reynolds nor Bolden was involved. Three of the four witnesses who saw the hooded man (Johnson, McMillian and Baker) positively identified him as Reynolds, and the fourth (Robinson) initially identified Reynolds as the hooded man before saying that Bolden looked the same as Reynolds. Two of the three witnesses who positively identified Reynolds as the hooded man (McMillian and Baker) also identified Bolden as the man in the T-shirt with varying degrees of certainty. Reynolds argues that if he could show that McMillian, Baker, and Robinson were mistaken in their identifications of Bolden, that would also significantly undermine their identifications of Reynolds, implying that neither man was involved. But McMillian and Baker explained at trial why they had a much better opportunity to view the face of the hooded man who ran directly in front of their car than the man in the T-shirt who they only saw from a distance. And it is hard to see how any reasonable juror would have placed any weight on Robinson's severely impeached testimony regarding Bolden. Moreover, Johnson's identification of Reynolds and non-identification of Bolden would have been entirely unaffected by the additional information.

¶23 The bottom line is that all three witnesses who positively identified Reynolds as the hooded man at trial had refrained from identifying anyone else as the hooded man in the 2003 arrays which did not include Reynolds, and they all picked out Reynolds from the 2004 arrays or lineups in which he was included. The odds of such independent identifications of Reynolds occurring coincidentally are negligible—particularly when Johnson viewed a photo array presented by a Florida police officer who did not even know who the suspects were. Thus, our

confidence in the outcome of the trial is not affected by any additional evidence relating to whether or not Reynolds and Bolden knew each other at the time of the murder.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

