COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0250-CR **Cir. Ct. No. 99 CF 6006**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTAE L. DOYLE,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Dontae L. Doyle appeals from a judgment entered after a jury found him guilty of eight counts of armed robbery (while concealing identity), one count of attempted armed robbery, two counts of recklessly endangering safety, and one count of fleeing an officer, all as party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b), 941.30(2), 939.641, 939.05 and 346.04(3)

(1999-2000).[1] He also appeals from an order denying his postconviction motion. Doyle claims his trial counsel provided ineffective assistance, citing five specific instances, which he states constituted deficient performance that prejudiced his case. Because Doyle received effective assistance from his trial counsel, we affirm.

BACKGROUND

¶2 On November 28, 1999, the State charged Doyle with nine counts of armed robbery, one count of attempted armed robbery, two counts of recklessly endangering safety, one count of theft of a firearm while armed, and one count of fleeing an officer. The charges stemmed from four armed robberies of supermarkets, two armed robberies of individuals in the supermarkets, theft of a gun from a security guard in one of the supermarkets, two armed robberies of automobiles (one of which was used during a supermarket robbery), an attempted armed robbery of a supermarket, two counts of recklessly endangering safety during robberies of the supermarkets, and one count of fleeing in the stolen car used in robbing the supermarket, all of which occurred between August 8, 1999, and November 24, 1999.

¶3 Doyle confessed to all of the crimes. His accomplice in five of the robberies, Demario Pokes, testified against him during the trial. All of the charges were joined in a single complaint. During the trial, count four (an armed robbery) was dismissed on the basis that it was duplicitous. The jury convicted Doyle on the remaining counts. At sentencing, count seven, which was theft of a firearm,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

was dismissed on the basis that it was duplicitous. The trial court denied Doyle's postconviction motion alleging that he received ineffective assistance. Doyle now appeals.

DISCUSSION

¶4 Doyle claims his trial counsel was ineffective in five instances: (1) when counsel failed to move to sever two of the counts—the theft of an automobile, which was not used in an armed robbery, and the fleeing count; (2) when he advised Doyle not to testify; (3) when he failed to subpoena time records to support an alibi to the armed robbery alleged in count four; (4) when he failed to properly investigate the case to locate two other suspects, Nathan Smits and "Shorty"; and (5) when he failed to subpoena witnesses David Peters, LaTonia McKinney and Mamood Bassar. Because Doyle has failed to demonstrate that his trial counsel was ineffective, we must reject his argument.

¶5 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶6 An attorney's performance is not deficient unless he or she made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. To satisfy the prejudice prong, the appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687.

¶7 Whether counsel's actions constituted ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***Id.*** at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶8 With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. ***Id.*** Rather, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

A. Severance.

¶9 Doyle's first claim is that his trial counsel should have moved to sever two of the counts from the remaining counts. He argues that the robbery of the automobile, which was not used in an armed robbery of a supermarket, was not similar to the other counts and should have been tried separately. He also argues that the fleeing an officer count was improperly joined because it occurred on November 24, 1999, and was not related to counts one through nine of the complaint, which occurred months earlier. He also contends that the fleeing count

could be believed by the jury as a sign that he was guilty of all of the robbery counts, and this caused him prejudice. We are not persuaded.

¶10 WISCONSIN STAT. § 971.12(1) provides that:

> Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged … are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

¶11 In its order denying Doyle's postconviction motion, the trial court addressed this issue, and concluded that even if a motion for severance had been made, it would not have been granted. The trial court found that the crimes were similar in character and committed within a relatively short period of time. The court also pointed out that the testimony with respect to some of the acts would have been admitted in other trials regarding identity and intent, and the facts relating to the car robberies were important to provide the entire context of the series of acts. Moreover, the defendant's confessions involved all of the robberies, and thus the joinder of all the counts resulted in the detectives who took the confessions only having to testify at one trial. Thus, for judicial economy reasons, severance would not have been favored.

¶12 We agree with the trial court's analysis and conclude that Doyle has failed to demonstrate that he was prejudiced by his trial counsel's failure to move to sever those two counts. The theft of a vehicle, which was not used in robbing a supermarket, could be admitted to show a common plan or scheme of stealing a vehicle to use in the armed robberies. This particular vehicle, however, broke down before the scheme was accomplished. The fleeing count occurred when Doyle was attempting to evade police while he was driving the second stolen

vehicle, which was used in robbing a supermarket. Given the overlapping evidence and the other aforementioned factors, we cannot conclude that Doyle's counsel was ineffective for failing to make the severance motion. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if a motion would not have been successful, trial counsel is not deficient for not filing the motion).

B. Doyle's Decision Not to Testify.

¶13 Doyle argues that his counsel was ineffective for advising him not to testify because his testimony would be the only evidence to counter his confessions and the testimony of Pokes. We reject this claim.

¶14 The record reflects that the trial court personally advised Doyle that he had a right to testify in his own defense, and that he had discussed the advantages and disadvantages of testifying with his trial counsel. The trial court personally confirmed with Doyle that he had decided it would not be in his best interest to testify. Doyle signed a waiver of his right to testify.

¶15 The record also reflects that trial counsel's advice was not unreasonable. There were three confessions from Doyle in the record. The only thing refuting his confessions was his subsequent statement that his confessions were false. He gave no other explanation. Further, Doyle does not indicate how he would explain to the jury why his fingerprints were on one of the stolen vehicles, or how he ended up in possession of the gun stolen during one of the supermarket robberies. Given the overwhelming evidence of Doyle's guilt and involvement in these crimes, there is no reasonable likelihood that his testimony in his own defense would result in a different outcome. Accordingly, counsel's advice on this issue was neither deficient nor prejudicial.

C. Failure to Subpoena Alibi Records.

¶16 Doyle also contends counsel was ineffective for failing to subpoena records which would have provided him with an alibi to the robbery in count four. He indicates that the records would have shown that the electronic bracelet he was required to wear could have proven that he left his home just two minutes before the crime in count four occurred. The crime in count four occurred twenty blocks from his house and, therefore, he argues the time records would prove he could not have committed the crime charged in count four.

¶17 Doyle, however, failed to submit any evidence supporting his conclusory assertion. We do not know whether such records actually exist because he has done nothing to produce them. Therefore, he is not entitled to an evidentiary hearing on this issue and we reject his contention. Moreover, as noted above, the trial court dismissed count four, which Doyle suggests is the only count affected by the evidence. Because of the dismissal, Doyle was not convicted on this count and he cannot complain about alibi evidence not obtained relative to this count.

D. Investigation of Smits and Shorty.

¶18 Next, Doyle contends his counsel was ineffective for failing to investigate two other potential suspects, Smits and Shorty. He contends that a witness advised police that Smits, who was a disgruntled employee of one of the supermarkets robbed, had been talking about robbing the store. The other potential suspect, Shorty, was a customer in one of the supermarkets on the day it was robbed. We reject this argument.

¶19 First, all of the witnesses indicated that the robbers were black. It is undisputed that Smits is white. Therefore, counsel would have been wasting his time if he pursued investigation of Smits. Second, it is clear from the testimony of the witnesses that although Shorty was mentioned as a potential suspect, he was ruled out because one witness indicated that the robber's voice was different from Shorty's voice. Thus, investigating Shorty as a suspect again would not have been fruitful. This claim fails.

E. Subpoena Other Witnesses.

¶20 Next, Doyle contends counsel was ineffective for failing to subpoena David Peters, a witness to one robbery, who indicated that the two robbers were five feet, eleven inches tall. Doyle points out that he is only five feet, six inches tall. We reject this argument.

¶21 At best, calling Peters as a witness would have resulted in one witness advising the jury that he believed the robbers were taller than Doyle. Given the consistency in the many other witnesses' testimony as to the shorter height of the robbers, plus Doyle's confessions and the testimony of Pokes, there is no reasonable likelihood that Peters's testimony would have changed the outcome of the trial.

¶22 Doyle also suggests counsel should have subpoenaed LaTonia McKinney and Mamood Bassar, who indicated they could identify one of the suspects in the robbery in count thirteen. Doyle argues that these witnesses should have been called to see if they could identify Pokes as the suspect. He contends that if the witnesses could not positively identify Pokes as the suspect, or if they were not sure, it would have bolstered his argument that Pokes was testifying

falsely in order to secure a favorable plea bargain. Pokes admitted participating with Doyle in the robbery listed in count thirteen. We reject this contention.

¶23 Such testimony would not automatically lead the jury to believe that Pokes was not involved in the robbery. Rather, the testimony would lead the jury to conclude that the witnesses were not able to positively state that Pokes committed the robbery. Further, there was no need to call these two witnesses to make the argument Doyle proffered. Even without these witnesses, Doyle was free to argue that Pokes was testifying untruthfully in the hopes of a favorable deal with the State.

¶24 Based on the foregoing, we conclude that Doyle has failed to prove that his trial counsel provided ineffective assistance. Therefore, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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