COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP633-CR **Cir. Ct. No. 2007CF54**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH A. AWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Joseph Awe appeals from a judgment of conviction for arson with intent to defraud as a party to the crime, in violation of

WIS. STAT. § 943.02(1)(b) (2007-08)[1] and WIS. STAT. § 939.05. On appeal, Awe challenges the participation of individuals in the investigation and at trial who were hired by the company that insured the building that was burned, the effectiveness of his trial counsel, and the sufficiency of the evidence. We affirm the judgment.

BACKGROUND

¶2 In September 2007, Awe was the owner of a two-story building located in Marquette County. On September 11, 2007, a fire occurred at the building, which resulted in substantial damage to the building. Awe was subsequently charged with arson with intent to defraud as a party to the crime, and the matter proceeded to trial.

¶3 At trial, the State presented numerous witnesses to support its theory that the cause of the fire was arson and that Awe was responsible. Relevant to this appeal is testimony given by Richard Relien and Chris Korinek. Relien is the owner of a company that assists in and compiles reports regarding the origins and causes of fires. He was retained by Awe's insurer, Mount Morris Mutual Insurance Company, to investigate the fire at issue here. Relien in turn arranged for Korinek, an electrical engineer, to inspect the electrical systems in the building to determine if any was the cause of the fire. At trial, Korinek testified that, following his investigation, it was his opinion that electricity was not the cause of the fire. Relien testified that, following his investigation and in light of Korinek's

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

opinion that the fire did not have an electrical cause, it was his opinion that the cause of the fire was arson.

¶4 Awe was ultimately found guilty by a jury and was sentenced to three years of imprisonment followed by nine years of extended supervision. Awe appeals. We refer to additional facts as needed in the discussion below.

DISCUSSION

INDEPENDENT INVESTIGATOR PARTICIPATION

¶5 Awe contends that the participation of Relien and Korinek in the investigation of the fire and at trial necessitates a new trial for several reasons. He argues first that Korinek removed components from the building's electrical system at the beginning of his investigation and that proper chain of custody was not established over that evidence. However, Awe has forfeited any objection to the admission of this evidence by failing to raise a proper objection at trial. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining that while "waiver" and "forfeiture" have been used interchangeably, a party's failure to raise an objection at trial is more appropriately framed as a "forfeiture").

¶6 Awe next argues that the State relied exclusively on the investigations and opinions of Relien and Korinek to support its allegation that the fire was caused by arson, and that doing so violated WIS. STAT. § 978.047 because neither Relien nor Korinek was "appoint[ed] … to act on behalf of the state."[2] He

[2] Awe asserts in his brief-in-chief that the State's reliance on independent investigators "implicated" his due process rights and, in his reply brief, that such reliance "violates his due process rights." Neither assertion is sufficiently developed and therefore does not warrant a response. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

claims that, as a result, the case became a "private prosecution of a criminal matter," contrary to law. Awe misconstrues § 978.047. That section does not regulate who the State may call as a witness, but instead authorizes the district attorney to appoint investigators who have been authorized by a county board. Section 978.047 did not restrict the State's ability to use the investigations and opinions of Relien and Korinek at trial.

¶7 Awe next argues that Relien and Korinek were paid for their investigations by Mount Morris Mutual Insurance Company, not Marquette County or the State, which he claims violated WIS. STAT. § 885.05. Section 885.05 provides that the fees for witnesses are prescribed in WIS. STAT. § 814.67, which in turn specifies the fees for witnesses and interpreters attending legal proceedings. Neither § 885.05 nor § 814.67 limits the State's ability to present an expert witness who is paid by a third party.

¶8 Awe also argues that the State violated its duty under ***Brady v. Maryland***, 373 U.S. 83 (1963), by failing to disclose to him that Relien and Korinek were paid by Mount Morris Mutual Insurance Company and not the State. ***Brady*** requires production of information by the State only when that information is within the exclusive possession of State authorities. ***State v. Sarinske***, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979). Awe has not shown that this condition has been met. Although the State was aware that Relien and Korinek were compensated for their services by Mount Morris Mutual Insurance Company, so too were Relien, Korinek, and Mount Morris Mutual Insurance Company. Thus, this information was not in the exclusive possession of the State.

¶9 Finally, Awe argues that he is entitled to a new trial because the source of Relien's and Korinek's compensation was unavailable to him at trial

and, therefore, that information constitutes newly discovered evidence. "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion. A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly discovered evidence." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42.

> To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative."

State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). Here, Awe has failed to establish by clear and convincing evidence that he was not negligent in seeking evidence regarding the source of Relien's and Korinek's compensation for their investigative services. Relien testified that he was asked to investigate the scene by an individual who was adjusting the claim for Mount Morris Mutual Insurance Company. Relien further testified that he in turn arranged for Korinek to investigate the electrical system. A logical question arises from that testimony—if Relien was retained by Mount Morris Mutual Insurance Company and Korinek's services were arranged by Relien, was Mount Morris Mutual Insurance Company compensating them for their services? Because Awe had notice at trial of the likelihood that Relien and Korinek were being compensated by Mount Morris Mutual Insurance Company, the information does not constitute newly discovered evidence.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶10 Awe contends that his counsel at trial was ineffective in that he failed to: (1) present an alibi witness at trial; (2) elicit testimony at trial from three of the State's witnesses regarding the source of their compensation; (3) present testimony from Awe's accountant and another unnamed witness who would have "offset the testimony of the State's witnesses"; and (4) provide the prosecutor with a report from defense expert Terry Schroeder. A ***Machner*** hearing[3] was held on Awe's ineffective assistance of counsel claim. As the State points out, the record is unclear, but it appears the circuit court decided that the evidentiary hearing would be limited to the issue of alibi witnesses. Accordingly, we agree with the State that our analysis of Awe's non-alibi ineffective assistance of counsel claims should focus on whether those claims were properly denied without a hearing.

¶11 To sustain a claim of ineffective assistance of counsel, Awe must show that trial counsel's representation was deficient and that his defense was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant must show both deficient performance and prejudice; therefore, "reviewing courts need not consider one prong if the defendant has failed to establish the other." ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878. "[W]hether counsel's performance was deficient and whether the deficient performance was prejudicial are questions of law that we review de novo." ***Id.***, ¶49. Counsel's assistance is constitutionally deficient if it falls below an objective standard of reasonableness and it is constitutionally prejudicial if the defendant demonstrates "a reasonable probability

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

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. Thiel***, 2003 WI 111, ¶¶19-20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

Failure to Call Witnesses Who Could Provide an Alibi

¶12 Awe first argues that his trial counsel was ineffective in failing to present witnesses at trial who would have provided an alibi for Awe on the night of the fire. The State responds that trial counsel's decision not to call any alibi witnesses was a reasonable trial strategy. We agree with the State.

¶13 Because there was no direct evidence as to who set the fire, the State prosecuted Awe on the theory that he was criminally liable under WIS. STAT. § 939.05 as a party to the crime. Under § 939.05, a defendant may be convicted of a crime even though he or she did not directly commit the crime if, among other acts, the individual: intentionally aided and abetted the commission of the crime; was a party to a conspiracy with another individual to commit the crime; or advised, hired, counseled, or otherwise procured another to commit the crime. Because Awe was not being prosecuted by the State for having been the individual who started the fire, witness testimony that he was not at the building on the night of the fire would not have provided Awe a defense. Furthermore, Awe's defense at trial was that the cause of the fire was accidental, not arson. Accordingly, Awe's whereabouts at the time the fire was started was not an issue critical to his defense. In light of the charge against Awe and his defense, we conclude that trial counsel's decision not to present alibi testimony was not a deficient trial strategy, and thus does not constitute ineffective assistance of counsel. *See* ***State v. Snider***, 2003 WI App 172, ¶22, 266 Wis. 2d 830, 668 N.W.2d 784.

Failure to Elicit Testimony Regarding the Source of Compensation of State's Witnesses

¶14 Awe next argues that his trial counsel was ineffective for failing to elicit testimony from Relien, Korinek, and Curtis Reynolds, a certified public accountant specializing in forensic accounting, regarding the fact that they were compensated for their services by Mount Morris Mutual Insurance Company. We agree with the State that this claim was properly rejected without a hearing.

¶15 Awe's postconviction motion and related pleadings needed to allege sufficient material facts that, if true, would entitle him to relief. *See* ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. As to prejudice, Awe needed to present "facts from which a court could conclude that its confidence in a fair result is undermined." ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. However, Awe neither asserts facts showing prejudice nor explains why we should conclude he suffered prejudice under ***Strickland***. The portion of Awe's pleadings addressing this issue focuses entirely on deficient performance.

Failure to Present Testimony from Awe's Accountant

¶16 Awe argues that his trial counsel was ineffective in failing to present testimony at trial from Awe's accountant. Again, the question is whether the circuit court correctly denied this claim of ineffective assistance without an evidentiary hearing.

¶17 Awe claims that his accountant would have testified as to the "generally health[y] financial situation that the Awes were in as of the date of the incident" and that this testimony was necessary to undermine testimony from a State's witness who he claims testified that he had a financial motive for setting

the fire. However, Awe has failed to explain why his trial counsel's decision not to call Awe's accountant as a witness was prejudicial.

¶18 As the State explains, Awe testified at trial that he was receiving around $3,300 from his VA pension and social security benefits and that this amount would have been just 3 or 4% less in September 2006. Awe also testified that, at the time of the fire, the only debt he and his wife had was a $26,000 home equity loan. He said he was current with his suppliers and with his utility bills at the bar. According to Awe, he and his wife had no financial difficulties until the fire occurred. None of this testimony was challenged by the State.

¶19 Before the circuit court, Awe did not allege facts showing that the accountant would have provided any significant additional information and Awe did not explain why he was prejudiced by the failure to call the accountant as a witness. Under these circumstances, we cannot fault the circuit court for denying this claim without a hearing.

Failure to Present Testimony from an Unnamed Witness

¶20 Awe argues that his trial counsel was ineffective in failing to present testimony from an unnamed witness whom Awe claims would have "offset the expert testimony of the State's witnesses." We agree with the State that this claim was properly denied without an evidentiary hearing.

¶21 According to Awe's affidavit, it was his "understanding" that his attorney spoke with an unnamed expert witness who had concluded that the cause of the fire was electrical and not arson. The circuit court was presented with no specifics whatsoever as to the basis for the expert's opinion or the qualifications of the expert. An assertion that it is Awe's understanding that an unidentified expert

would testify that the cause of the fire was not arson is insufficient to warrant an evidentiary hearing on the issue.

Failure to Provide Prosecutor with Report from Defense Expert

¶22 Finally, Awe argues that his trial counsel was ineffective in failing to provide the prosecutor with a report from defense expert Terry Schroeder. He claims that this resulted in the State's experts being present during Schroeder's testimony though Schroeder was not permitted to be present during the State's experts' testimony. Awe has failed to explain how he suffered any prejudice by the presence of the State's experts during the testimony of Schroeder. Because Awe has not shown prejudice as required by ***Strickland,*** the circuit court properly denied this claim of ineffective assistance of counsel without an evidentiary hearing.

SUFFICIENCY OF THE EVIDENCE

¶23 Awe argues that the evidence was insufficient to support the jury's verdict because it failed to establish the cause of the fire and failed to show he was the perpetrator. When considering a challenge to the sufficiency of the evidence, this court will overturn a jury's verdict "only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted). "[I]f any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn a verdict even if we believe that a jury should not have found guilt based on the evidence before it." ***Id.*** at 377.

Cause of the Fire

¶24 Awe challenges the fact that the State's witnesses were not "able to conclusively identify the cause of the fire," but were instead "merely able to eliminate a number of *possible* mechanisms for fire ignition." It is unclear whether Awe is arguing that the State's witnesses must have conclusively identified that the fire was intentionally set or whether they must have identified precisely how or what ignited the fire.

¶25 Assuming Awe is arguing the former, we conclude that the witnesses *did* conclusively identify the cause of the fire as arson. Arson was identified as the cause of the fire by three of the State's witnesses. Although each of those witnesses reached his conclusion through a process of investigation and elimination, such methods are approved in arson cases. *See, e.g.*, ***Chu***, 253 Wis. 2d 666, ¶¶42-43.

¶26 Alternatively, if Awe is arguing that his conviction should be overturned because the State's witnesses were unable to identify the precise intentional method by which the fire was started, he is incorrect. The jury was charged with determining "*whether* the fire was intentionally set[,] not specifically *how* it was set." *See* ***id.***, ¶¶44-45. The evidence was sufficient to support a factual finding that the cause of the fire was not electrical. In the context of this case, this finding, in turn, supports a finding that the cause of the fire was intentional.

Awe's Guilt

¶27 Awe contends that the evidence was insufficient to prove that he was responsible for the fire. He challenges the jury's verdict in light of the fact that no witness was able to place him at the scene of the fire, he had an uncontested alibi

on the night of the fire, and "[n]o evidence was produced that linked [him] directly or indirectly with the source of the fire."

¶28 Because the State prosecuted Awe as a party to the crime, it was not necessary for the State to prove that Awe was present when the fire ignited. The State needed only to prove that Awe either personally or by someone else on his behalf intentionally damaged the building by means of fire. *See* WIS. STAT. §§ 943.02(1)(b) and 939.05. There was more than enough credible evidence to support a jury finding that Awe was guilty as a party to the crime. This evidence includes: testimony that the cause of the fire was arson; testimony that the doors to the building had been locked at the time of the fire and the building did not show signs of forced entry; testimony that Awe was one of only four people with a key to the building; evidence that the fire occurred when the apartment on the building's second floor was unoccupied; testimony that the building had been listed for sale for approximately three years and the asking price had been reduced; testimony from a forensic accountant that the bar which occupied the first level of the building had been experiencing declining revenue; and evidence that a large photograph of Awe with army companions in Iraq had been removed from the bar days before the fire occurred.

¶29 Once the jury found that the fire was caused by arson, this evidence is strong circumstantial evidence that Awe was responsible for setting the fire. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) (a finding of guilt may rest upon circumstantial evidence).

CONCLUSION

¶30 For the reasons discussed above, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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