COURT OF APPEALS DECISION DATED AND FILED

May 21, 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 Nos. 2007AP719-CR
2007AP1335-CR

Cir. Ct. Nos. 2001CF1768

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORNELL D. REYNOLDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARTIN J. DONALD and DANIEL L. KONKEL, Judges. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Cornell Reynolds appeals a judgment convicting him of three felony counts: operating without consent while armed with a weapon

and causing death, WIS. STAT. § 943.23(1g) & (1r) (2001-2002),[1] operating without consent while armed with a weapon and causing great bodily harm, WIS. STAT. § 943.23(1g) & (1m), and possessing a firearm as a felon, WIS. STAT. § 941.29(2). He also appeals an order denying him postconviction relief. The trial court entered judgment after a jury trial. Reynolds contends on appeal that he received ineffective assistance from trial counsel. We affirm.

¶2 Two people were shot, one fatally, during a carjacking. The State charged and tried Reynolds as one of the two carjackers. He was convicted principally on the basis of testimony from four eyewitnesses to the shooting, all of whom identified him as one of the two carjackers and as the man who shot at least one of the victims. Reynolds neither testified at trial nor presented any other defense witnesses.

¶3 After his conviction, Reynolds filed a postconviction motion alleging ineffective assistance of trial counsel. The trial court denied the motion without a hearing. On appeal this court reversed and remanded for a postconviction hearing, holding that Reynolds' motion contained sufficient facts to warrant a hearing on his claim. After holding an evidentiary hearing the court again denied relief, resulting in this appeal. Reynolds contends that counsel performed ineffectively by failing to: (1) adequately cross-examine three of the four eyewitnesses to the shootings; (2) investigate and present an alibi defense; and (3) present Reynolds' only remaining viable defense, given the failure to adequately cross-examine or to pursue the alibi defense.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 A defendant claiming ineffective assistance of counsel must show that counsel made such serious errors that he or she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citation omitted). The test for competent performance is an objective standard of reasonableness. ***State v. Johnson***, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). Stated otherwise, counsel's performance is not deficient unless the defendant shows that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992). If we conclude that counsel's representation was deficient, the defendant must also show that counsel's performance prejudiced the defense, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Johnson***, 153 Wis. 2d at 129. To prevail on an ineffective assistance of counsel claim the defendant must satisfy both elements. ***Id.*** at 127. We review the issues of performance and prejudice independently. ***Id.*** at 128.

¶5 Counsel did not perform deficient cross-examination of the eyewitnesses. Before Reynolds' trial, three of the four eyewitnesses to the shootings, including the surviving victim, testified at Reynolds' probation revocation hearing. All three testified that they initially identified Reynolds as one of the perpetrators in photo or in-person lineups. During cross-examination at the hearing, then-counsel for Reynolds elicited testimony that, in Reynolds' view, provided grounds to challenge their identification of Reynolds as the darker skinned of the two carjackers. He contends that trial counsel performed inadequately by failing to use the witnesses' revocation hearing testimony to pursue a misidentification defense at trial. However, in testimony the trial court

expressly found credible, trial counsel testified in the postconviction proceeding that Reynolds admitted that he was present when the shootings occurred. Counsel was also aware that Reynolds gave police a signed statement admitting to being present. Knowing of Reynolds' admission, counsel reasonably chose not to challenge the witnesses on their testimony that Reynolds was present at the scene, but to focus instead on their inconsistencies and omissions regarding his role in the shootings.

¶6 Additionally, a reasonable attorney might also have avoided the misidentification defense because the revocation testimony did not, in fact, significantly put the witnesses' identifications of Reynolds into question. None of the three witnesses testifying at the hearing gave testimony providing a basis to challenge the police lineup procedures on constitutional grounds, and Reynolds has never challenged those procedures. All three witnesses testified to close contact with Reynolds for a period of time before the shootings, when Reynolds shook two of their hands and was standing right by the third for a time talking. All three unequivocally stated that they were positive about their identifications of him. An attorney could have reasonably determined that further cross-examination on the issue would not have helped Reynolds.

¶7 Reynolds failed to establish that counsel performed ineffectively when he chose not to pursue an alibi defense. As noted, Reynolds told counsel and police that he was present when the shootings occurred. A reasonable counsel would not attempt to develop and present a defense that the State could easily disprove by using the defendant's own statement. Additionally, Reynolds presented no evidence at the postconviction hearing that there were alibi witnesses who could and would have testified on his behalf had counsel located and

presented them. Therefore, even if we assumed deficient performance, Reynolds failed to meet his burden on the question of prejudice.

¶8 Reynolds has not shown that counsel failed to present his only viable defense. Without a challenge to the eyewitnesses' identification of him and without alibi witnesses, Reynolds contends that the only meaningful defense he had left was his own appearance on the stand to testify that he shot only one of the victims, and that this occurred accidentally. However, his claim of ineffectiveness in this regard necessarily attributes to counsel the decision not to testify, and it was the trial court's finding, based on its credibility determinations, that Reynolds knowingly and voluntarily decided not to testify. We will accept that finding. *See* ***State v. Pote***, 2003 WI App 31, ¶17, 260 Wis. 2d 426, 659 N.W.2d 82 (we accept the trial court's findings based on credibility determinations). Without a finding that counsel was responsible for the decision not to testify, Reynolds cannot show deficient performance in that regard. In any event, he failed to demonstrate prejudice from not testifying because he made no showing of what he would have said, or that it would have probably brought a different result had he testified to an accidental shooting.

¶9 Reynolds argues in conclusion that the totality of counsel's errors prejudiced him even if individually they did not. Because we conclude that Reynolds failed to demonstrate that counsel committed any of the errors he alleges, we do not address this argument.

By the Court.—Judgment and order affirmed.

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