COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1129-CR **Cir. Ct. No. 2005CF5211**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELISHA J. CROSSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO and JEFFREY A. CONEN, Judges. *Affirmed.*

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

¶1 KESSLER, J. Elisha J. Crossley appeals from a judgment of conviction, entered after a jury trial, for arson of property other than a building and burglary of a building, contrary to WIS. STAT. §§ 943.03 and 943.10(1m)(a) (2005-

06).[1] He also appeals from an order denying his motion for postconviction relief.[2] Crossley argues he is entitled to a new trial based on trial counsel ineffectiveness and in the interest of justice. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 At about 8:15 a.m. on September 3, 2005, firefighters were dispatched to a fire at a duplex in Milwaukee. The fire caused property damage to an apartment on the second floor, and in particular to the front bedroom of that apartment.[3] Crossley's ex-girlfriend, Felicia Harris, lived in the apartment.

¶3 Crossley was charged with setting the fire in Harris's apartment and with burglarizing the duplex. The case proceeded to trial. On the morning of trial, Crossley's trial counsel was provided with thirty-seven photographs of the burned bedroom and duplex. It is undisputed that trial counsel did not seek an adjournment or object to receiving the photographs on the day of trial.[4]

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

This case was joined with Milwaukee County Case Number 2005CF5625, which charged Crossley with felony bail-jumping. The jury acquitted Crossley of that charge. Therefore, we do not discuss the evidence concerning the bail-jumping charge.

[2] The Honorable Glenn H. Yamahiro presided over the trial. The Honorable Jeffrey A. Conen considered the motion for postconviction relief.

[3] The first floor of the duplex was used as a chiropractic office.

[4] Trial counsel's actions upon receiving the photographs the morning of trial form the basis for Crossley's ineffective assistance of counsel claim, which we discuss in greater detail in the discussion section of this opinion.

¶4 At trial, Crossley admitted being at the duplex shortly before the fire started. Specifically, he testified that he and Harris broke up a week before the fire and that Harris changed the locks on the duplex, preventing him from accessing his property. Crossley said he and Harris discussed when he could retrieve his belongings. Crossley said Harris told him to arrive "as early as you can" on Saturday, September 3, because Harris planned to go out of town. Crossley said he and his friend, Darrell Mitchell, arrived at the duplex at about 7:30 a.m. Crossley said he was expecting Harris to be there, but there was no response when he rang the doorbell.

¶5 Crossley testified he was concerned that his belongings had been "put out" on the street, based on a telephone call he said he received from Harris's nephew the night before. Crossley said he decided to see if his belongings were in the basement of the duplex. He said he entered through a basement window, as he and Harris had done before when they got locked out of the duplex. He indicated that he believed he had a right to be there because he had paid part of the rent.

¶6 Crossley acknowledged that he tried to take a thirteen-inch television from the basement—he claimed it was his—but said he could not fit it through the basement window. Crossley denied kicking in a door that leads from the basement to the second floor apartment and he denied starting a fire in the apartment bedroom. He said he never even went to the second floor.

¶7 Other witnesses corroborated much of Crossley's testimony, although their testimony varied slightly from Crossley's. For instance, a man who worked for a business located next door to the duplex testified that he saw Crossley removing more than just a television through the basement window; he said Crossley removed a few bags and what looked like a VCR.

¶8 The State's theory at trial was that Crossley had arrived at the duplex, entered the basement through the window, taken property from the basement and then kicked in the door leading up the stairs to the apartment. The State suggested Crossley was upset about not being able to retrieve his belongings and had decided to set Harris's bedroom on fire. In support of the State's theory that the fire was intentionally set and that Crossley set it, the State introduced testimony from two men who investigated the fire.

¶9 Battalion Chief Leo Harper of the Milwaukee Fire Department testified that he was one of the firefighters who arrived at the duplex. He said his investigation led him to conclude that the fire started in the bedroom on the second floor, specifically on the bed. Harper said that the bed contained burned items that had likely been placed on the bed prior to the time the fire started, including a nightstand and other household items. Harper said he did not see any evidence that the fire was started by an electrical outlet or ceiling lamp and that he had found no accelerant. He said the quilt and mattress of the bed could have been lit on fire with a match, lighter or other ignition source. He also testified that the burn evidence suggested the fire began ten or fifteen minutes before the fire department arrived on the scene, although he could not be certain.

¶10 Detective Moises Gomez of the Milwaukee Police Department also testified concerning the cause of the fire. He opined that the fire had started on the bedroom mattress. He estimated that the fire burned for approximately ten minutes before it was extinguished. Gomez also testified about a door leading upstairs from the basement. He said there was evidence the door was forced open because the frame of the basement door was cracked and the hook used to secure the door from the non-basement side of the door had been unhooked.

¶11 Crossley's defense at trial was that Harris was trying to set him up. In closing, his attorney emphasized that there was no proof Crossley ever went upstairs and started the fire. Counsel suggested that Crossley would have had to be "an idiot in order to go into a building where he knows people [at the business next door have seen him] and then start a fire and say goodbye to the people without thinking that he's going to be in trouble." It was more likely, trial counsel argued, that Harris had "set[] him up like she promised she was going to do and [wanted to] make sure he gets convicted." Counsel suggested Harris herself started the fire, not "realiz[ing] the damage she was going to do to her apartment when she started that bedspread on fire."

¶12 At trial, Harris denied that she set her own bedroom on fire. She testified that she and Crossley had lived together in the apartment from January through late August of 2005. She said they broke up and Crossley left without his belongings. Harris said she changed the locks and told Crossley that he could come to the house and retrieve his belongings on Saturday, September 3 at 10:00 a.m. Harris testified that on that morning, she awoke early and decided to leave the duplex because she was concerned about Crossley, who she said had broken into the duplex two days earlier and confronted her.

¶13 Harris said she left home about 6:30 a.m. and went to her sister's house. She said she went to Walmart and then returned to her duplex with her sister at about 8:05 a.m. Harris said she saw smoke coming out of the duplex.

¶14 Harris said that later, after the fire was put out, she walked through the apartment with an arson investigator. She said her bedroom was "totaled" and that everything else was damaged by smoke. She estimated her loss at five to ten thousand dollars. Harris testified that she had not placed any items on her bed

before leaving that morning and that she had not smoked in the bedroom that morning.

¶15 The jury found Crossley guilty of burglary and arson. For the arson, Crossley was sentenced to eighteen months of initial confinement and two years of extended supervision. For the burglary, the trial court imposed a consecutive sentence of four years of initial confinement and two years of extended supervision.

¶16 Crossley filed a postconviction motion seeking a new trial on grounds that trial counsel provided ineffective assistance and that a new trial should be ordered in the interest of justice because the real controversy was not fully and fairly tried. The trial court held a hearing on Crossley's motion, at which both trial counsel and a fire expert retained by the defense testified. Ultimately, the court denied Crossley's motion. The court concluded that trial counsel's performance had not been deficient and that there was no basis for a discretionary reversal. This appeal follows.

DISCUSSION

¶17 Crossley argues he should be granted a new trial based on trial counsel ineffectiveness. Specifically, he takes issue with trial counsel's failure to object or seek an adjournment on the morning of trial when he first received thirty-seven photographs depicting the fire damage. In the alternative, he seeks a discretionary reversal. We discuss each argument in turn.

I. Ineffective assistance.

A. Legal standards.

¶18 To prove ineffective assistance of counsel, a defendant must show: (1) deficient performance by his or her lawyer; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both deficiency and prejudice if the defendant does not make a sufficient showing on either one. ***Id.*** at 697.

¶19 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. ***Strickland***, 466 U.S. at 687. "The 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." ***Id.*** at 694.

¶20 The issues of deficient performance and prejudice both present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We will uphold the trial court's findings of fact unless they are clearly erroneous, but whether trial counsel's performance was deficient or prejudicial is a question of law we review *de novo*. ***Id.***

B. Deficient performance.

¶21 Crossley argues that trial counsel's performance was deficient because when he was given thirty-seven photographs of the burned duplex on the morning of trial, trial counsel did not: (1) "request additional time to review and investigate the photos"; (2) "move to exclude the photos as a discovery violation"; (3) "seek a mistrial based on the State's provision of the photos on the day of trial"; or (4) "retain a fire expert to review the photographs."

¶22 At the ***Machner***[5] hearing, trial counsel testified that he had been appointed to represent Crossley in January 2006.[6] At the time, the trial was scheduled for April, but that date was moved to March 2006 after a February 2006 bail hearing when Crossley's motion to modify bail was denied and Crossley remained in custody. At that bail hearing, trial counsel filed a speedy trial demand on Crossley's behalf.

¶23 Trial counsel testified that on the first day of trial, the State gave him thirty-seven photographs of the burned duplex. Trial counsel said the photos had not previously been provided with the other discovery produced by the State. Trial counsel said that he did not request an adjournment and that he had between two and two-and-one-half hours to review the photos before the trial started. He said one of the reasons he elected to proceed with the trial as quickly as he did was that Crossley was in custody and had filed a speedy trial demand. Trial counsel testified that he did not remember if he and Crossley had talked about seeking an

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[6] The record suggests Crossley had two previous attorneys.

adjournment, but he knew that Crossley wanted to go to trial that day. Trial counsel said Crossley had repeatedly expressed his desire to conclude the case and that it was a "major concern" for Crossley.

¶24 Trial counsel said that when he looked at the photos the morning he received them, he thought they helped the theory of defense, which was that Crossley was set up by Harris, who "started the fire with the intention of blaming him." Specifically, one of the photographs showed a purse on a couch, which trial counsel believed

> contradicted the testimony of the alleged victim that she was away from the scene and was at a different place and arrived after the fire was started. The purse that she allegedly had with her was in the pictures, and we're able to determine through cross examination that she would have not have been allowed access to the premises until after the pictures were taken.

Trial counsel explained that he also thought the photos "enhanced" the defense theory of the case

> because of the way the fire investigator had written the report and the way he had testified. It was clear that there was no determination on how the fire was started, who started it, other than circumstantial evidence of my client being at the scene of the crime. There was really no specific information ever elicited about the types of materials, the fire retardant, nature of those materials, and all those things. From my perspective I was able to argue to the jury that there was reasonable doubt.

¶25 Trial counsel testified that prior to the trial starting he did not discuss retaining a fire investigator with Crossley, but he said that after the trial started, "it became evident that Mr. Crossley had issues with and would have liked to have a

fire examiner or an expert." For example, counsel said, Crossley mentioned an electric fixture that had thrown off sparks.[7]

¶26 The trial court implicitly accepted trial counsel's testimony as true. In the trial court and on appeal, Crossley does not challenge the veracity or accuracy of trial counsel's testimony. Rather, Crossley argues that trial counsel's actions were deficient under ***Strickland***. We disagree.

¶27 It is undisputed that on the morning of trial, trial counsel was prepared to try the case using a defense theory that Harris had started the fire and was trying to set Crossley up. Further, when trial counsel reviewed the photographs, he believed they would help the case, because of the photo showing Harris's purse on the couch. Trial counsel was also aware that Crossley was anxious for the trial to take place because he was in custody. Given the facts available to trial counsel the morning of trial, we cannot conclude that trial counsel's strategic decision to proceed to trial without seeking an adjournment or otherwise objecting to the use of the photographs was deficient. *See* ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (court reviewing attorney's performance "must avoid the 'distorting effects of hindsight'") (citation omitted).

¶28 Crossley argues that "it is impossible to make a strategic decision about photographs that are the basis for expert testimony without having adequate time to discuss the photographs with the defendant." We reject the suggestion that there is a bright-line rule as to how long a particular piece of evidence must be

[7] Trial counsel asked Crossley several questions about this at trial, but in closing did not suggest to the jury that the cause of the fire could have been accidental.

examined by a defendant and his attorney before a strategic decision can be made. Rather, we consider the facts of each case to determine if, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. In this case, trial counsel testified that he had between two and two-and-one-half hours to review the photographs and that he ultimately concluded at least one of the photographs was helpful. He did not testify that he believed he needed more time to examine the photos before trial. We do not believe trial counsel's performance was outside "professional norms." *See* ***Johnson***, 153 Wis. 2d at 127.

¶29 Crossley also asserts that trial counsel should have retained a fire expert to examine the photographs. To the extent he is arguing that a fire expert must always be retained, we disagree with that assertion. We have already recognized on at least one occasion that an attorney can make a reasonable choice not to seek a fire expert. *See* ***State v. Chu***, 2002 WI App 98, ¶¶50-52, 253 Wis. 2d 666, 643 N.W.2d 878 (trial counsel not deficient for failing to hire arson expert where: defense theory was that someone other than defendant had started the fire; defendant never told counsel he did not agree the fire was an arson; defendant lacked funds to hire arson expert; and trial counsel believed expert's conclusions could harm the defense case). Under the facts presented here, we likewise conclude that trial counsel's decision not to retain a fire expert to look at the photos was not deficient performance.

¶30 Because we conclude that trial counsel's performance was not constitutionally deficient, we do not consider whether the alleged deficiency was prejudicial. *See* ***Strickland***, 466 U.S. at 697.

II. Discretionary reversal.

¶31 Crossley asks us to reverse his conviction in the interest of justice, *see* WIS. STAT. § 752.35, asserting that the controversy was not fully tried "because the jury did not hear evidence of a non-intentional source of the fire from the defense expert." However, the expert who the defense retained after the trial, and who testified at the postconviction hearing, was unable to determine whether the fire was accidental or intentional. Like the State's fire experts, the defense expert concluded that the fire started in the bedroom and that the cause of the fire could not be determined. The key point on which the expert disagreed with the State's experts was whether the fire started on a dresser or on the bed. The defense expert was not able to offer the "evidence of a non-intentional source" that Crossley asserts would have helped his case. The lack of the defense expert's testimony does not mean the case was not fully tried. Thus, we decline to exercise our discretionary reversal power.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.