COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP768 **Cir. Ct. No. 2004CF1192**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EP WALLACE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. EP Wallace[1] appeals from an order denying his WIS. STAT. § 974.06 (2009-10) postconviction motion.[2] Wallace contends that the circuit court erroneously denied his motion, which Wallace filed *pro se*, without a hearing.[3] We reject his arguments and affirm.

BACKGROUND

¶2 The homicide victim in this case was Jerry Taylor, a man who received Supplemental Security Income (SSI) based on his mental capacities. He lived in an apartment on his own, but his family members managed his SSI funds and provided other assistance to him because he could not read, write, tell time or count money.

¶3 Just before 9 p.m. on July 26, 2003, Taylor was shot in his apartment. In connection with that shooting, Wallace was charged with attempted first-degree intentional homicide as a party to a crime in Milwaukee County Circuit Court Case No. 2003CF4748, and a jury trial was scheduled for March 2004. In February 2004, Taylor died of his injuries related to the shooting. The 2003 circuit court case was dismissed without prejudice and Wallace subsequently

[1] Wallace's name is listed in various ways in the record: E.P. Wallace, E.P. Wallace, Jr., and EP Wallace.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] Wallace filed his postconviction motion *pro se*. On appeal, he is represented by counsel.

was charged with first-degree intentional homicide as a party to a crime, intimidation of a witness as a party to a crime and battery.[4]

¶4 At the trial on the new charges, a woman named Chaveon Brodie testified that she sold crack cocaine out of Taylor's apartment for Wallace, who was known as "Boo."[5] Brodie said that when she sold the drugs, she would then give the money to either Wallace or one of his two brothers, who she knew as "Von" and "Rico." Brodie testified that when some drugs went missing during the day on July 26, 2003, both Wallace and Von came to the apartment and threatened Brodie, telling her that she had to find the drugs. According to Brodie, Wallace and Von returned to Taylor's apartment that night. She said Wallace hit her in the head with an iron, briefly rendering her unconscious. She said that when she woke up, she saw Taylor and Wallace wrestling on the floor while Von stood in the apartment doorway. Brodie said that Von slid a gun across the floor to Wallace and Wallace used it to shoot Taylor. Both Von and Wallace then left the apartment.

¶5 Taylor's neighbor, Rita Schneider, lived in the apartment across the hall from Taylor. She testified that on July 26, 2003, she and her boyfriend were watching television when she heard "[a] loud thud" and then, after opening her apartment door, she saw two men run from Taylor's apartment. At trial, she said that one man wore "a black do-rag" and the other wore a yellow t-shirt and black

[4] Wallace's brother Johnny Wayne Wallace, also known as "Von," was also charged in connection with Taylor's death. At the time of the trial in Wallace's case, Johnny had yet to be apprehended.

[5] We do not attempt to summarize all trial testimony.

pants. Schneider identified Wallace as the man who had worn the yellow t-shirt and black pants.

¶6 Schneider testified that she had seen Wallace wearing the same yellow t-shirt and black pants about two hours before the shooting, when she looked out her apartment window to the front of the building. She said Wallace was standing outside the building, loudly stating, "Jerry [Taylor], I want my stuff back." Schneider said Wallace said "[t]hat he was just going to get 'em."

¶7 Wallace did not testify at trial. His trial counsel presented an alibi defense, eliciting testimony from Wallace's mother and sister. His mother testified that there was a party at her house on July 26, 2003. She said that she, her husband and her son Johnny (also known as Von) left the party at 6:30 p.m. to drive to Mississippi and that Wallace was still at the party when she left.

¶8 Wallace's sister's testimony varied in some respects from her mother's. She said that Wallace did not arrive until "[a]round 7:30" p.m., after Wallace's mother had already left on the trip with her husband and son Johnny. She said Wallace remained at the party until it ended at about 11 p.m.

¶9 A jury found Wallace guilty of the lesser-included offense of first-degree reckless homicide as a party to a crime, in violation of WIS. STAT. §§ 940.02(1) (2003-04) and 939.05 (2003-04), and battery, in violation of WIS. STAT. § 940.19(1) (2003-04). The jury acquitted Wallace of the witness intimidation charge.[6] Wallace was sentenced to twenty-two years of initial

[6] This charge was based on Brodie's testimony that about a week after the shooting, Wallace and Von threatened her.

confinement and eight years of extended supervision on the first-degree reckless homicide charge. A concurrent nine-month jail term was imposed for the battery.

¶10 Postconviction counsel was appointed for Wallace. That attorney, James L. Lucias, filed a postconviction motion arguing that the trial court had erroneously exercised its sentencing discretion.[7] The motion sought resentencing. The trial court denied the motion in a written order, without a hearing.

¶11 Lucias filed a no-merit report with this court on Wallace's behalf. However, for reasons not apparent in the record, Lucias later withdrew and successor counsel, Michael J. Steinle, was appointed. Steinle was given ninety days to file a postconviction motion or a notice of appeal. Steinle filed a notice of appeal pursuant to WIS. STAT. § 809.30. Accordingly, we indicated in an order that the appeal would no longer proceed as a no-merit appeal.

¶12 Steinle presented two issues on appeal: (1) whether there was sufficient evidence to support the jury's guilty verdict for the reckless homicide; and (2) whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Wallace***, No. 2006AP2031-CR, unpublished slip op. ¶1 (WI App July 29, 2008). We affirmed, concluding that there was sufficient evidence to support the verdict and that the trial court had not erroneously exercised its discretion. *See* ***id.*** Steinle filed a petition for review in the Wisconsin Supreme Court, which was denied on November 17, 2008.

[7] This court does not generally identify counsel by name. However, because there were ultimately two attorneys who represented Wallace after trial, we identify the attorneys by name to fully explain the procedural history of this case.

¶13 On December 24, 2009, Wallace filed the *pro se* postconviction motion that is at issue in this appeal. Wallace argued that his "appellate counsel" had provided ineffective assistance by failing to allege that trial counsel provided ineffective assistance in several ways.[8] Wallace asserted that trial counsel had performed ineffectively by failing to: (1) "investigate, discover or review all discovery materials retained by the State"; (2) present evidence that the victim, Taylor, told officers that a man named Von had shot him; and (3) "challenge and to timely object to the sleeping Juror who was inattentive during [Wallace's] trial."

¶14 The circuit court denied Wallace's motion without a hearing. It recognized that postconviction counsel ineffectiveness can be the basis for failing to raise an issue on direct appeal, citing ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). However, the circuit court concluded that trial counsel had not provided ineffective assistance and, therefore, postconviction counsel was not ineffective for failing to allege trial counsel ineffectiveness. This appeal follows.

DISCUSSION

¶15 On appeal, Wallace argues that he was entitled to a ***Machner***[9] hearing on his postconviction motion because he alleged sufficient facts concerning trial counsel's failures to elicit testimony concerning Taylor's statements to officers and to challenge the service of a juror who had trouble

[8] Wallace's *pro se* motion and accompanying brief at times referred to "appellate counsel" and at times referred to "postconviction counsel."

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

staying awake.[10] We conclude that Wallace's motion was properly denied because the record conclusively demonstrates that trial counsel did not provide ineffective assistance. Specifically, we reject Wallace's argument concerning Taylor's statements because Wallace was not prejudiced and we reject his argument concerning the juror because trial counsel did not perform deficiently.

I. Legal standards.

¶16 In ***State v. Allen***, 2004 WI 106, ¶¶12-24, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing. Relying on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the ***Allen*** court repeated the well-established rule:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Id., 274 Wis. 2d 568, ¶9 (citations omitted). "When an issue of ineffective assistance of counsel is intertwined, the movant must also allege a prima facie claim of ineffective assistance of counsel, showing that counsel's performance

[10] In his postconviction motion, Wallace also argued that trial counsel had failed to "investigate, discover or review all discovery materials retained by the State." He does not present this argument on appeal and, therefore, we deem it abandoned. *See* ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 307 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned).

was deficient and that this deficient performance prejudiced the movant." ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. "To establish deficient performance, the movant must show facts from which a court could conclude that counsel's representation was below the objective standards of reasonableness. To establish prejudice, the defendant must show facts from which a court could conclude that its confidence in a fair result is undermined." ***Id.*** (citations omitted). With these standards in mind, we consider Wallace's arguments concerning trial counsel ineffectiveness.

II. Trial counsel's alleged failure to present evidence that the victim identified Von as the shooter.

¶17 In his postconviction motion, Wallace argued that his trial counsel performed ineffectively when he failed to call two officers to testify concerning statements Taylor made to them identifying the shooter. Wallace's postconviction motion included police reports from Officer Chris Heidemann and Detective James Timm. Heidemann's report stated that he rode with Taylor to the hospital the night he was shot. Heidemann asked Taylor who shot him and Taylor replied, "Vaughn [sic]."

¶18 Timm's report indicates that on August 6, 2003, Timm visited Taylor in the hospital. Timm's report states that Taylor indicated "yes" when Timm asked Taylor if "Von" shot him. Timm said Taylor also indicated that he had known "Von" for five years.

¶19 Wallace has not identified, and we have not located, any part of the record indicating that either trial counsel or the State sought to admit these statements, and neither officer was called at trial. However, at sentencing, trial counsel raised an issue with respect to the presentence investigation report's

identification of Wallace as the shooter. Trial counsel noted that the report indicated that Taylor had positively identified Wallace from a photo lineup. Trial counsel told the trial court that this was not "a complete recitation of the identification materials in this matter." Trial counsel said that according to discovery materials, Taylor had also identified Von as the actual shooter. The State agreed that Taylor had at one point identified Von as the shooter, but added that on August 13, 2003, Taylor had picked out Wallace from a photo lineup.

¶20 Based on the information in the record, we cannot determine whether trial counsel had a strategic reason for not seeking to present evidence of Taylor's identification of "Von" as the shooter. Nonetheless, we conclude that the record conclusively demonstrates that Wallace was not prejudiced by trial counsel's alleged error. Therefore, Wallace was not entitled to a hearing on his postconviction motion. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 697 (1984) (defendant must show both deficient performance and prejudice, and court need not discuss both prongs if one is dispositive); ***Wesley***, 321 Wis. 2d 151, ¶23 (no hearing required if "record conclusively demonstrates" movant is not entitled to relief).

¶21 To prove the prejudice prong of the ineffective assistance analysis, a defendant must demonstrate that his lawyer's errors were so serious that the defendant was deprived of a fair trial 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. Wallace cannot meet this burden.

¶22 Wallace was convicted of first-degree reckless homicide as a party to the crime. Thus, whether he or his brother actually pulled the trigger is irrelevant to Wallace's liability for the crime. As the trial court explained:

> In this case, the defendant was tried as a party to a crime, and the party to a crime instruction was given by the court. Even if trial counsel would have introduced evidence that the victim had identified Von as the shooter, there is not a reasonable probability that the defendant would have been acquitted of first degree reckless homicide as a party to a crime. Chaveon Brodie testified that the defendant was in the apartment with his brother. Other witnesses identified him and his brother as being at the apartment that day and saw them leave the area both times. Chaveon Brodie testified that the defendant shot Taylor as Taylor lay on the floor. The victim had learning disabilities. Whether the jurors would have believed that the brother had shot the victim instead of the defendant, they would still have returned the same verdict. They quite obviously believed that both the defendant and his brother were present during the shooting because they didn't believe the defendant's alibi defense. Because the defendant would still have been convicted of the offense as a party to a crime, he was not prejudiced by any failure on the part of trial counsel to present such evidence. Consequently, postconviction/appellate counsel's failure to raise this issue was neither deficient nor prejudicial.

¶23 Wallace disagrees with this analysis. He asserts that the central issue at trial was the credibility of Brodie, the only witness who allegedly saw the shooting. He argues that if the jury had heard that Taylor identified Von as the shooter, Brodie's credibility would have been undermined. He also contends that "Taylor's statement to police that it was Von who shot him—without any mention of Wallace being involved—calls into question Wallace's very presence in the apartment."

¶24 We are not convinced "that there is a reasonable probability that ... the result of the proceeding would have been different" if the officers had been called to testify about Taylor's statements. *See* ***Strickland***, 466 U.S. at 694. If the

trial court had permitted the officers to testify about Taylor's statements identifying Von as the shooter, it likely would have also admitted Taylor's subsequent identification of Wallace as the shooter. Thus, the jury would have heard that Taylor—a man of limited mental capabilities—had named both Von and Wallace as the shooter. This would call into question the reliability of Taylor's identification of the person who actually pulled the trigger, but it would not contradict evidence that both Wallace and Von were present in the apartment that night. Even if only Taylor's statements identifying Von had been admitted, the jury may have concluded that either Taylor or Brodie was mistaken about who pulled the trigger, but we are unconvinced that it would have concluded that Wallace was absent from the apartment. Taylor's statements did not indicate that there was only one man present or that Wallace was not there, and both Brodie and Schneider testified that Wallace was in the apartment. We agree with the trial court that the jury believed Wallace was present for the shooting and that the officers' testimony, if presented, would not have altered that the jury's finding that Wallace was guilty as a party to a crime.

¶25 Wallace also argues that if the jury had learned that Taylor had named a shooter other than Wallace, it would have boosted Wallace's alibi claim. We disagree. The alibi witnesses—who offered conflicting testimony with respect to when Wallace arrived at the party—both testified that Von left for Mississippi with his mother and her husband at about 6:30 p.m. on the night of the shooting. Thus, Taylor's statement that Von was the shooter would not have supported the alibi testimony, but instead would have contradicted it.

¶26 For these reasons, we conclude that Wallace was not prejudiced by his trial counsel's alleged failure to elicit testimony concerning Taylor's identification of the shooter. Because trial counsel was not ineffective, neither

postconviction attorney was ineffective for failing to allege trial counsel ineffectiveness with respect to the use of Taylor's statements.

III. Trial counsel's alleged failure "to litigate the issue of the sleeping juror."

¶27 After the jury was sent to deliberate, the trial court made a record concerning a note it received from court staff. The trial court stated:

> The lady who was occupying what would be Seat Number 7 in the jury appeared to nod off just a little bit. I didn't see it until the note was … passed up to me….
>
> I did consult with the bailiffs and [with the deputy] ... who made the observation initially; and he said that the nodding off was just at the very, very end and when [the prosecutor] stood up for his rebuttal.
>
> Given that, it would be my inclination not to choose her as an alternate simply based on that. And she certainly was not fast asleep. I looked over there. I think she was just having a bit of a hard time at the end staying awake.
>
> However, if either of you wants her to be the alternate, I will give it careful consideration.

The trial court later stated that it had observed the juror nodding off "for about the last 30 or 60 seconds" of the State's rebuttal argument.

¶28 The State asked whether *voir dire* of the juror might be appropriate. The trial court said it would consider it if the State or trial counsel requested it, but it expressed concern that sometimes *voir dire* is problematic because it "is like telling somebody not to remember something." Ultimately, after considering the matter during a short break, both the State and trial counsel indicated that they did not wish to challenge the juror's continued service on the jury and they did not ask the trial court to conduct *voir dire* with the juror. The trial court concluded the discussion with this statement: "I would independently make the decision to remove that juror as an alternate if I thought there was a problem here, but I don't

believe there is, and so I will have the alternate selected in the usual manner by lot."

¶29 In his postconviction motion, Wallace asserted that not only did the juror fall asleep during the closing argument, but she was also seen sleeping during the trial. Wallace's motion included notarized letters from his two sisters, dated June and July 2009. Both sisters indicated that they observed the juror sleeping during the trial, including during a witness's testimony. One sister said the woman slept for two minutes during one witness's testimony, while the other sister did not specify a length of time. However, neither affidavit indicates that the sisters brought this information to the attention of trial counsel at or after the trial, so we fail to see how trial counsel can be faulted for not asserting that the juror was sleeping during witness testimony.

¶30 At issue is whether trial counsel performed deficiently when he did not object to the juror's continued service or request that the trial court conduct *voir dire* with the juror. We are unconvinced that trial counsel performed deficiently. The information known to trial counsel at the time the trial court raised the issue was that the bailiff and the trial court had observed the juror struggle to stay awake during the end of the closing arguments, which are not evidence.[11] *See* WIS JI—CRIMINAL 160. It was reasonable for trial counsel to decline to ask that the juror be removed or that the trial court conduct *voir dire* concerning the brief portion of closing argument that the juror might have missed. Because trial counsel was not ineffective, neither postconviction attorney was

[11] Prior to closing arguments, the jury was on a break, so the only proceedings at issue with respect to the juror's attentiveness were closing arguments.

ineffective for failing to allege trial counsel ineffectiveness with respect to this issue.

By the Court.—Order affirmed.

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