COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1914 **Cir. Ct. No. 2002CF5399**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE D. WELCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge.[1] *Affirmed*.

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

[1] The Honorable John A. Franke heard the motions *in limine* and presided over the jury trial, sentencing, and the first postconviction motion. The Honorable Jeffrey A. Wagner presided over the *pro se* postconviction motion filed after the affirmance of Welch's direct appeal.

¶1 CURLEY, P.J. Andre D. Welch, *pro se*, appeals from the order denying his WIS. STAT. § 974.06 postconviction motion. Welch contends that his postconviction attorney was ineffective for failing to raise the ineffectiveness of his trial attorney when: (1) his trial attorney never raised Welch's constitutional right to notice when the State filed an amended information in Welch's absence and without, apparently, first seeking leave of the court; (2) his trial attorney did not object to the use of hearsay evidence at trial; and (3) his trial attorney failed to interview and call additional witnesses at trial.

¶2 Because Welch was not prejudiced by the amended information, no improper hearsay was admitted at trial, and the testimony of the missing witnesses Welch wanted would not have resulted in a reasonable probability of a different outcome, postconviction counsel was not ineffective for failing to include these claims against Welch's trial attorney in the direct appeal. Consequently, we affirm.

I. BACKGROUND.

¶3 Originally, Welch was charged with first-degree reckless homicide with the use of a dangerous weapon as a result of an incident that occurred on September 2, 2002, at about 1:00 a.m. According to the testimony of several witnesses at trial, Welch approached a house from a side yard where the victim, Robert Lamon, and several other men were conversing on the porch and the steps. An argument ensued between Welch and Lamon, and Welch, who was armed with a gun, shot Lamon in the chest. Welch then left, taking his gun with him. Lamon was pronounced dead at the hospital. Welch was not immediately apprehended.

¶4 Another witness at trial, Alvin Ford, an old friend of Welch's, testified that he received a phone call from a woman several days after the

shooting, asking him to pick up Welch because Welch was in trouble, which he did. Ford claimed that during the ride, Welch confessed to the shooting:

> A. He told me he got into it with somebody, that he had robbed somebody and that he was over there into it with him and they got into it and he pulled out a gun and shot him.
>
> Q. Did he tell you who the person was that he shot?
>
> A. Some young dude that he robbed before. I ain't [sic] know him.

Ford stated that once they arrived in Racine, he took Welch to the home of Chris Calge. Calge told the police that Welch was never at her home on the day in question. When Calge could not be located at the time of the trial, Welch's attorney sought an adjournment. The State offered to stipulate to the admission of her statement denying that Welch had been at her home on the day in question. Although this information came before the jury, Welch's trial attorney failed to move the admission of the police report. Ford also revealed at trial that in exchange for his testimony, the State contacted the State of Louisiana and secured a promise from it that it would not extradite him for a pending criminal charge.

¶5 Shortly after Welch was arrested, approximately two and one-half months after the shooting, he filed a motion seeking a speedy trial. After a preliminary hearing was held and Welch was bound over for trial, the trial court scheduled a final pretrial. The final pretrial was held two weeks before the scheduled jury trial date. Present at this hearing were the trial court, the prosecuting attorney, and Welch's attorney. Welch was not present. The judgment roll reflects that an amended information was filed; however, there is no transcript of this transaction indicating whether the State sought and obtained the trial court's leave before filing the amended information because it was done off

the record. The amended information charged Welch with first-degree intentional homicide with the use of a dangerous weapon, a class A felony which requires life imprisonment if convicted. *See* WIS. STAT. §§ 940.01(1)(a) & 939.63(1)(a)2. (2001-02).[2]

¶6 On the date the jury trial was to begin, the trial court heard the pretrial motions filed by both the State and Welch. With regard to a motion *in limine* brought by Welch's counsel, the trial court ruled that the State could introduce Welch's statements to others and statements made by both Welch and Lamon at the time of the fatal argument, but the trial court prohibited the State from introducing statements made by Lamon to others outside the presence of Welch.

¶7 Various witnesses testified for the State and the defense. Welch claims that the questioning of several witnesses, Larry Moore, Ford, and Detective Gastrow,[3] violated the trial court's pretrial order. He also claims that the prosecutor violated it in his opening statement. The jury found Welch guilty of first-degree intentional homicide with use of a dangerous weapon, and he was sentenced to life imprisonment with an eligibility date for extended supervision of January 20, 2043. Following sentencing, Welch was assigned an attorney for postconviction purposes. Welch's new attorney filed a postconviction motion claiming Welch's trial counsel was ineffective for failing to introduce Cagle's statement given to the police that Welch never came to her house on the date that

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] Welch's brief actually references testimony from Detective Steven Caballero, who spoke to Ford.

Ford claimed Welch confessed en route to her home. The trial court denied the motion. In Welch's direct appeal, *see* ***State v. Welch***, No. 2004AP3216-CR, unpublished slip op. (WI App Jan. 31, 2006), this court affirmed, finding that trial counsel made a strategic decision not to introduce the statement as evidence.[4] Welch, then acting *pro se*, brought a postconviction motion pursuant to WIS. STAT. § 974.06. In a written decision, the motion was denied. This appeal follows.

II. ANALYSIS.

A. Law concerning ineffective assistance of postconviction counsel claims.

¶8 All three issues raised by Welch in this appeal are predicated on his assertion that his postconviction counsel was ineffective for failing to raise in his direct appeal certain actions or inactions taken by his trial attorney which he alleges rendered his trial attorney ineffective. The following explains the requirements to successfully make a claim of ineffectiveness of an attorney. To maintain an ineffective assistance of counsel claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for

[4] Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable" and do not constitute ineffective assistance. ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984).

counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "'*affirmatively* prove[n].'" ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). This law concerning ineffective assistance of counsel applies to all three issues raised by Welch.

B. The filing of the amended information did not prejudice Welch.

¶9 Welch argues that his postconviction attorney was ineffective for failing to raise the ineffectiveness of his trial attorney, who never raised Welch's constitutional right to notice when the information was amended without leave of the court and without Welch's presence. He submits that he was unaware of the change in the charge until the morning of the jury trial. Citing ***State v. Neudorff***, 170 Wis. 2d 608, 489 N.W.2d 689 (Ct. App. 1992), he argues that because he was not apprised of the new charge, he was deprived of "the opportunity to defend himself against it." We disagree.

¶10 WISCONSIN STAT. § 971.29 sets out the procedure for amending a charge or an information:

> **Amending the charge. (1)** A complaint or information may be amended at any time prior to arraignment without leave of the court.
>
> **(2)** At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

> **(3)** Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

¶11 A determination of whether to allow an amendment of the information is a matter within the discretion of the trial court. *See* ***State v. Frey***, 178 Wis. 2d 729, 734, 505 N.W.2d 786 (Ct. App. 1993). The State explains in its brief:

> [WISCONSIN STAT. §] 971.29 permits an amendment of "'the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial, and the opportunity to defend.'" ***State v. Webster***, 196 Wis. 2d 308, 318, 538 N.W.2d 810 (Ct. App. 1995) (citation omitted). "The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him. There is no prejudice when the defendant has such notice." ***State v. Flakes***, 140 Wis. 2d 411, 419, 410 N.W.2d 614 (Ct. App. 1987) (citation omitted).

¶12 As noted, the State amended the information on the date of the final pretrial. The amendment changed the criminal charge from one count of first-degree reckless homicide to one count of first-degree intentional homicide. An entry in the judgment roll notes that on February 10, 2003, "Amended Information filed," and further advises that this action took place "off the record." Thus, there is no transcript reflecting what actually was said. Whether the State asked for leave of the court prior to filing the amendment is unknown. However, it is quite likely that the trial court was aware of the amendment and gave its consent because the next entry reflects that: "Court ordered case adjourned for jury trial in Branch 25 on 2-24-03 at 10 a.m." Thus, there was further involvement by the trial court in the case after the amended information was filed. Even assuming that the trial court was never asked whether an amended information

could be filed, counsel's failure to object to the amendment cannot be considered ineffective assistance of counsel unless Welch was prejudiced by the amendment. We are satisfied that he was not prejudiced by the amendment.

¶13 Both charges alleged that Welch shot and killed Lamon. The change in the charge required the State to prove that Welch intended to kill the victim, creating a higher burden of proof for the State. *See generally* WIS JI—CRIMINAL 1018. The earlier charge required the State to prove only that Welch acted with criminal recklessness. Welch's defense, that he shot Lamon accidentally while struggling for possession of the gun, was the same regardless of the charge. In fact, this defense was a better defense to first-degree intentional homicide than it would have been to the original charge. We believe this to be so because Welch and his attorney resisted the State's attempt to submit lesser included offenses to the jury.[5] As observed by the postconviction court:

> The amended information did not change the nature of the charged crime (homicide); it merely changed the character of that charge from homicide by reckless conduct to homicide by intentional conduct. The defendant's theory of defense was that the victim pulled out a gun and that a shot went off during a struggle over the gun (i.e. that the shooting was accidental). The court fails to perceive how amending the charge from reckless homicide to intentional homicide prejudiced the defendant's ability to raise an accidental shooting defense.

We agree. Welch, even if unaware of the amended charge, was not prejudiced by it. Moreover, his attorney was on notice of the amendment. Consequently, Welch's postconviction attorney was not ineffective for failing to pursue a claim

[5] Eventually the trial court granted the State's request to submit lesser included offenses.

of ineffective assistance of trial counsel for not objecting to the amended information or Welch's absence when the amended information was filed.

C. No prohibited hearsay was admitted into evidence.

¶14 Welch next argues that postconviction counsel was ineffective for failing to argue in his direct appeal that certain rulings by the trial court concerning hearsay evidence were violated and his trial attorney failed to object. Specifically, he submits that the prosecutor in his opening statement violated the trial court's order following the motion *in limine* that any statements of the victim made to third parties when Welch was not present were prohibited. Welch also contends that the testimony of three witnesses, Ford, Moore, and Detective Caballero, included forbidden hearsay statements. We are not persuaded.

¶15 Welch submits that the prosecutor's opening statement violated the trial court's order when the prosecutor stated:

> You're going to hear at that time this defendant, Mr. Welch, came around the house. He was sort of sneaking around the house, and Mr. Welch went onto the porch of that house. You're going to hear evidence that Mr. Welch and Robert Jackson Lamon had a dispute on that porch. You're also going to hear evidence that Mr. Welch had robbed Robert Jackson Lamon of some drugs and money at a prior time at least once, and that Robert Jackson Lamon began telling people about this robbery. Mr. Welch wasn't pleased with that and confronted Robert Jackson Lamon.

Welch insists that these statements were ruled "off limits" and his attorney failed to object. We adopt as our own the postconviction court's reasoning found in the decision denying the postconviction order: "The prosecutor's opening statement did not reference any particular statement made by the victim, the defendant or any of the witnesses. Moreover, opening statements are not evidence, and the jury was instructed not to consider them as such." Furthermore, the prosecutor did

elicit properly admitted testimony to back up his statements. When Welch confessed to Ford, he admitted that he had robbed Lamon, and another witness, Moore, testified that he heard Welch say to Lamon something to the effect that Lamon had been telling people that Welch had robbed him. The opening statement did not violate the trial court's order.

¶16 Next, Welch claims the testimony of Moore, referenced above, was improper hearsay. Specifically, Moore testified:

> Q. Did you remember anything else about the conversation, anything else that was said?
>
> A. Um, something – the conversation was pertaining to a robbery or something, some particular part about Robbie being robbed by Mr. Welch and Mr. Welch coming to defend himself about Robbie's statement that he was going to do something to him or I don't know. I don't know.

These statements describe what Moore heard shortly before the shooting when both Welch and Lamon were present. Consequently, these statements did not violate the trial court's order.

¶17 Welch also argues that Ford's unobjected-to testimony violated the trial court's order when Ford was asked about his earlier statement to the police.

> Q. Do you remember telling Detective Caballero that he took out a gun. He took out a gun and he shot the person in the stomach and he shot the person because the person wanted to get tough?
>
> A. Yes, sir.
>
> Q. Where did he tell you that at?
>
> A. When I first picked him up on 26th.
>
> Q. Did he tell you how many time he had robbed this person that he shot?

> A. Like once before or something. Once or twice or something.

These questions did not violate the trial court's order, as they are alleged to be Welch's own words.

¶18 Finally, Welch points to the testimony of Detective Caballero as another example of when his trial attorney should have objected to the questioning by the prosecutor. Detective Caballero told the jury about his interview with Ford. What he told the jury about the interview was almost identical to what Ford told the jury about Welch's statements to him on the way to Racine. Thus, the testimony of the detective outlining what Ford told him that Welch said to him was permissible. The pretrial rulings of the trial court were not violated and the failure of Welch's trial attorney to object to this testimony was not ineffective assistance of counsel. Moreover, Welch suffered no prejudice because Detective Caballero's testimony mirrored that of Ford.

D. No ineffective assistance of trial counsel occurred when various named defense witnesses were not called to testify.

¶19 Welch's final claim of ineffective assistance of his postconviction counsel for failing to raise the ineffectiveness of trial counsel is his attack on his trial attorney for not interviewing and calling certain witnesses. Welch outlines why certain witnesses, if called to testify, would have contradicted the observations of Moore, an eye witness, and other State witnesses.

¶20 When Welch's trial attorney asked for an adjournment prior to the start of the jury trial, one of the grounds for the adjournment was his investigator's inability to locate witnesses. He advised the court:

> In addition to that, my investigator has been trying to serve a number of people who were on the witness list that I proposed to the court and provided to the state, and

> those witnesses have also moved and we don't have addresses for them, although we have been slowly trying to figure out where they are, but we have been unable to serve some of those witnesses.
>
> Also, it's not for lack of trying, because my investigator has been working on it for nearly three weeks in terms of trying to serve people who would be witnesses or potential witnesses in this case, witnesses for the – for the defense in terms of people who were at the house, who were upstairs, who came down afterwards, perhaps potential witnesses as to what was taken, what they saw and things of that nature.[6]

¶21 As noted in the State's brief, "If counsel is unable to locate witnesses after due diligence then counsel cannot be deficient for not calling those witnesses." *See* ***Alexander v. McCotter***, 775 F.2d 595, 602 (5th Cir. 1985) (in order for counsel's failure to call a witness to be deficient, defendant must show that the witness would have testified). We agree. Clearly, trial counsel exercised due diligence in trying to locate the missing witnesses. Moreover, the police reports which set forth the statements of some of these missing witnesses given to the police suggest that these witnesses would not necessarily help Welch. Although the witnesses would have made the evening's events murkier and would have introduced some confusion about where the gun came from and its disappearance, none would have been able to challenge the testimony of Ford, who claimed Welch confessed to shooting Lamon, who he had robbed previously. As the postconviction court wrote:

> The court has reviewed what the purported testimony of these witnesses would have been and finds that there is not a reasonable probability of a different outcome had counsel called them to testify. …. Even if defense counsel was able to locate all of the above witnesses and presented them

[6] The police reports contain information that items may have been removed from the victim after the shooting.

> for trial purposes, there is not a reasonable probability that the testimony of any of these witnesses would have affected the verdict. The jury had to consider the elements of first-degree intentional homicide before any lesser included offense and they could not get passed [sic] this charge because of the compelling testimony of the defendant's lifelong friend Alvin Ford who testified that the defendant told him that he pulled out a gun and shot the victim in the stomach because "he wanted to get tough."

¶22 We agree with the trial court. First, Welch's counsel made an exhaustive search for the witnesses. Further, the failure to locate and call these witnesses to testify would not have altered the verdict. As a result, Welch was not prejudiced by their absence. For the reasons stated, the order is affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.