COURT OF APPEALS DECISION DATED AND FILED

November 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-0094

Cir. Ct. No. 91CF912153

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRIS LAMAR CRITTENDON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Chris Lamar Crittendon appeals from the trial court's denial of his motion for postconviction relief under WIS. STAT. § 974.06 (2001-02).[1] He contends that his postconviction counsel was ineffective for

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

failing to argue that trial counsel was ineffective for failing to object: (1) when the trial court excluded his friends and family members, except his mother, from the trial proceedings; and (2) to the admission of evidence of his gang involvement. He also argues that the trial court erred when it denied his postconviction motion without a hearing. Because Crittendon has failed to establish that he received ineffective assistance of counsel, we affirm.

I. BACKGROUND.

¶2 In 1992, Crittendon and a co-defendant were tried for the shooting death of David Robinson, III. During the trial, the State asked that members of the defendants' families be excluded from the courtroom because some of the witnesses were afraid to testify in their presence. The prosecutor stated that some of the witnesses had received threats, including death threats. The prosecutor also said that he had subpoenaed eight to ten witnesses for the preliminary hearing, but none of them had appeared due to fear of testifying in the presence of the defendants' family members or friends. The court then excluded friends and family members of the defendants, except for their parents, during the testimony of certain witnesses. Defense counsel did not object to this decision.

¶3 During the course of the trial, many witnesses testified about what they saw the night of the shooting. At least seven of the witnesses testified that they saw Crittendon shoot in David Robinson's direction or "shoot Robinson." Several witnesses also testified in regard to gang-related matters. That testimony, however, was elicited by defense counsel.

¶4 The jury found Crittendon guilty of first-degree intentional homicide, party to a crime. He appealed his conviction, alleging that the trial court deprived him of his right to a fair trial by excluding members of his family

and friends from the trial proceedings, and that there was insufficient evidence to support the conviction. We affirmed the conviction, concluding that Crittendon waived any allegation of trial court error in regard to the exclusion of his friends and family from the courtroom by failing to object at trial and that there was more than sufficient evidence from which the jury could find that Crittendon committed the crime with which he was charged. ***State v. Crittendon***, No. 98-1460-CR, unpublished slip op. (Wis. Ct. App. Oct. 5, 1999).

¶5 On December 4, 2003, Crittendon filed a motion for postconviction relief under WIS. STAT. § 974.06 alleging that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective for failing to object to: (1) "an open trial violation," allegedly resulting from the exclusion of his family members from portions of the proceedings; and (2) "prejudicial hearsay insinuations regarding gang affiliation," specifically to the testimony of Torina Taylor, and to "gang insinuations" allegedly made by the prosecutor during closing arguments. He also requested an evidentiary hearing "to review the issue of ineffective assistance of counsel on appeal."

¶6 The trial court denied the motion without holding an evidentiary hearing. It found that Crittendon was not prejudiced by trial counsel's failure to object to the exclusion of the defendant's family members during the trial proceedings. The trial court found that, based upon the prosecutor's representations that some of the witnesses received death threats, witnesses who received these threats did not appear at the preliminary hearing, and none of the witnesses were likely to appear if the defendant's friends and family members were present, "there is not a reasonable probability that [the trial court] would have overruled the objection had trial counsel objected."

¶7 The trial court further found that Crittendon's argument that trial counsel should have objected to witness Torina Taylor's reference to gang members and to the State's reference to gang members was unsupported by the record. It explained that Taylor was a defense witness, and it was defense counsel who asked about gang parlance, not the State. It also noted that the State made no references to gang members in its closing argument, and that it was defense counsel who raised the issue in both opening and closing arguments. Furthermore, the trial court found that given the testimony of seven witnesses who saw Crittendon shoot or shoot towards Robinson, there is not a reasonable probability that any references made to the gang ties undermined confidence in the outcome. Crittendon now appeals.

II. ANALYSIS.

¶8 Crittendon argues that the trial court erred in denying his postconviction motion without a hearing. He insists that trial counsel was ineffective for failing to object to the trial court's exclusion of his family members from portions of the trial proceedings and for failing to argue that evidence related to gang membership should not have been admitted. He contends that but for trial counsel's failure to object to the exclusion of his friends and family, the result of the proceeding would have been different: "[b]ut for this sub-standard error, the results of the proceeding would probably have been different, and [he] would not have been convicted, as the prejudicial effect of having no family present could not have been missed by the jury." He also insists that the evidence relating to gang membership was improperly admitted "other acts" evidence, and his trial counsel was therefore ineffective for failing to object to its admission. We are unpersuaded.

¶9 Under ***Strickland v. Washington***, 466 U.S. 668 (1984), in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced as a result of this deficient conduct. *See* ***id.*** at 687; *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors were so serious that the result of the proceeding was unreliable. ***Id.*** at 687.

¶10 Both prongs of the ***Strickland*** test involve mixed questions of law and fact. ***Pitsch***, 124 Wis. 2d at 633-34. "'An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and the counsel's conduct and strategy unless the findings are clearly erroneous.'" ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (citation omitted). However, "[t]he questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the [trial] court." ***Pitsch***, 124 Wis. 2d at 634. Finally, if the defendant fails to meet either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. ***Strickland***, 466 U.S. at 697.

¶11 Moreover, a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). In fact, an evidentiary hearing is required only if the motion alleges facts which, if proven, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). "If the motion on its face alleges facts [that] would entitle the defendant to relief, the [trial] court has

no discretion and must hold an evidentiary hearing." ***Id.*** As such, "[w]hether a motion alleges facts [that], if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** "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 [trial] court has the discretion to grant or deny a hearing." ***State v. Allen***, 2004 WI 106, ¶9, __ Wis. 2d __ , 682 N.W.2d 433. In such a case, the trial court's exercise of discretion is reviewed under the deferential erroneous exercise of discretion standard. ***Id.***

¶12 Crittendon insists that his postconviction counsel was ineffective for failing to argue that his trial counsel was ineffective for failing to raise an objection when the trial court excluded members of his family from portions of the trial proceedings. In his direct appeal, postconviction counsel attempted to argue that Crittendon was denied a fair trial. We concluded, however, that Crittendon waived this alleged error by failing to object during the trial. *See* ***Crittendon***, No. 98-1460-CR, unpublished slip op. at 3. Crittendon now argues that "[i]n light of the Appellate Court's ruling on this issue, it is clear that but for this error by the post-conviction counsel, the result of the proceeding would have been different." We are unpersuaded.

¶13 In his brief, Crittendon asserts that trial counsel was ineffective for failing to object, that postconviction counsel was ineffective for failing to argue that trial counsel was thus ineffective, and that but for these errors "the result of the proceedings" would have been different, but he fails to explain why or how. He fails to provide any legal or factual support for his contention indicating that had trial counsel objected, the result of the trial would have been different. He merely contends, in a conclusory manner, that but for counsel's "sub-standard

error," he would not have been convicted, "as the prejudicial effect of having no family present could not have been missed by the jury." In denying his motion for postconviction relief, the trial court held:

> [T]his court finds that the defendant was not prejudiced by counsel's failure to object to the exclusion of family members and friends during the trial proceedings. Based on the prosecutor's representations that some of the witnesses had received death threats; that none of the witnesses who saw the shooting appeared at the preliminary hearing due to these threats and because of fright; and that none of the witnesses were likely to appear if members of the defendant's family were present in the courtroom while they testified, there is not a reasonable probability that [the trial court] would have [sustained][2] the objection had trial counsel objected.

(Footnote added.) Crittendon provides us with no basis to conclude otherwise. The failure to raise an objection that would have been unsuccessful does not prejudice the defendant. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994). For these reasons, we cannot conclude that Crittendon received ineffective assistance of counsel in this regard.

¶14 In considering his contention that the evidence relating to gang membership was improperly admitted as "other acts" evidence, we are concerned with Crittendon's characterization of the record. In his brief, he contends:

> In the present case, evidence was admitted regarding Crittendon's involvement with a gang, from both a witness, Torina Taylor, and the prosecution. The only reason that this evidence was introduced [was] solely for the purpose of showing that Crittendon had the character to commit the instant offenses and that he acted in conformity

[2] Although the trial court's order used the word "overruled" instead of "sustained," it is clear from the context that the trial court had intended to use "sustained," or something similar, and that this was an inadvertent error. Moreover, neither party takes issue with the typographical mistake.

> with that character. This is not a permissible reason for the introduction of other acts evidence under either Wisconsin law or federal law, and it prejudiced Crittendon to the point that he did not receive a fair trial. Therefore, the other acts evidence should not have been admitted, and its admission constituted a violation of Crittendon's due process rights.
>
> In denying this argument, the circuit court noted that the gang evidence was unlikely to have undermined confidence of Crittendon's trial, as "seven witnesses saw the [Defendant-Appellant] shoot Robinson or shoot towards Robinson." If the instant matter is so clear cut, then why the need for irrelevant and prejudicial evidence related to gang affiliation? Clearly, the evidence was not so overwhelming as portrayed by the circuit court as to discount the effect of the evidence at issue, otherwise, the prosecution would not have even bothered with painting Crittendon as a gang member.

(Record citations omitted.) As indicated by the trial court, quite to the contrary of Crittendon's representations, it was defense counsel who pursued the gang-related evidence during the trial. Torina Taylor was a defense witness, and it was defense counsel who questioned her about the significance of a term in gang parlance. It was the defense, not the prosecution, who made gang references in opening and closing arguments. Indeed, it appears from the record that it was the strategy of defense counsel to raise gang-related matters in an attempt to discredit the testimony of several witnesses.

¶15 Although he somewhat acknowledges this in his reply, he continues to insist that "[r]egardless of who introduced the evidence of prior bad acts, the evidence must comport with the requirements of admissibility as put forth in ***State v. Sullivan***, 216 Wis.[ ]2d 768, 772-773, 576 N.W.2d 30 (1998)[,]" and contends that "trial counsel was ineffective for introducing both prejudicial and inadmissible evidence." He argues that "the jury heard evidence of his gang membership, which makes it much easier to convict an individual even without evidence supporting the charged crimes." However, even setting aside the issues

of defense strategy and who introduced the evidence, in regard to characterizing the gang references as "other acts" evidence, Crittendon fails to explain exactly how any of the testimony constitutes "other acts" evidence. He does not tell us what was said, much less point to any prior bad acts, wrongs, or crimes that were supposedly introduced into evidence. Merely referencing unspecified testimony and alleging, in a conclusory manner, that it was introduced "solely for the purpose of showing that Crittendon had the character to commit the instant offenses and that he acted in conformity with that character" does not establish a viable argument. As such, we cannot conclude that trial counsel was ineffective in this regard.

¶16 Furthermore, the trial court properly denied Crittendon's motion without a hearing. In requesting a hearing, Crittendon failed to provide sufficient facts that, if proven true, would entitle him to relief. Indeed, in requesting a hearing he merely stated: "In the instant case, Petitioner asserts that a due process violation occurred when his post-conviction attorney failed to raise two key issues. Therefore, the Petitioner requests an evidentiary hearing to review the issue of ineffective assistance of counsel on appeal." It is apparent that the trial court determined that the record conclusively demonstrates that Crittendon is not entitled to relief, and it did not erroneously exercise its discretion in doing so. The record conclusively demonstrates that Crittendon was not denied the effective assistance of postconviction counsel. For all of these reasons, we affirm.

By the Court.—Order affirmed.

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