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DISTRICT I

May 24, 2022

To:

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Circuit Court Judge
Electronic Notice

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

2021AP672-CR State of Wisconsin v. Malcolm Bernard Hagler
(L.C. # 2019CF2351)

Before Brash, C.J., Dugan and White, JJ.

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).

Malcolm Bernard Hagler, by Attorney Michael S. Holzman, appeals a judgment of conviction and an order denying postconviction relief. A jury found Hagler guilty of false imprisonment, first-degree recklessly endangering safety, and two counts of possessing a firearm while a felon. In postconviction proceedings, Hagler raised claims that he was denied the right to be present for jury selection and that his trial counsel was ineffective in numerous ways. The circuit court rejected those claims, and he renews them in this court. Based upon our review of

the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

H.W. testified at trial that on May 31, 2019, she lived in a Milwaukee apartment with Hagler, who was her boyfriend at that time, and their seven-month-old baby. H.W. testified that when she returned home that night, she argued with Hagler about their child's daycare needs. In response he seized the baby, pointed a gun at H.W.'s head, and ordered her to step away from the entryway door. Hagler next fired a shot that passed close to her ear and penetrated the wall. H.W. testified that she wanted to leave the apartment, but was afraid that Hagler might harm her or the infant. When Hagler fell asleep in the bedroom, H.W. fled with the baby to the home of a friend, where she called the police.

Detective Elgerreith Tucker testified that he interviewed H.W. at her friend's home. After hearing her description of the incident, Tucker went with other officers to H.W.'s apartment. Hagler opened the door and allowed them in. Additional law enforcement officers testified that they searched the apartment, found a handgun on the bedroom floor, and observed a bullet hole in the wall near the front door. The hole was 5' 3" from the floor, the same height as H.W.

The State's witnesses also included a police sergeant who testified that after Hagler was arrested, H.W. again called police to report that she had found another gun in the kitchen. The sergeant said that he returned to H.W.'s apartment to retrieve the second gun. While there, he found a bullet casing in a chair near where H.W. alleged that Hagler was standing when he shot at her. Next, a firearm and tool mark examiner testified that the casing found in H.W.'s apartment

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

was fired from the handgun that police found in H.W.'s bedroom. A DNA analyst testified that a comparison of Hagler's DNA with the DNA mixture found on the trigger of that handgun showed that Hagler was "the major contributor by far."

Hagler stipulated that he was a felon, and he also testified on his own behalf. He admitted that he had handled the guns found in H.W.'s apartment, but he denied that he had done so on May 31, 2019, and he denied firing a gun there. Hagler said that he and H.W. had argued that night because she wanted a romantic relationship with him, but he was involved with another woman. He suggested that H.W. called the police because she was upset that he had rebuffed her.

On cross-examination, Hagler admitted that H.W. had obtained a restraining order against him in September 2018. He acknowledged that the restraining order "would have made it impossible" for H.W. to maintain a romantic relationship with him, but he went on to explain that the restraining order was dismissed in early October 2018. The circuit court subsequently instructed the jurors that it had taken judicial notice of certain facts and that the jurors should therefore accept as true both that H.W. had obtained a temporary restraining order against Hagler and that it was dismissed in October 2018.

Hagler did not prevail at trial, and he moved for postconviction relief. He claimed that the circuit court denied him the right to be present during jury selection and that his trial counsel was ineffective for failing to object. Hagler also claimed that his trial counsel was ineffective for failing to: (1) impeach Tucker with evidence that in 2009, he was disciplined by the Milwaukee Police Department for violating department rules and procedures; (2) present testimony from four of H.W.'s neighbors who, according to police reports, did not hear a gunshot on May 31, 2019; or (3) object to evidence regarding the temporary restraining order.

The circuit court denied the majority of Hagler's claims without a hearing. The circuit court determined, however, that the trial transcripts did not definitively resolve whether or not Hagler remained in the courtroom throughout jury selection and granted him a hearing on his claim that he was not present.

At the hearing, Hagler testified that two bailiffs inexplicably removed him from the courtroom near the end of *voir dire* while the judge was conferring with counsel in chambers regarding the jurors who should be removed from the panel for cause. Hagler described how the bailiffs each took him by an arm and, without handcuffing him, walked him past the jury pool and out of the courtroom with his arms spread out in front of him. Hagler said that he remained in a holding cell while counsel and the circuit court returned to the courtroom and the lawyers completed jury selection by making peremptory challenges.

Hagler offered varied descriptions of precisely what he recalled regarding the jury selection process and its aftermath. He testified that he "never spoke to [trial counsel] about jurors," never communicated with his trial counsel during *voir dire* and never "nudge[d]" trial counsel or passed counsel a note. Hagler then went on to testify about his exchange with trial counsel regarding which jurors to keep on the panel and about trial counsel's cautioning him that he "can't really do any more nudges. The judge doesn't like that." Hagler also testified that he was unaware that jury selection was completed after the bailiffs removed him from the courtroom, but he then testified that when he returned to court the next day, the first thing he said to his trial counsel was "I thought I was going to pick my jury." Eventually, Hagler interrupted his cross-examination to assert that the State was "trying to confuse" him and "it works."

Trial counsel also testified. He said that he did not specifically recall the jury selection in Hagler's case, but that he had conducted "hundreds" of jury trials and that his client was always next to him while making peremptory challenges. Trial counsel said that he would remember if Hagler had not been present for those challenges in his case and that his absence would have been "so extraordinary" that counsel would have requested a sidebar conference and demanded that Hagler be produced.

The State presented testimony from the two bailiffs who provided security for Hagler's trial. Both said that they did not and would not remove a defendant in custody from the courtroom while the jury was present. One of the bailiffs described the mechanics of removing such a defendant and explained that the sheriff's policy is to place the inmate in handcuffs before removal. The bailiff said that he had never failed to follow that policy. Last, the State played recordings of telephone calls that Hagler made from jail on the evening of jury selection. In those calls, he lamented that the jury was "all white."

Following the hearing, the circuit court ruled from the bench, finding that Hagler's testimony was "contrived," "evasive," and "painfully incredible," and that the evidence defeated any claim that Hagler was denied the right to be present for jury selection. Hagler appeals.

We first consider Hagler's claim that he was denied the right to be present during jury selection for the exercise of peremptory challenges and his related claim that his trial counsel was ineffective for failing to object to the denial of that right. Criminal defendants have a constitutional and a statutory right to be present for *voir dire*. *See* ***State v. Tulley***, 2001 WI App 236, ¶6, 248 Wis. 2d 505, 635 N.W.2d 807. When we review a circuit court's decision addressing a claimed violation of those rights, we uphold the circuit court's findings of fact unless they are clearly

erroneous. *See* ***State v. David J.K.***, 190 Wis. 2d 726, 737-38, 528 N.W.2d 434 (Ct. App. 1994). Further, "[t]he determination of credibility, including the defendant's credibility, is exclusively for the trier of fact." ***Id.*** at 738. Whether the facts satisfy constitutional and statutory standards is a question of law that we review *de novo*. *See* ***State v. Gribble***, 2001 WI App 227, ¶13, 248 Wis. 2d 409, 636 N.W.2d 488.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). These inquiries present additional mixed questions of fact and law. *See* ***State v. Reinwand***, 2019 WI 25, ¶18, 385 Wis. 2d 700, 924 N.W.2d 184. We "uphold a circuit court's factual findings unless they are clearly erroneous. However, whether counsel's performance was deficient and whether a defendant was prejudiced thereby, present questions of law that we review independently." ***Id.*** (citations omitted). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***Strickland***, 466 U.S. at 688. To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. *See* ***id.*** at 697.

Hagler claims in this court, as he claimed in postconviction proceedings, that bailiffs removed him from the courtroom before the parties made their peremptory strikes, and thus, he lost the right to participate in that aspect of jury selection. The circuit court, however, flatly rejected his testimony as "painfully incredible." The circuit court's credibility determination is fully supported by the record. Hagler gave inconsistent responses during the postconviction

hearing and offered different answers to the same question. Further, as the circuit court observed, Hagler claimed in postconviction proceedings that he was "shocked" when he was brought to a holding cell before the parties completed jury selection, but when he returned to court the day after the jury was chosen, he failed to draw the court's attention to his alleged absence from the jury selection process although "[h]e had the ability to" do so.[2]

Conversely, the circuit court credited the testimony of Hagler's trial counsel, who said that in every one of the hundreds of jury trials that counsel had conducted, the defendant was present for jury selection and that counsel would recall the "extraordinary" absence of the defendant during jury selection if that had occurred. The circuit court similarly believed the testimony of the bailiffs, finding that they would have handcuffed Hagler "for everyone's safety and security, including Mr. Hagler's" before he was taken from the courtroom during a trial, and that the bailiffs would not have risked causing a mistrial by moving him in restraints in the presence of jurors.

The circuit court also considered the telephone calls that Hagler placed from jail immediately following the jury selection, and the circuit court emphasized that Hagler told multiple people in separate telephone calls that he had an "all white" jury. The circuit court then found that Hagler "was perfectly aware of ... who was being selected for jury service because he was discussing it in these two telephone calls." Ultimately, the circuit court concluded that "Hagler

[2] The trial transcript reflects that when court proceedings reconvened on the morning after jury selection, defense counsel advised the circuit court that Hagler had "concerns over proceeding to trial" with his current lawyer. The circuit court asked Hagler to describe those concerns. He responded that late the previous night he had begun to worry about the discovery materials, and he went on to allege that his trial counsel had not spent sufficient time with him in preparation for trial. The circuit court determined that no relief was warranted and that the trial underway would continue.

was present during the whole large jury pool selection. He was never removed from the courtroom ... and he was there for the peremptory strikes in this case."

In light of the foregoing, we reject the claim that Hagler was denied the right to be present while the parties made peremptory strikes and the related claim that this trial counsel erred by failing to object to Hagler's absence. The circuit court found that Hagler was present and that finding is not clearly erroneous. His claims therefore fail.

Hagler also suggests that he was wrongly excluded from the conference in chambers during which counsel and the circuit court discussed striking certain jurors from the panel for cause. Again, we reject the claim. Our supreme court has held that "'there is no constitutional right for a defendant to be present at a conference in chambers concerning dismissal of a juror.' All that the Constitution requires at such a conference is the presence of defense counsel." ***State v. Alexander***, 2013 WI 70, ¶29, 349 Wis. 2d 327, 833 N.W.2d 126 (citations omitted). The ***Alexander*** court further determined that a defendant's presence in chambers is necessary only "to the extent a fair and just hearing would be thwarted by his absence." *See* ***id.*** at ¶30 (citations omitted). Hagler did not offer any evidence either that his presence in chambers was necessary to assist in the determination of whether to strike jurors for cause or that his trial counsel's presence was insufficient to protect his rights. Because Hagler has not demonstrated that his absence from the conference in chambers deprived him of a fair and just hearing, he has failed to demonstrate that the procedure entitles him to any relief. *See* ***id.***, ¶32.

We turn to Hagler's remaining claims of ineffective assistance of trial counsel. We begin with the allegation that trial counsel was ineffective for not seeking to challenge Tucker's credibility by offering evidence that in July 2009, Tucker was disciplined for neglecting to secure

police department equipment while he was off duty and then being untruthful about that behavior. Counsel's failure to pursue a particular challenge is not a deficiency, however, if the defendant cannot establish that the challenge would have succeeded. *See* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369. That principle defeats Hagler's claim, because the circuit court concluded that it would have excluded the proposed evidence if trial counsel had offered it.

Circuit courts have broad discretion to admit or exclude evidence. *See* ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We uphold such discretionary determinations so long as they were made "in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850 (citation omitted).

Here, the circuit court advised in the postconviction proceedings that it had reviewed a decision entered in another case by a fellow circuit court judge who had recently considered whether to permit Tucker's 2009 disciplinary history as impeachment evidence. That judge, the circuit court explained, had found the impeachment evidence inadmissible because its relevancy was diminished by its context and remoteness in time and was substantially outweighed by other considerations, including distraction of the jury and waste of time. The circuit court then determined that it would have made the same findings and would have barred the disciplinary history for the same reasons.

We conclude that the circuit court conducted an appropriate analysis. Evidence that is relevant and therefore admissible under WIS. STAT. § 904.02 may nonetheless be excluded if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time,

or needless presentation of cumulative evidence." *See* WIS. STAT. § 904.03. This balancing of considerations rests in the circuit court court's discretion. *See* ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 Wis. 2d 225 (1979). The circuit court concluded here that the minimal relevance of Tucker's disciplinary history from more than a decade earlier was substantially outweighed by the potential to waste time and confuse the issues at trial with extraneous information regarding an internal police department investigation. The circuit court's analysis reflects a reasonable application of the facts to the relevant legal standards. *See* ***State v. Olson***, 179 Wis. 2d 715, 724-25, 508 N.W.2d 616 (Ct. App. 1993) (explaining that a court may place limits on inquiries into matters impacting the credibility of a prosecution witness, particularly "where the attack on credibility is based on prior alleged false allegations as opposed to a more particular attack on credibility aimed toward revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand").

Hagler nonetheless contends that the detective's disciplinary history would have been admissible under WIS. STAT. § 906.08(2), which provides in pertinent part that specific instances of conduct may, "if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness[.]" The statute does not aid him. The circuit court determined that the disciplinary history was remote in time, and that determination was reasonable. The conduct at issue occurred more than ten years before the start of Hagler's trial. Our supreme court concluded that prior incidents of conduct were "certainly" remote when they were separated from the charged crime by more than one year. *See* ***State v. Sonnenberg***, 117 Wis. 2d 159, 170, 344 N.W.2d 95 (1984).

In sum, the postconviction proceedings show that the circuit court would have properly excluded evidence of Tucker's disciplinary history if Hager's trial counsel had sought to use it to

challenge Tucker's credibility. Hagler therefore fails to show that his trial counsel performed deficiently for not seeking to do so. *See* ***Ziebart***, 268 Wis. 2d 468, ¶14. Accordingly, his trial counsel was not ineffective in regard to this issue.

Hagler next contends that his trial counsel was ineffective for failing to subpoena H.W.'s neighbors to testify at trial that they did not hear gunfire on the night of the incident. Pointing to information reflected in police reports, Hagler asserts that four neighbors "were present in nearby apartments in the same building [but] none of them heard a shot."

We conclude that Hagler again fails to demonstrate that his trial counsel performed deficiently. When a defendant contends that trial counsel performed deficiently for not presenting witnesses, the defendant's postconviction motion must allege sufficient material facts that the defendant can prove to support the claim. *See* ***State v. Allen***, 2004 WI 106, ¶¶23-24, 274 Wis. 2d 568, 682 N.W.2d 433. Hagler's postconviction motion, however, did not show that H.W.'s neighbors were available or willing to testify at trial, nor did the motion show that trial counsel neglected to make reasonable efforts towards finding those witnesses and ascertaining the testimony that they would give under oath. *See* ***Strickland***, 466 U.S. at 691 (holding that trial counsel has a duty to make either a reasonable investigation or a reasonable decision that an investigation is unnecessary); *see also* ***Jandrt v. State***, 43 Wis. 2d 497, 506, 168 N.W.2d 602 (1969) (explaining that any conclusion that witnesses did not testify due to counsel's incompetency is mere speculation when the record does not show, among other matters, that the witnesses were available and would have supported the defendant's position). Because Hagler did not allege sufficient material facts demonstrating that his trial counsel performed deficiently, the circuit court properly denied his claim that trial counsel was ineffective in this regard.

Hagler next claims that his trial counsel was ineffective for failing to object to evidence that he was briefly the subject of a restraining order that H.W. obtained. Hagler contends that this constituted evidence of other crimes, wrongs or acts. *See* WIS. STAT. § 904.04(2). Such evidence is admissible if the circuit court concludes that the evidence: (1) is offered for a proper purpose; (2) is relevant; and (3) has probative value that is not substantially outweighed by the danger of unfair prejudice or by other concerns set out in WIS. STAT. § 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). Hagler argues here that the evidence does not satisfy each step of the ***Sullivan*** analysis and would therefore have been excluded if his trial counsel had mounted an objection.

When reviewing a claim of ineffective assistance of counsel, we need not consider whether trial counsel performed deficiently if we conclude that the defendant failed to demonstrate prejudice from the alleged deficiency. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). We reach that conclusion here and agree with the circuit court's determination that "there is no reasonable possibility that [evidence of the restraining order] contributed in any significant way to [Hagler's] conviction" given the overwhelming evidence against him. As reflected in this opinion, that evidence included: H.W.'s testimony that Hagler fired a gun at her head; a bullet hole found in H.W.'s apartment piercing the wall at the height of H.W.'s head; a bullet casing found where H.W. said the shooting occurred; expert testimony that the gun found when Hagler was arrested was directly related to that fired casing; expert testimony that Hagler's DNA was on the trigger of that gun; and Hagler's admissions that he was a felon and had handled both guns found in the apartment. Accordingly, we conclude that no reasonable probability exists that the outcome of the trial would have been different if Hagler's trial counsel had objected to

evidence that Hagler was briefly the subject of a restraining order.[3] *See* ***State v. Sholar***, 2018 WI 53, ¶43, 381 Wis. 2d 560, 912 N.W.2d 89 (concluding that the defendant did not show prejudice from counsel's alleged deficiency in failing to object to certain evidence where the State presented consistent testimony from witnesses and the physical and forensic evidence all reinforced the State's case).

Finally, Hagler alleges that he is entitled to relief because he suffered cumulative prejudice from his trial counsel's errors and omissions. Before we may reach such a conclusion, we must determine that the effect of multiple deficiencies prejudiced Hagler and undermined confidence in the outcome of his trial. *See* ***State v. Thiel***, 2003 WI 111, ¶58, 264 Wis. 2d 571, 665 N.W.2d 305. Here, however, we have determined that trial counsel did not perform deficiently in regard to Hagler's allegations regarding jury selection, impeachment, and the production of witnesses, and that Hagler was not prejudiced by the only other alleged deficiency, namely, the omission of an objection to evidence about a restraining order. Accordingly, we do not have multiple deficiencies to aggregate for cumulative impact. *See* ***id.***, ¶61. For all the foregoing reasons, we affirm.

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

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

Sheila T. Reiff
Clerk of Court of Appeals

[3] Hagler states that the evidence of a restraining order prejudiced him because the jury learned that he had "harassed H.W. in the past" and therefore was a "bad man." We are unable to identify a place in the record where the jury learned that Hagler harassed H.W. To the contrary, the record does not include any information about the facts underlying the restraining order or why it was issued. Regardless, the evidence of a restraining order was insignificant in light of the other evidence against Hagler.