COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1956-CR **Cir. Ct. No. 2006CF2273**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. PRESBERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Wedemeyer, JJ.

¶1 CURLEY, P.J. Brian A. Presberry appeals the judgment convicting him of five counts of armed robbery, as a party to the crime, contrary to WIS. STAT. §§ 943.32(1)(b) and (2), and 939.05 (2003-04).[1] He also appeals from the

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

(continued)

order denying his postconviction motion. He argues that his convictions should be reversed because his attorney was ineffective for failing to conduct an investigation and for failing to subpoena alibi witnesses. He also contends that the evidence presented at trial was insufficient to convict him. Finally, he claims that the trial court erroneously exercised its discretion when it sentenced him on each count to two and one-half years of initial confinement, to be followed by four years of extended supervision, to be served consecutively. Because Presberry's attorney was not ineffective, the evidence was sufficient, and the trial court properly exercised its discretion at sentencing, we affirm.

I. BACKGROUND.

¶2 On February 3, 2006, an armed robbery took place at the Fast Track Bar by two masked men, one of whom displayed a handgun and was taller than the other. During the robbery, a struggle ensued and the two robbers were captured. When their masks were removed, Presberry was discovered to be the taller of the two men, and the shorter man was identified as sixteen-year-old L'Michael B. After his arrest, L'Michael B. confessed to being involved in sixteen other armed robberies, including five committed with Presberry. As L'Michael B. explained at the jury trial, in exchange for telling the truth regarding the robberies, the State agreed not to waive him to adult court. The crimes committed with Presberry that were charged in this case included: an earlier armed robbery of the bartender and a patron at the Fast Track Bar on December 29, 2005; an armed robbery of the

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The judgment of conviction states violations of WIS. STAT. §§ 943.32(1) and 939.05. However, based on the verdict forms, the judgment of conviction should have referenced §§ 943.32(1)(b) and (2), in addition to § 939.05. Upon remittitur, the judgment of conviction should be corrected.

Golden Gyros restaurant on January 8, 2006; an armed robbery of the Dickens Grille on January 20, 2006; and an armed robbery of Stella's Tavern on January 23, 2006.[2] Besides the similarities of the physical appearances of the two robbers, the *modus operandi*, and L'Michael B.'s confession, the police also had as evidence L'Michael B.'s fingerprint recovered from a bag left outside the Golden Gyros restaurant.

¶3 After being charged, Presberry entered a speedy trial demand. The State filed a motion seeking to introduce other acts evidence at trial, and shortly thereafter, Presberry's attorney attempted to withdraw. The trial court granted the motion to introduce other acts evidence, but denied the request of Presberry's attorney to withdraw. The jury trial lasted several days, culminating in a guilty verdict on all counts. Prior to the date set for sentencing, the trial court obtained the presentence investigation report for Presberry for the second Fast Track Bar armed robbery. The trial court sentenced Presberry on each count to two and one-half years of incarceration, to be followed by four years of extended supervision. The court ordered all the sentences to be served consecutively. Later, a postconviction motion filed on Presberry's behalf was denied.

II. ANALYSIS.

A. Presberry's attorney was not ineffective.

¶4 Presberry's first complaint is that his attorney was ineffective for failing to investigate or subpoena alibi witnesses. The two-prong test for proving

[2] One count of attempted armed robbery, as a party to the crime, was issued, but later dismissed. The February 3, 2006 robbery was charged in another case. Presberry was convicted of armed robbery and battery in that case.

ineffective assistance of counsel requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "'[B]oth the performance and prejudice components ... are mixed questions of law and fact.'" ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985) (citation omitted). We will not overturn the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. However, determinations of whether counsel's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id.***

¶5 To prove counsel's deficiency, Presberry must show that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82 (citation omitted). To prove prejudice from counsel's deficient performance, Presberry must show that the errors "had an actual, adverse effect." ***Id.***, ¶16. Presberry must satisfy both prongs of the test to be afforded relief. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

¶6 Presberry's appellate brief proclaims that "he informed counsel of alibi witnesses at the start of his representation. Mr. Presberry maintains that he provided contact information to counsel to be able to speak to these alibi witnesses and have them subpoenaed for the jury trial." In addressing this contention, the trial court stated: "The defendant does not set forth the names of the alibi witnesses who would have been called or what they would have testified to; moreover, he does not append any affidavits from these witnesses to support his motion." Ultimately, the trial court concluded that this omission was fatal, and wrote in its decision denying the postconviction motion that:

> [I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

(Quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972); brackets added.) We agree.

¶7 Presberry was required to advise the court of the names of the alibi witnesses and state what they would have testified to. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) ("'[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [proceeding].'") (citation omitted); *see also* ***Strickland***, 466 U.S. at 694. Presberry has failed to identify the alibi witnesses and has failed to summarize their potential testimony. Due to this failure, the trial court properly exercised its discretion and denied his motion without a hearing.

B. Sufficient evidence was introduced to convict Presberry.

¶8 Presberry contends that the State failed to produce sufficient evidence to prove his guilt beyond a reasonable doubt. He points out that none of the victims could identify him and there was no physical evidence that connected him with the robberies. He submits that the only testimony connecting him with the robberies came from L'Michael B., and, as a co-actor, "[h]e was also charged in these events and may have been placing blame on others to deflect his culpability." We disagree.

¶9 The standard of review with respect to a claim of insufficient evidence to convict is well-settled. A reviewing court must accept the findings of

the trier of fact "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This standard arises from the fact that "the jury has the great advantage of being present at the trial and is thus in the best position to weigh and sift conflicting testimony and attribute weight to those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence." ***State v. Allbaugh***, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989) (citation and internal quotation marks omitted).

¶10 While it is true that no victims could identify Presberry as one of the perpetrators and no physical evidence tied Presberry with the crimes, neither type of evidence was needed if other evidence existed which, if believed, convinced the jury that Presberry was guilty beyond a reasonable doubt. "[T]he present rule is that uncorroborated testimony of an accomplice does not need corroboration to be sufficient to sustain a conviction if the finder of the fact finds the testimony credible." ***Rohl v. State***, 65 Wis. 2d 683, 692, 223 N.W.2d 567 (1974). Here, the State relied on the testimony of L'Michael B., Presberry's accomplice, and circumstantial evidence to convict Presberry. L'Michael B. gave the jury a detailed account of the various robberies. He related how he was involved in sixteen armed robberies, five of which were committed with Presberry. He described the guns used by Presberry in the robberies, the getaway cars, and the efforts they took in disguising themselves. The jury was free to accept or reject L'Michael B.'s testimony. The jury apparently believed L'Michael B.'s account.

¶11 In addition, the State argued that Presberry's arrest and testimony admitting to having been involved in the second robbery of the Fast Track Bar, which was previously robbed by two men, was powerful circumstantial evidence

that Presberry was one of the robbers in the earlier robbery. By virtue of L'Michael B.'s persuasive testimony and circumstantial evidence, sufficient evidence to convict was presented to the jury.

C. The trial court properly exercised its discretion in sentencing Presberry.

¶12 Finally, Presberry contends that the trial court erroneously exercised its discretion when it sentenced him because the court believed that he was the ringleader in the numerous robberies and L'Michael B. the follower.

¶13 Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. ***State v. Brown***, 2006 WI 131, ¶19, 298 Wis. 2d 37, 725 N.W.2d 262 (A trial court "exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised."). Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination and, an appellate court must presume that the trial court acted reasonably. ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988).

¶14 As noted, Presberry was sentenced to two and one-half years of incarceration and four years of extended supervision on each count, to be served consecutively. Thus, his total sentence was thirty-two and one-half years with twelve and one-half years of confinement, followed by twenty years of extended supervision. He maintains that in the one robbery that he admitted to, he was the follower, not the leader. Also, he claims the trial court mistakenly thought that he had not received his GED and used this fact as a negative factor, when in fact, he had obtained his GED.

¶15 The trial court acknowledged that Presberry had obtained his GED, although the trial court later stated that: "You are to obtain your GED or HSED." In any event, his educational success, or the lack thereof, was not mentioned by the trial court as being a negative factor. Presberry's contention that the trial court mistakenly believed that he was the ringleader, which resulted in a more severe sentence, is not supported by the record. The trial court stated it was most disturbed that Presberry perjured himself on the witness stand when he denied being involved in the other robberies. The trial court also mentioned that Presberry's actions frightened a great many people, including the victims of the crime, and hurt the businesses that were robbed. The trial court also commented at sentencing that it was disturbed that a real gun was sometimes used in the robberies and that there were multiple armed robberies. No specific reference was made by the trial court that Presberry was the ringleader. Here, the trial court explained its reasons for the sentences. Thus, the sentences were the product of a proper exercise of discretion.

¶16 For the reasons stated, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.