COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0568 **Cir. Ct. No. 99CF001595**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZONG LOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Zong Lor, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2001-02)[1] motion for postconviction relief. He argues

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

that the circuit court erred in denying his postconviction motion without holding a ***Machner***[2] hearing. We affirm.

I. Background

¶2 In July 1999, a jury convicted Lor of first-degree reckless homicide while using a dangerous weapon, and first-degree recklessly endangering safety while using a dangerous weapon, both as a party to the crime. The convictions stemmed from a March 23, 1999 drive-by shooting of two teenage boys, Steve Cheng and Tulee Thaoxaochoy. Trial testimony established that Cheng and Thaoxaochoy were smoking on a porch on North 37th Street when five Asian-American males, later identified as Lor, Meng Vang, Tong Xiong, Chu Yang, and Jeno Yang, drove by in a Toyota Camry and started firing at them. As the boys tried to reenter the house, Thaoxaochoy was shot and killed. Cheng told police that the shooter was seated in the right, rear passenger seat and that he had shoulder-length hair.

¶3 Testimony also established that Cheng's brother belonged to the gang, "M.O.D.," and that Lor and those in the car were members or associates of a rival gang, the "Asian Crips." One of the occupants of the car, Meng Vang, testified that, at the time of the shooting, he saw Lor's hand sticking out of the window with a gun in it and that, after the shooting, Lor said he was shooting at members of a rival street gang. At the time of trial, Vang was unavailable; his preliminary hearing testimony was admitted into evidence.

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

¶4 The defense theory at trial was mistaken identity. Defense counsel exposed the conflicting statements Vang gave the police and suggested that State witnesses were protecting another passenger in the car, Chu Yang, a fellow Asian Crip, who fit the victim's description of the shooter and who had a possible motive to retaliate against Cheng's family. Counsel also attacked the State's witnesses' credibility by suggesting that they were testifying in exchange for not being prosecuted.

¶5 At the conclusion of a three-day trial, the jury found Lor guilty. On direct appeal, Lor claimed that trial counsel was ineffective for conceding that Vang was unavailable. This court rejected his claim. *See* ***State v. Lor***, No. 00-2724-CR, unpublished slip op. (WI App Aug. 23, 2001). In his most recent postconviction motion, Lor contends that postconviction counsel was ineffective for failing to challenge trial counsel's performance with respect to: (1) advising him to reject a plea agreement; (2) failing to challenge the introduction of a gun case recovered from his bedroom during his arrest; and (3) failing to object to the introduction of his booking photograph.

II. Analysis

¶6 Lor first contends that postconviction counsel was ineffective for failing to claim that trial counsel's performance was deficient for advising him to reject a purportedly favorable plea offer. We cannot agree.

¶7 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶8 Ineffective-assistance-of-counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶9 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations that fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, the court may deny the motion on its face. ***Id.*** at 309-10. Whether a motion alleges facts warranting relief, thus entitling a defendant to a hearing, is a legal issue we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has discretion to deny the postconviction motion without a hearing, ***id.*** at 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶10 In his WIS. STAT. § 974.06 motion, Lor asserts that trial counsel told him that the State offered to recommend twenty years' imprisonment, presumably to reduced charges, although Lor does not divulge the details of the alleged offer. He claims, however, that he declined the offer because, in the words of Lor's affidavit in support of his motion, counsel told him "the State didn't have enough evidence to convict [him,]" and his "defense of mistaken … identity was viable." Lor now alleges that a competent attorney would have realized that he had no viable mistaken identity defense because Vang identified him as the person in the car with the gun. Lor claims that Vang's testimony was particularly credible because he was a member of the same gang, the Asian Crips. We are not persuaded.

¶11 In ***State v. Fritz***, 212 Wis. 2d 284, 569 N.W.2d 48 (Ct. App. 1997), this court explained that the right to effective assistance of counsel applies to advice regarding acceptance or rejection of a plea agreement, ***id.*** at 293. In ***State v. Lentowski***, 212 Wis. 2d 849, 569 N.W.2d 758 (Ct. App. 1997), we determined that counsel's performance was deficient in advising a defendant to reject a plea based on two defenses when, as a matter of law, those defenses were not legally tenable, ***id*** at 853-54. Here, however, Lor's postconviction affidavits do nothing more than allege that counsel informed him that, in his opinion, the evidence was insufficient and that the mistaken identity defense was viable. Lor provides nothing to refute counsel's forecast.

¶12 Moreover, we conclude that counsel's defense theory of mistaken identity was reasonable in light of the State's evidence—specifically, the conflicting statements of Vang who had told Detective Michael Wesolowski that he was not sure whether it was Lor or Chu Yang who had his hand out the window. The defense theory was also supported by Cheng's failure to pick Lor

out of a lineup or photographic array. While the jury ultimately did not believe the theory, this does not mean that counsel's advice was unreasonable.

¶13 Further, Lor has failed to establish that, but for counsel's advice, he would have accepted the plea offer. *See* ***Fritz***, 212 Wis. 2d 297 ("defendant must show … that he or she would have in fact accepted the plea bargain but for the lawyer's deficient performance"). Indeed, Lor's statements at sentencing indicated that he chose to proceed to trial, not because of counsel's advice, but rather, because he did not want to admit his guilt. At sentencing, he stated,

> I'm so guilty. I'm so ashamed of myself, more than words can say. Now I'm happy that the truth came out how it did. I can't stand living day by day without the truth known. *The fact is I'm not man enough to tell the truth in the first place, that's why I took this case to a jury trial….*
>
> ….
>
> I'm so sorry for misleading everyone, my family, the attorney—my attorneys, the Police Department, and especially your court.

Hence, Lor has failed to establish prejudice.

¶14 Lor also contends that counsel was ineffective for failing to seek to suppress the gun case recovered from his bedroom during his arrest. The postconviction court concluded, however, that such a challenge would have been rejected. We agree with the court's assessment; we conclude that nothing in Lor's supporting affidavits refutes that either consent or exigent circumstances supported the search and seizure.

¶15 Moreover, the gun case, which was never connected to the murder weapon, was of limited probative value. In fact, Lor's argument on appeal

suggests that counsel, recognizing this fact, made a tactical decision not to move to suppress the evidence. In his brief to this court, Lor indicates that he and counsel had discussed the gun-case evidence and he acknowledges that counsel essentially advised him not to move to suppress the evidence because it was, in counsel's opinion, insignificant given that the police recovered it without any gun or bullets. At trial, counsel emphasized the insignificance of the evidence during his cross-examination of police and in his closing argument, establishing both that the police had not found any guns or bullets and that the case could be used to carry many types of guns. Clearly, Lor was not prejudiced by this evidence.

¶16 Lor also argues that counsel was ineffective for failing to challenge the introduction of the booking photograph, which showed him wearing jail attire. Citing numerous federal cases, Lor contends that permitting the jury to see the photograph undermined the presumption of innocence. As the State points out, however, counsel did indeed object. In reply, however, Lor modifies his argument and claims that counsel's failure was in not objecting for an additional reason—that the evidence was cumulative. Again, we are not persuaded.

¶17 Contrary to the cases Lor cites in his brief, where booking photographs suggested the defendants' past criminal activities, the photograph here was limited to this offense and clearly indicated the date of the arrest for the charged crimes. The State introduced the photograph for a very important purpose—to establish the length and style of Lor's hair on the day of the offense because the description of the shooter's hair was at issue. Again, Lor has failed to establish that trial counsel was ineffective. The trial court properly denied Lor's ineffective-assistance-of-counsel claim without a hearing.

By the Court.—Order affirmed.

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