COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2305-CR **Cir. Ct. No. 00-CF-663**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY HARDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Jerry Harden appeals pro se from a judgment convicting him of burglary and attempted burglary and from the order denying his postconviction motion. We are unpersuaded by any of Harden's challenges to his conviction and the postconviction proceedings, and we affirm.

¶2 Harden's fingerprints were found on a lawn chair beneath a window through which Harden allegedly entered to commit the burglary. The chair belonged to a neighbor of the homeowner. The police found the fingerprints the same day the homeowner discovered the burglary. Fingerprints from the chair matched the prints obtained from Harden after his arrest two days later. During his trial to the court,[1] Harden denied that he burglarized the residence or left his fingerprints on the lawn chair.

¶3 At trial, a fingerprint technician testified that she matched fingerprints from the lawn chair with the prints obtained from Harden after his arrest. On cross-examination, Harden tried to impeach the technician with what he contended was her inconsistent testimony at the preliminary examination. At the preliminary examination, the technician testified that Harden's postarrest fingerprints matched only one of the prints taken from the chair. At trial, the technician explained that she had time to evaluate only one of the fingerprints from the chair before the preliminary examination, and that since the preliminary examination, she had examined the rest of the prints and found additional matches with Harden's postarrest fingerprints.

¶4 Although Harden wanted to pursue the allegedly inconsistent testimony, the circuit court did not permit him to do so. The court found that Harden could not impeach the technician because she had not testified inconsistently. Rather, she had explained how she came to evaluate additional fingerprints between the preliminary examination and the trial. Harden did not object to the court's ruling terminating his attempt to impeach the technician.

[1] Harden proceeded pro se at trial with the assistance of stand-by counsel.

¶5 On appeal, Harden argues that the circuit court denied him the right to confront and cross-examine the technician. This argument is waived because Harden did not object on these or any grounds at the time the circuit court terminated his attempt to impeach the technician with allegedly inconsistent testimony. *See* ***State v. Agnello***, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (to preserve objection for appeal, specific grounds for objection must be articulated to permit circuit court to address alleged error). Harden also cannot raise a confrontation argument for the first time on appeal. *See* ***State v. Copening***, 103 Wis. 2d 564, 571, 309 N.W.2d 850 (Ct. App. 1981).[2]

¶6 Harden attacks the fingerprint evidence on several additional grounds. On the second day of trial, Harden moved to suppress the fingerprint evidence because the State did not produce the lawn chair. The State did not possess either the chair or a photograph of it. The police did not take the chair into evidence because they were able to obtain fingerprints from it, and it was too large to store. Harden contended that production of the chair would have allowed him to confirm that his fingerprints were actually taken from that piece of evidence as opposed to having been taken from his automobile after he was arrested.[3] The court responded that the presence or absence of the chair did not make the fingerprints taken from the chair less probative.

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[2] Even if this issue were not waived, we would not hold in Harden's favor. The circuit court correctly observed that the technician's testimony was not inconsistent, and she explained the difference between her preliminary examination and trial testimony.

[3] This argument ignores the trial testimony that the fingerprints were lifted off the chair on June 20, 1999. Harden was arrested on June 22. The technician compared the fingerprints on June 23. There is no basis for suggesting that the crime-scene fingerprints were procured after Harden's arrest.

¶7 The court denied the suppression motion as untimely because WIS. STAT. § 971.31(5) (2001-02)[4] requires a suppression motion to be filed within ten days of arraignment. It is undisputed that the motion was untimely. Harden was arraigned on August 3, 2003, and he made his suppression motion on February 16, 2001.

¶8 On appeal, Harden argues that there is an exception to the ten-day rule if "the defendant is surprised by the state's possession of such evidence." WIS. STAT. § 971.31(2). He invoked that exception after the circuit court declined to consider his suppression motion due to its untimeliness.

¶9 We agree with the State that Harden did not demonstrate surprise. Even though Harden did not make a pretrial demand for discovery, the State turned over the contents of its prosecution file. Harden could have inquired about the chair and whether it was collected as an item of evidence.

¶10 Harden suggests that the State was required to disclose the chair to the defense. The requirement that the State disclose physical evidence applies only when the State intends to offer such evidence at trial. WIS. STAT. § 971.23(1)(g). Here, the State never intended to introduce the chair into evidence and offered into evidence only the fingerprints taken from it at the scene of the burglary. Furthermore, Harden has not made any offer of proof that the chair has exculpatory value, which would have brought it within the requirement that the State disclose exculpatory evidence to the defense. Sec. 971.23(1)(h).

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

¶11 We also do not agree that the absence of the chair meant that the State destroyed evidence, a due process violation. "A defendant's due process rights are violated by the destruction of evidence (1) if the evidence destroyed was apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means; or (2) if the evidence was potentially exculpatory and was destroyed in bad faith." ***State v. Parker***, 2002 WI App 159, ¶14, 256 Wis. 2d 154, 647 N.W.2d 430, *review denied*, 2002 WI 111, 256 Wis. 2d 65, 650 N.W.2d 841 (Wis. July 26, 2002) (No. 01-2721-CR). Bad faith exists if the officer was aware of the potentially exculpatory value of the evidence, and the officer "acted with official animus or made a conscious effort to suppress exculpatory evidence." ***State v. Greenwold***, 189 Wis. 2d 59, 69, 525 N.W.2d 294 (Ct. App. 1994).

¶12 Harden has not met his burden to show a due process violation. First, he has not demonstrated that the chair was apparently exculpatory evidence. The chair yielded fingerprints which matched Harden's. Second, Harden has not shown bad faith because there is no evidence that the chair was actually destroyed; it was simply never taken into evidence by the State, and the chair's whereabouts were unknown at the time of trial. Although Harden argued that one inference to be drawn from the missing chair was that his fingerprints were not actually taken from it, the circuit court did not accept this inference. The court relied upon uncontradicted testimony that the fingerprints were taken from the chair and submitted to the identification bureau before Harden was arrested.

¶13 Harden next argues that trial counsel, whom he discharged before trial, was ineffective for not investigating the whereabouts of the chair. "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient

performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶14 We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). "A showing of prejudice requires more than speculation," ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993); rather, "the defendant must affirmatively prove prejudice," ***State v. Pitsch***, 124 Wis. 2d 628, 641, 369 N.W.2d 711 (1985). Prejudice means that "the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885, *review denied*, 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 891 (Wis. Sept. 26, 2002) (No. 01-2973-CR). Harden "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different" such that our confidence in the outcome would be undermined. ***Id.*** (citation omitted). Whether counsel's performance prejudiced the defendant is a question of law which we review de novo. ***Moats***, 156 Wis. 2d at 101.

¶15 Harden has offered nothing to suggest that the chair would have been in any way exculpatory such that counsel's alleged failure to investigate the chair adversely affected the defense. Harden reiterates his theory that his fingerprints were taken from the vehicle after his arrest, a theory which has no basis in any of the evidence adduced at trial. Unless the chair could have exculpatory value, trial

counsel's failure to investigate its whereabouts did not prejudice Harden, and Harden's ineffective assistance claim fails.

¶16 Harden next argues that the absence of the chair precluded him from challenging the credibility of the latent fingerprint card containing the fingerprints lifted from the chair. The police officer who collected the fingerprints and completed the latent fingerprint card testified at trial that he has specialized training as an evidence technician. He observed the chair beneath a window through which the burglar gained access. The officer described the chair and how he lifted the fingerprints, completed the fingerprint card and turned the card over to an evidence clerk in the identification bureau. He identified, as a trial exhibit, the fingerprint card he completed in this case.

¶17 Harden cross-examined the evidence technician about the type of chair, the location of the fingerprints on the chair, and the procedure for completing the fingerprint card and submitting it to the identification bureau. Harden inquired about the whereabouts of the chair and why it had not been photographed at the scene.

¶18 The absence of the chair did not preclude Harden from inquiring with regard to the collection of the fingerprints and the weight to be given to that evidence. We conclude that Harden had a sufficient opportunity to raise questions about the whereabouts of the chair and the procedure for collecting fingerprints from items at the scene of the crime.

¶19 Harden next argues that the circuit court erroneously exercised its discretion because it declined to hold an evidentiary hearing on his postconviction

motion.[5] We independently review whether Harden's postconviction motion alleged facts which would have entitled him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion failed to allege sufficient facts, the circuit court had discretion to deny the motion without an evidentiary hearing. ***Id.*** at 310-11.

¶20 Harden's postconviction motion reiterated his trial arguments about the chair. He did not offer any proof of his allegation that the State destroyed the chair or acted in bad faith vis-à-vis the chair. Additionally, Harden did not substantiate his claims of ineffective assistance of counsel or that counsel's failure to consult with a fingerprint expert prejudiced him. His motion merely alleged that trial counsel failed to investigate the State's evidence, i.e., the chair and the chain of custody of the latent fingerprint card. A defendant who contends that counsel failed to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Harden did not do so in this case. We conclude that the circuit court did not erroneously exercise its discretion in denying an evidentiary hearing on Harden's motion.

¶21 Harden also challenges the denial of his motion for postconviction discovery. Harden wanted production of records of latent fingerprint cards filed in the month of his crimes and a copy of the Kenosha County Sheriff Department's policies and procedures governing the investigative practices of evidence technicians. The circuit court denied the motion because it did not satisfy the

[5] Even though the circuit court declined to hold an evidentiary hearing, the court permitted argument on the motion.

standards for postconviction discovery under ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). A "defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence." ***Id.*** at 321. "[E]vidence is [consequential] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 320-21 (citation omitted). "The mere possibility that an item of undisclosed information might have helped the defense … does not establish '[a consequential fact].'" ***Id.*** at 321 (citation omitted).

¶22 We agree with the circuit court that Harden did not demonstrate that the evidence he sought would have affected the outcome of the trial. As the circuit court noted, information regarding evidence gathering and preservation procedures would have gone to the weight and credibility of the fingerprint evidence, not to its admissibility. Harden did not offer any expert opinion about evidence collection and preservation procedures, and he did not show that the evidence would have altered the result at trial.

¶23 Finally, Harden challenges the sufficiency of the evidence to convict him of attempted burglary. We determine whether the evidence, "viewed most favorably to the state and the conviction, is so insufficient in probative value and force 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. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted).

¶24 Burglary is the intentional entry of a dwelling without consent and with intent to steal or commit a felony. WIS. STAT. § 943.10(1)(a). "An attempt to commit a crime requires that the actor have an intent to perform acts and attain a

result which, if accomplished, would constitute such crime" and the actor's conduct must unequivocally demonstrate that the actor formed that intent and would have committed the crime except for the intervention of another person. *See* WIS. STAT. § 939.32(3).

¶25 We conclude that the evidence was sufficient to convict Harden of attempted burglary. The homeowner testified that she saw Harden, who was holding a metallic object in his hand, peering through her kitchen window and trying to pull the window open. Upon being confronted by the homeowner, Harden stated he was looking for "John." He then departed the area in a vehicle which was registered to a woman who told police that she lent the vehicle to Harden on the day of the attempted burglary. The police arrested Harden.

¶26 In his defense, Harden contended that he was looking for someone at that address. He was merely trying to get the homeowner's attention when she found him peering through a kitchen window.

¶27 It was for the circuit court, as the fact finder, to evaluate the credibility of the witnesses and their testimony. ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981). The court did not find credible Harden's explanation for his presence outside the window. The court accepted the homeowner's account of the incident. Additionally, Harden committed two burglaries six days later in the same neighborhood by cutting through screens and crawling through windows. When Harden was arrested, police found a silver

knife on his key ring. This evidence supported an inference that Harden intended to commit a burglary but was interrupted.[6]

By the Court.—Judgment and order affirmed.

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

[6] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").