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DISTRICT I

August 29, 2023

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You are hereby notified that the Court has entered the following opinion and order:

2021AP239-CR State of Wisconsin v. James Dank Green (L.C. # 2014CF2812)

Before White, C.J., Donald, P.J., and Dugan, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

James Dank Green appeals an order denying his postconviction motion on the basis of ineffective assistance of counsel. Green argues that his trial counsel was ineffective for failing to investigate alibi evidence, a claim upon which the circuit court held a ***Machner***[1] hearing and denied his claim. He also argues that the circuit court erred when it declined to conduct a

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

Machner hearing on his claim that trial counsel failed to present a third-party perpetrator ***Denny***[2] defense at trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[3] We affirm.

The State charged Green with shooting J.C.N. on North 35th Street in Milwaukee on May 15, 2013. J.C.N. named Green as the person who shot him. He further identified that his child's mother, T.H., was Green's sister, and that she was present at the shooting. Green was convicted of attempted first-degree homicide while using a dangerous weapon and possession of a firearm by a felon after a jury trial in October 2014. The circuit court imposed concurrent sentences of fifty-one years of imprisonment on the attempted homicide count, divided as thirty-six years of initial confinement and fifteen years of extended supervision, and ten years of imprisonment on the firearm possession count, evenly divided between initial confinement and extended supervision.

Green's first postconviction motion was denied in September 2015. He alleged ineffective assistance of counsel because trial counsel failed to file a notice of alibi. He further sought resentencing on the ground that the length of his sentence was too harsh. Green appealed this decision, but later voluntarily dismissed the appeal to pursue another postconviction motion.

After this court granted several extensions, Green filed his second postconviction motion in January 2019. He again alleged ineffective assistance of counsel for failing to pursue and

[2] ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

[3] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

present alibi witness evidence. Second, he alleged that trial counsel failed to investigate and present ***Denny*** evidence of a known third-party suspect who had previously shot at J.C.N. Third, he alleged that trial counsel's performance was deficient at trial in numerous ways that had the cumulative effect of prejudice: (1) failing to subpoena C.D., J.C.N.'s sister; (2) ineffective cross-examination of a key witness for the State; (3) ineffective cross-examination of the State's rebuttal witness regarding Green's alibi not being verified; (4) failure to subpoena eyewitnesses to the shooting who did not identify Green in the police photo array; and (5) permitting Green to testify about his alibi in an incomplete and unbelievable way.

In June 2019, the circuit court ordered a ***Machner*** hearing only on Green's postconviction claim that counsel was ineffective for failing to investigate and present alibi evidence from Kenneth Jackson and Franklin Love; the court denied his other six claims. The court denied Green's motion for postconviction relief on January 27, 2021, finding that based on the testimony and evidence of contemporaneous letters during the period of representation, trial counsel's performance with regard to the alibi issue was not deficient. The court also found that Green did not suffer prejudice to his defense from any deficient performance by counsel.

Green now appeals, renewing his argument that counsel was ineffective for not pursuing alibi evidence and that the circuit court erred when it did not grant him a new trial, and arguing

that the circuit court erred when it did not grant a ***Machner*** hearing on the ineffectiveness claim based on the failure to present a ***Denny*** defense.[4]

Green also makes two new arguments on appeal: (1) that trial counsel was ineffective for putting Green "in the driver's seat" of his defense, in violation of counsel's professional duties to use his professional judgment to make strategic decisions for criminal defense; and (2) that trial counsel was ineffective for failing to seek an adjournment of the trial because Green's speedy trial demand was not strategic and was prejudicial. "As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal." ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691. As a result we decline to address either argument individually; however, we will discuss them to the extent that the arguments apply to Green's properly raised claims.

Alibi evidence

Green argues that trial counsel was ineffective for failing to investigate Green's alibi witness evidence prior to trial and for failing to file a notice of alibi. He asserts that trial counsel should have not only presented evidence to show that Green was not in Milwaukee at the time of the shooting, but that there was a third-party perpetrator.

[4] Green's motion also alleged that postconviction counsel failed to present alibi evidence and third-party perpetrator evidence in the first postconviction motion. We interpret him to have abandoned his claims against postconviction counsel and the five cumulative deficiencies by not discussing these issues in this appeal and we address them no further. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

"Whether counsel was ineffective is a mixed question of fact and law." ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. "The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous; whether counsel's conduct constitutes ineffective assistance is a question of law, which we review" independently. ***State v. Breitzman***, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93. To prove a claim of ineffective assistance of counsel, the defendant must satisfy two tests: first, that counsel's performance was deficient; and second, that counsel's deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "If the defendant fails to satisfy either prong, we need not consider the other." ***Breitzman***, 378 Wis. 2d 431, ¶37.

Based on our examination of the record and the circuit court's findings from the ***Machner*** hearing on the alibi claim, we conclude that trial counsel's performance was not deficient because it was objectively reasonable. "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. "The reasonableness of counsel's conduct must be evaluated 'on the facts of the particular case, viewed as of the time of counsel's conduct.'" ***Balliette***, 336 Wis. 2d 358, ¶23 (quoting ***Strickland***, 466 U.S. at 690).

Here, Green argues that the alibi defense was not investigated, but the record reflects that trial counsel "noted in writing many times that Mr. Green's own statements were not clear as to whether he was in Milwaukee or La Crosse at the time of this shooting." Trial counsel testified that Green presented himself to counsel as a "heavy user [of marijuana]" and stated that he was not at the scene of the shooting, but could not pinpoint his location on May 15. Trial counsel testified that he spoke with Jackson, and found that "he was not helpful," and "was not terribly

willing to come to Milwaukee and testify, and his recollection was poor of something that happened a year ago."

We conclude that Green has not demonstrated that trial counsel's performance was deficient in his investigation of an alibi defense. The record reflects that trial counsel spoke to Green's purported alibi witness and concluded that he was not useful to Green's defense because he could not place Green away from the crime. Although now Green produces affidavits from persons who attest they might provide an alibi, we review trial counsel's conduct based on the facts and circumstances known at the time counsel made his decisions and formed his strategies. *See* ***Balliette***, 336 Wis. 2d 358, ¶23. Working under Green's request for a speedy trial, trial counsel had limited time and the investigations he undertook did not support an alibi defense.[5] We conclude counsel's representation was not deficient. *See* ***Thiel***, 264 Wis. 2d 571, ¶19. Because Green has failed to make a showing of deficient performance, we will not engage in a prejudice analysis. *See* ***Breitzman***, 378 Wis. 2d 431, ¶37.

[5] To the extent that we address the State's arguments with regard to the speedy trial issue within the alibi claim, we conclude that Green's decision to maintain his speedy trial demand should not benefit him on appeal to argue that counsel should have investigated more thoroughly, or should have tried to overrule Green's speedy trial demand. *See* ***State v. Tomlinson***, 2001 WI App 212, ¶36, 247 Wis. 2d 682, 635 N.W.2d 201, *aff'd*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367. The record reflects that trial counsel made an adequate investigation of the evidence available.

Similarly, we reject Green's claim that counsel was ineffective for only offering "five minutes" of preparation before Green testified. The record reflects that trial counsel did not expect Green to testify and counsel did not believe there was any strong alibi evidence. Therefore, counsel's decision not to invest time in preparing Green to testify within the limited timeframe caused by the speedy trial demand was objectively reasonable and did not fall below professionally competent assistance. *See* ***State v. Pico***, 2018 WI 66, ¶28, 382 Wis. 2d 273, 914 N.W.2d 95.

Third party perpetrator defense

Green's second argument on appeal is that the circuit court erred when it denied, without an evidentiary hearing, his ineffectiveness claim based on failing to bring a third-party perpetrator defense, in other words, a defense under ***State v. Denny***, 120 Wis. 2d 614, 623-24, 357 N.W.2d 12 (Ct. App. 1984). To determine whether a defendant is entitled to an evidentiary hearing on a postconviction motion, we engage in a two-step process. *See* ***State v. Jackson***, 2023 WI 3, ¶8, 405 Wis. 2d 458, 983 N.W.2d 608. "First, we assess whether the motion on its face alleges sufficient material and non-conclusory facts that, if true, would entitle the defendant to relief." ***Id.*** "Second, we determine whether the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.***

To succeed on this claim, Green would need to prove that he alleged sufficient material facts in his postconviction motion to prove that there was a legitimate tendency that another person committed this crime by showing a third-person's motive, opportunity, and direct connection to the crime. *See* ***Denny***, 120 Wis. 2d at 623-24. Green would then have to show that trial counsel's performance was deficient for failing to pursue a ***Denny*** defense and that this failure was prejudicial to his defense. *See* ***Strickland***, 466 U.S. at 687.

Here, Green proffered affidavits in support of his alleged third-party perpetrator defense. The evidence is as follows: about five days before the shooting, Green's girlfriend (L.F.), his two sisters (T.H. and J.G.), and J.G.'s then-boyfriend "Tae" were picking up the daughter of T.H. and J.C.N. at the house of J.C.N.'s sister, C.D. There was an altercation. J.G. stated that C.D. broke the rear window of the vehicle with a machete or baseball bat and then Tae shot at J.C.N. with a 9mm firearm. Alternatively, L.F. stated that in the altercation, J.C.N. ran at the car with a

baseball bat, broke the rear window, and then Tae shot at J.C.N. through the broken window. L.F. stated that Tae asked where J.C.N. lived and stated he would kill him whenever he caught him. In further support of this theory, Green relied upon two police reports. First, C.D.'s statement to police at the time her brother was shot that she knew and could identify Green and knew he was not the shooter. Second, a neighbor who went to J.C.N.'s aid after hearing the shots reported that a woman who identified herself as the victim's sister "was upset because she stated that 'this person tried to kill him (victim) last week and the police were not doing their job.'"

Green argues that this evidence satisfies the third-party perpetrator test by showing there was a legitimate tendency that Tae was the actual perpetrator of the shooting of J.C.N. He contends that the altercation at the car involving shots being fired at J.C.N. proves motive. The circuit court and the State both accept that the motive prong could be satisfied with the prior event. Even if we assume without deciding that motive has been shown, Green's argument fails under the analysis of opportunity and direct connection.

Green asserts that the "opportunity for the offense was the fact that the crime took place in public" and any person in that vicinity had the opportunity. The opportunity test "asks whether the alleged third-party perpetrator *could have* committed the crime in question. This often, but not always, amounts to a showing that the defendant was at the crime scene or known to be in the vicinity when the crime was committed." ***State v. Wilson***, 2015 WI 48, ¶65, 362 Wis. 2d 193, 864 N.W.2d 52. Green's claim fails because he does not allege material facts to support that "Tae" was present at the site of the shooting on May 15.

Green's argument for direct connection similarly fails. "The 'legitimate tendency' test asks whether the proferred evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." ***Denny***, 120 Wis. 2d at 624. In support of this prong, Green contends that there was a 9mm firearm involved in both incidents, although he concedes that the shell casings at each incident did not match. Further, Green also posits that evidence of Tae's identity, his picture, and his location information supports a direct connection. We reject Green's argument that this evidence shows a direct connection to Tae as the perpetrator.

We conclude that Green has failed to show that there is a legitimate tendency that a third-party perpetrator committed the shooting.[6] Accordingly, we conclude that Green failed to show that trial counsel was ineffective for not pursuing a ***Denny*** defense. Therefore, the circuit court acted within its discretion when it denied this claim without an evidentiary hearing. *See* ***Jackson***, 405 Wis. 2d 458, ¶8.

[6] We decline to address Green's argument raised within this claim that trial counsel was ineffective for failing to call certain witnesses. Green has not developed an argument to connect the allegedly missing witnesses to his third-party perpetrator defense claim. We will not develop the argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals