COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1730-CR **Cir. Ct. No. 99-CF-617**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE ANDREW KNOWLIN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Lee Knowlin appeals a judgment convicting him of burglary while armed and carrying a concealed weapon, both as a repeater. He also appeals the order that denied him postconviction relief. We affirm on all issues.

¶2 While on routine patrol at 5:00 a.m., Officer Hansen of the Racine Police Department saw evidence of a break-in at a restaurant. He immediately noticed Knowlin walking a short distance away, and saw no one else in the area. Another officer came to the scene and subsequently stopped Knowlin, patted him down, and found a weapon-like object in his pocket. Knowlin was arrested, handcuffed, and searched. The object was a knife, and police also testified to finding evidence on his person linking Knowlin to the restaurant burglary. Additionally, objects stolen from the restaurant were discovered near where Knowlin was stopped, and officers later testified that a print matching Knowlin's shoes was observed in greasy residue on a chair in the restaurant.

¶3 Knowlin, by counsel, moved to suppress the crime scene evidence as the product of what he argued was an illegal stop and arrest. Based on the testimony of Hansen and other police officers at the scene, the trial court denied the motion.

¶4 At trial Knowlin's defense consisted of efforts to show that police officers framed him. To that end he pointed out discrepancies and inconsistencies in their testimony, and offered an innocent explanation for his presence in the area at 5:00 a.m. In particular, it was Knowlin's contention that he was walking to a nearby business to visit his father, who he believed worked there. A defense witness, Valeria Christian, testified that Knowlin's father was working at the business during the time the burglary occurred. However, on cross-examination Christian stated that Knowlin's father had stopped working there five days before the burglary.

¶5 The jury found Knowlin guilty of the burglary. In postconviction proceedings, Knowlin alleged that trial counsel provided ineffective assistance by:

(1) failing to move for reconsideration of the suppression decision after investigation uncovered discrepancies and physical impossibilities in the officers' description of Knowlin's stop and arrest; (2) failing to obtain expert analysis of the shoe-print evidence; (3) permitting witness Christian to testify falsely or inaccurately concerning his father's employment; and (4) making inaccurate and damaging comments about the evidence in closing argument. The trial court found that trial counsel provided adequate representation and denied Knowlin's motion. The trial court also rejected Knowlin's request for postconviction testing of the greasy substance that created the shoe prints on the chair.

¶6 On appeal Knowlin raises the following issues: (1) whether the trial court properly found counsel effective; (2) whether the prosecutor made improper remarks during closing arguments; (3) whether the trial court erroneously denied a postconviction motion for further scientific testing; (4) whether Knowlin is entitled to a new trial in the interest of justice due to prosecutorial misconduct and false testimony; and (5) whether the evidence was sufficient to support the guilty verdict.

¶7 We conclude that trial counsel provided Knowlin with effective assistance. To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. ***Id***. at 636-37. Prejudice results when there is a reasonable probability that but for counsel's errors a result of the proceeding would have been different ***Id***. at 642. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment. ***Id***. at 637. Whether counsel's behavior was deficient and whether it prejudiced the defendant are questions of law. ***Id***. at 634.

¶8 It is true that counsel could have requested reconsideration of the suppression ruling because discrepancies in the officers' versions of events were subsequently discovered. However, counsel testified he did not believe the discrepancies were sufficiently persuasive to obtain reversal of the court's ruling, and instead chose to use them to attack the officers' credibility before the jury. We conclude that was a reasonable tactical decision. The trial court stated that the evidence used at trial would not have changed the suppression decision, and we agree with that legal conclusion. Counsel cannot be considered ineffective for failing to pursue a fruitless motion. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

¶9 Knowlin also failed to show that counsel was deficient in not retaining experts to prove that police officers concocted the shoe-print evidence. Knowlin presented expert testimony at the postconviction hearing, evidently hoping to establish that crime-scene photos failed to show shoe prints on the chair. But his witness testified that he found no photographic evidence suggesting later police tampering with the shoe-print evidence. Knowlin speculated that the shoe print itself, apart from the crime-scene photos, also would have revealed evidence of police tampering. However, he offered no evidence to support that speculation. To prove his claim, Knowlin needed proof that the omitted investigation would have probably changed the outcome of the proceeding. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

¶10 There is, in addition, no evidence that counsel acted deficiently in using Christian as a witness. Counsel testified that he called Christian at Knowlin's urging, and expected her to testify correctly about the date that Edwards (his father) stopped working. The defense theory was that even though Edwards stopped working five days before the burglary, Knowlin did not know that, and therefore still had reason to look for his father at the business. Calling Christian as a witness was therefore a reasonable tactical decision, and counsel cannot be held responsible for her subsequent imprecise testimony, or the fact that it was clarified on cross-examination.[1]

¶11 Regarding the prosecutor's closing argument, we conclude it does not present grounds for reversal on appeal. After noting defense counsel's arguments suggesting altered and/or manufactured evidence, the prosecutor stated that the evidence, if believed, was overwhelming, and "that the only way you can acquit the defendant is to find that all the police in this case were lying about what they testified to." Knowlin made no contemporary objection to this comment, and his objection to it on appeal is therefore waived. *See* ***State v. Guzman***, 2001 WI App 51, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. In any event, Knowlin's theory of defense was, in fact, that police officers acted in concert to frame him. If they did not, then, as the prosecutor indicated, the evidence of guilt was overwhelming. The prosecutor is allowed considerable latitude in closing argument. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). The prosecutor here stayed

[1] Knowlin also argued in his main brief that counsel's closing argument was deficient, but we read his reply brief (at page 14-15) to withdraw this argument and we therefore do not address it.

within the permitted boundaries of argument by accurately describing the jury's alternatives.

¶12 We conclude the trial court properly denied postconviction testing to identify the greasy residue on the shoe-print chair. Postconviction discovery is not justified on a mere possibility that the information sought might aid the defense. ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). Knowlin's request was based on his speculation that discovery would identify the substance as some sort of material typically used by law enforcement. He presented no factual basis for the existence of any such material. Also necessary to his theory is a determination that the disputed crime-scene photographs did not show his shoe prints, which Knowlin was unable to establish.

¶13 We deny Knowlin's request for a new trial in the interest of justice. We may order a new trial under WIS. STAT. § 752.35 (2001-02)[2] only if we believe a second trial will probably produce a different result, or the real controversy was not fully tried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797, 804 (1990). Neither grounds exist here. All of the issues Knowlin identifies in support of his request were addressed during the trial. Consequently, the issue of Knowlin's guilt or innocence was fully tried. He provides no basis to conclude that a second trial would produce a different result.

¶14 Finally, we conclude the evidence presented at trial supports the verdict. We will not reverse a conviction for insufficient evidence unless the evidence, viewed most favorably to the State, is so insufficient in probative value

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

that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Here, the evidence of guilt, when viewed most favorably to the State, was very strong. The only question was whether that evidence was the product of inaccurate testimony and/or attempts to frame Knowlin. That was a question for the jury to resolve as a matter of credibility, and not for this court to decide on review. *See* ***id***. at 503-04.

By the Court.—Judgment and order affirmed.

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