



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 2, 2023

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

2022AP1043-CR

State of Wisconsin v. Michael G. Davis (L.C. # 2017CF5276)

Before Brash, C.J., Donald, P.J., and White, 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).

Michael G. Davis appeals his judgment of conviction for attempted first-degree intentional homicide using a dangerous weapon. He also appeals the order denying his postconviction motion, in which he alleged that his trial counsel was ineffective for failing to call two alibi witnesses. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21(1) (2021-22).¹ We summarily affirm.

The charge against Davis stems from the shooting of T.S. in October 2017, which occurred at approximately 11:40 a.m. T.S. told police that Davis was the shooter; he said he had met Davis several months prior to the shooting, and had bought marijuana from him. On the day of the shooting, T.S. said that he was with a group of people, which included Davis, outside of a residence located at 44th and Center Streets in Milwaukee. T.S. stated that he and Davis got into a disagreement, and that Davis took a gun from someone else in the group and started shooting at him. T.S. ran into an alley, and at one point tried to wrestle the gun away from Davis. T.S. said that Davis shot him in the hip and leg; T.S. fell, and Davis then stood over him and “kept pulling the trigger until the gun clicked empty.”

T.S. was shot a total of six times; he had gunshot wounds to his left hip, lower right leg, and shoulder, along with two graze wounds to his back and one graze wound to his head. The police also discovered surveillance video which had captured the incident, and reflected T.S.’s version of events.

The matter proceeded to trial in March 2018, and the jury convicted Davis as charged. He was sentenced to twenty-seven years of initial confinement to be followed by thirteen years of extended supervision.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Davis subsequently filed a postconviction motion claiming that his trial counsel was ineffective for failing to call two alibi witnesses, Allie Strichlin and Marcus Lewis, who would have testified that he was with them at the time of the shooting. Based on that alleged error, he sought a new trial in the interests of justice.

A *Machner*² hearing was held in March 2022. Davis’s trial counsel, Attorney Kerri Cleghorn, testified that she had taken over representation of Davis after his first attorney had to withdraw for health reasons after the trial had begun. Attorney Cleghorn stated that Davis had told her he still wanted to go forward with the proceedings pursuant to his speedy trial request. She also said that she had asked Davis whether there were any witnesses who could testify in his defense, and Davis had stated that “he didn’t want to bring anybody else into it.” In contrast, Davis testified that he told Cleghorn about Strichlin and Lewis and believed that an investigator was sent to talk to them, and that they would be subpoenaed.

Strichlin and Lewis also testified at the hearing. They both stated that Davis was with them all day on the day of the shooting. They also both said that Davis had gone with them to look at apartments in the morning, and that they had stopped at a liquor store on the way home. However, Lewis testified that after going to the liquor store, they had stopped at a house at 44th and Center Streets just before noon—right around the time of the shooting. Lewis stated that he stayed in the car while Davis got out and went into the house, but that Davis “came right back out.” Lewis testified that he did not hear gunshots, and that he did not know that was the location of the shooting. When Davis testified, he admitted that he had not told police about

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

stopping at the residence where the shooting took place, but maintained that he was not there when it occurred.

The circuit court found Attorney Cleghorn to be more credible than Davis with regard to their conversations about the alibi witnesses. The court also pointed out that neither Attorney Cleghorn nor Davis's previous counsel had filed a notice of alibi or included Strichlin and Lewis on their witness lists, observing that the trial had been under way with Davis's first attorney without those witnesses. The court further noted that Lewis's testimony placed Davis at the scene "at or near the time of the offense." As such, the court found that Attorney Cleghorn was not deficient for failing to call Strichlin and Lewis, and further, that even if it was error, Davis was not prejudiced by it. The court therefore denied Davis's motion. Davis appeals.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his lawyer performed deficiently and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court may reject a claim of ineffective assistance of counsel on either ground. *Id.* at 697. Whether counsel's performance was deficient and whether the defendant was prejudiced are questions of law that we review *de novo*. *State v. Roberson*, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111.

To demonstrate deficient performance, the defendant must show that trial counsel's representation fell below objective standards of reasonableness. *See State v. McDougle*, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. To demonstrate prejudice, the defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. However, a defendant "cannot meet this burden by simply showing that an error had some conceivable effect on the outcome." *State v.*

Koller, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838. Rather, establishing prejudice “means showing that counsel’s alleged errors actually had some adverse effect on the defense.”

Id.

Here, the circuit court found Attorney Cleghorn’s testimony—that Davis wanted to maintain his speedy trial request and not involve any witnesses—was more credible than Davis’s testimony that he wanted the witnesses called. For purposes of a *Machner* hearing, the circuit court “may weigh the credibility of the witnesses, including trial counsel, in assessing the deficiency and reasonableness of the trial counsel’s performance.” *State v. Jenkins*, 2014 WI 59, ¶64 n.31, 355 Wis. 2d 180, 848 N.W.2d 786 (emphasis omitted). We will not disturb the credibility determinations or factual findings of the circuit court unless they are clearly erroneous. *See State v. Jenkins*, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24.

Trial counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. The reasonableness of that decision “may be determined or substantially influenced by the defendant’s own statements or actions.” *Id.* This is assessed through an “inquiry into counsel’s conversations with the defendant,” which may reflect the need for investigation to have been “considerably diminished or eliminated altogether,” and counsel’s decisions based on that information “may not later be challenged as unreasonable.” *Id.* Based on the factual findings and credibility determinations by the circuit court, which are supported by the record, we conclude that Attorney Cleghorn was not deficient in not investigating the alibi witnesses.

Furthermore, Davis has not demonstrated that he was prejudiced by the failure to call these witnesses, as one of them puts him at the scene around the time the shooting occurred.

Therefore, Davis has not shown that the alleged error of failing to call these witnesses would have affected the outcome of the trial. *See Koller*, 248 Wis. 2d 259, ¶9.

As a result, Davis’s ineffective assistance of counsel claim fails. Given that conclusion, we also reject Davis’s claim that he is entitled to a new trial in the interests of justice. Our discretionary reversal power is “formidable,” and should be “exercised sparingly and with great caution.” *State v. Watkins*, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244. We decline to apply it here.

Accordingly, we affirm Davis’s judgment of conviction, and the circuit court’s order denying his postconviction motion.

Therefore, upon the foregoing,

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.

Sheila T. Reiff
Clerk of Court of Appeals