COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1017-CR **Cir. Ct. No. 2009CF1692**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MALCOLM L. PRINCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Malcolm L. Prince appeals from a judgment of conviction entered after a jury found him guilty of possessing a firearm as a felon. *See* WIS. STAT. § 941.29(2). He also appeals from an order denying his postconviction motion. He contends that his trial lawyer provided constitutionally

ineffective assistance by failing to introduce allegedly exculpatory evidence at trial. Because Prince fails to demonstrate that he was prejudiced by the loss of the evidence, we affirm.

I.

¶2 The State charged Prince with possessing a firearm as a felon, and the matter was tried to a jury. Officer Rebekah Eberhardy testified at trial that on April 5, 2009, police received a report of a person with a gun at 3010 North 21st Street in Milwaukee, Wisconsin, and she was one of the officers who first arrived at that location. Upon entering the house, she saw numerous people in an open area, and she ordered them into the living room. According to Eberhardy, one of the people, subsequently identified as Prince, responded by lifting a jacket from a table, "kind of cradling" the jacket, and then "set[ting] it on a chair." Next, Prince "immediately picked [the jacket] up again," and Eberhardy "saw a gun on the chair."

¶3 Sergeant Richard Jack testified that he followed Eberhardy into the house. He also saw Prince lift a jacket from a table, cradle the jacket, and place it on a chair. According to Jack, he knew that Prince put the jacket on an empty chair because Jack watched Prince's movements carefully.

¶4 Prince testified on his own behalf. He did not dispute that he was a convicted felon, but he denied possessing a gun. He said that he saw a gun on a chair after another person, Raymond Woods, got out of that chair. According to Prince, he moved a coat hanging on the back of a chair and "show[ed] the police the gun in the chair." Prince testified that he dropped the coat when Eberhardy ordered him to put it down.

¶5 The circuit court instructed the jury regarding possession, stating:

> [p]ossession means that the defendant knowingly had actual physical control of a firearm.
>
> An item is in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.
>
> It is not required that a person own an item in order to possess it. What is required is that the person exercises control over the item.
>
> Possession may be shared with another person. If a person exercises control over an item, that item is in his possession even though another person may also have similar control.

The jury found Prince guilty as charged.

¶6 Prince filed a motion for postconviction relief. He alleged that his trial lawyer was constitutionally ineffective by failing to offer as evidence a computer-aided dispatch summary of the 911 call and police response leading up to Prince's arrest, and by failing to call Woods to testify.

¶7 As relevant here, the dispatch summary shows that an anonymous woman called 911 on April 5, 2009, to report that "Raymond Earl Woods" had a gun and that he was walking into 3010 N. 21st Street. According to the dispatch summary, the caller also reported that "4 b/m's [*sic*] are with [Woods] and he handed the gun over to one of the men ...wrg [*sic*] a black hoodie." The summary further reflects that officers entered the residence at 12:56:21 p.m. and found the gun sixteen seconds later.

¶8 Woods gave a recorded statement about the incident to police, and Prince submitted a transcript of that statement with his postconviction motion. Woods acknowledged that he was in the house at 3010 N. 21st Street when police

officers entered on April 5, 2009, but he said that he neither owned nor touched the gun they found. He told the police several times that someone else tried to cover the gun with a coat.

¶9 The circuit court denied Prince's postconviction motion without a hearing. The circuit court concluded that the dispatch summary was inadmissible hearsay but that, if it had been admitted, the summary would not have benefited Prince. As to the claim that Prince's lawyer should have called Woods as a witness, the circuit court observed that nothing in the motion specified what he would have said if called to testify. Additionally, the circuit court determined that if Woods had testified in conformity with his recorded statement, the testimony would not have affected the outcome of the trial. Prince appeals.

II.

¶10 A familiar two-pronged test governs claims of ineffective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, a defendant is required to demonstrate deficient performance by his or her lawyer and resulting prejudice to the defense. *See* ***ibid.*** To demonstrate deficient performance, the defendant must show specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. 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. The test is not outcome determinative. ***State v. Jones***, 2010 WI App 133, ¶16, 329 Wis. 2d 498, 508, 791 N.W.2d 390, 395. Rather, "'the touchstone of the prejudice component is whether counsel's deficient performance renders the result of the trial unreliable or the

proceeding fundamentally unfair.'" ***Ibid.*** (citation and one set of quotation marks omitted).

¶11 A defendant must satisfy both the deficiency and the performance prongs of the ***Strickland*** test to be afforded relief. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 587, 682 N.W.2d 433, 443. A reviewing court may address either prong first, and if the defendant fails to satisfy one prong, the court need not address the other. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69, 76 (1996).

¶12 Also familiar is the rule that when a defendant seeks postconviction relief based on claims of a trial lawyer's ineffectiveness, the defendant must file a postconviction motion alleging sufficient facts to "'allow the reviewing court to meaningfully assess the defendant's claim[s].'" *See* ***Allen***, 2004 WI 106, ¶21, 274 Wis. 2d at 584, 682 N.W.2d at 441 (citation and one set of brackets omitted). A postconviction motion provides sufficient facts when it alleges "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, 2004 WI 106, ¶23, 274 Wis. 2d at 585, 682 N.W.2d at 441. The circuit court must hold an evidentiary hearing to resolve claims presented in a postconviction motion if the motion sets forth facts that, if true, would entitle the movant to relief. ***Id.***, 2004 WI 106, ¶14, 274 Wis. 2d at 580, 682 N.W.2d at 439. A circuit court may, however, deny a postconviction motion without a hearing if the motion fails to set forth sufficient facts to raise a question of fact, or if the record conclusively demonstrates that a defendant is not entitled to relief, or "if one or more key factual allegations in the motion are conclusory." ***Id.***, 2004 WI 106, ¶12, 274 Wis. 2d at 579, 682 N.W.2d at 438.

¶13 With the foregoing principles in mind, we turn to Prince's claims on appeal. He contends that his trial lawyer was ineffective by failing to offer documentary evidence and witness testimony in support of the defense theory that Prince did not possess a firearm. We reject the claims.

¶14 Prince first contends that his trial lawyer should have presented as evidence the dispatch summary of the 911 call and police response because it would have undermined the police officers' testimony.[1] The summary shows that police found a gun sixteen seconds after entering the house on North 21st Street, and Prince argues that sixteen seconds is not long enough for him to complete the actions described by the police, namely, lifting a jacket from a table, placing the jacket on a chair, and then lifting the jacket again. According to Prince, his own testimony that he moved a jacket already on a chair describes acts that better fit the sixteen-second timeframe.

¶15 Prince's arguments are merely conclusory and unsupported assertions. Prince submitted no affidavits or other evidentiary material disclosing who would testify that the actions described by police could not be completed within sixteen seconds, how the witness would reach that conclusion, or why the actions necessarily require a longer time to complete. His arguments fail to satisfy the ***Allen*** test and are insufficient to warrant a hearing.

[1] On appeal, the State does not defend the circuit court's conclusion that the police dispatch summary of the 911 call was inadmissible hearsay. We accept the State's implicit concession that the summary was admissible. *See*, *e.g.*, ***Boyer v. State***, 91 Wis. 2d 647, 663, 284 N.W.2d 30, 36 (1979) (police reports admissible as public records and reports pursuant to WIS. STAT. RULE 908.03(8)); *see also* ***State v. Ballos***, 230 Wis. 2d 495, 505–507, 602 N.W.2d 117, 122–123 (Ct. App. 1999) (evidence of statements made by 911 caller admissible under several exceptions to the hearsay rule).

¶16 Prince also contends that he was prejudiced by loss of evidence in the dispatch summary that an anonymous caller saw Woods going to 3010 North 21st Street with a gun. Prince believes that this evidence supports his theory that Woods, not Prince, possessed the gun in the house. We are not persuaded.

¶17 With exceptions that do not apply here, a felon who handles a firearm commits the crime of possessing a firearm as a felon.[2] *See* ***State v. Black***, 2001 WI 31, ¶20, 242 Wis. 2d 126, 144–145, 624 N.W.2d 363, 372. Therefore, the dispatch summary does not aid Prince. As the circuit court accurately observed, "[a]ll [the summary] suggests is that Woods may have brought the gun into the home.... [T]he caller said the gun was handed over to another person wearing a black hoodie." Thus, the summary neither provides a basis for concluding that Woods alone handled the firearm nor excludes Prince as a person who handled it. Accordingly, Prince shows no reasonable probability that the outcome of the trial would have been any different if his lawyer had presented the dispatch summary to the jury. *See* ***Strickland***, 466 U.S. at 694.

¶18 We turn to the claim that Prince's trial lawyer was ineffective by not calling Woods as a defense witness. Prince's claim cannot succeed because he failed to allege with specificity the testimony that Woods would have provided if called to testify. *See* ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 397, 674 N.W.2d 647, 660 (defendant claiming trial lawyer was ineffective by failing to present testimony must allege with specificity the testimony that witness would have provided).

[2] A felon may in some circumstances assert a privilege to handle a firearm. ***State v. Black***, 2001 WI 31 ¶21, 242 Wis. 2d 126, 145, 624 N.W.2d 363, 372. Prince did not assert a privilege in this case.

¶19 Prince argues that his position is not defeated by ***Arredondo***. He asserts:

> [i]n the lower court, the [S]tate argued that it would have been futile to call Raymond Woods as a witness because he would have asserted his [F]ifth [A]mendment right not to testify.[3] Under § 908.04(1)(a), a declarant is unavailable if he asserts a privilege against testifying. Once a declarant is unavailable, under § 908.045(2), statement of a recent perception is admissible. Further, the [S]tate asserts that Woods would not testify because it is against his penal interest. Under § 908.045(4), the transcript of Woods' statement could come into evidence as a statement against interest. Prince's trial attorney should have called Woods as a witness. If Woods refused to testify pursuant to his rights under the [F]ifth [A]mendment, Prince's trial attorney should have offered the transcript of Woods' statement to police into evidence.

In the circuit court, Prince further argued that "if Woods' testimony is not consistent with his prior statement, Woods could be impeached by his prior statement. The impeachment would benefit the defense."

¶20 The thesis that calling Woods to testify necessarily would have benefited Prince is wholly unwarranted and completely unsupported. Prince does not demonstrate whether Woods, if called as a defense witness, would have refused or agreed to testify. Had Woods chosen to testify, we do not know what he would have said. If, for example, Woods's testimony had threatened to undermine the theory of defense, a reasonable trial lawyer might well have concluded that the risk of hostile testimony would outweigh any benefit that Prince might obtain from impeaching his own witness with a prior inconsistent

[3] The State argued in its circuit court memorandum that, at the time of Prince's trial, Woods faced charges of first-degree intentional homicide and possessing a firearm as a felon, and therefore he probably would have invoked his privilege not to incriminate himself if called to testify at Prince's trial. *See* U.S. CONST. amend. V.

statement. *Cf.* ***State v. Domke***, 2011 WI 95, ¶52, 337 Wis. 2d 268, __, 805 N.W.2d 364, 378. Conversely, if Woods had offered testimony that supported the theory of defense, we do not know if that testimony would have conflicted with his prior statement, opening the door to impeachment by the State that would have undermined his value as a witness. A defendant earns a postconviction hearing by alleging specific material facts sufficient to allow an assessment of his or her claim, not by inviting speculation about possible scenarios that might have unfolded at trial. *See* ***Allen***, 2004 WI 106, ¶24, 274 Wis. 2d at 585–586, 682 N.W.2d at 442–443. Prince did not meet his burden here.

¶21 For the sake of completeness, we briefly address Prince's assumption that Woods, if called to testify, would have invoked his Fifth Amendment privilege against self-incrimination, and the jury would then have heard his custodial statement. Prince observes: "Woods states that [] Prince took the jacket off the back of the chair and placed it on top of the gun." Prince then argues that in Woods's version of events, Prince exercised "much less" control of the gun than the police officers described. Possession of a firearm, however, "simply 'means that the defendant knowingly had actual physical control of a firearm.'" ***Black***, 2001 WI 31, ¶19, 242 Wis. 2d at 142, 624 N.W.2d at 371 (citations omitted). The quantum of control need not be great: "[a]n item is … in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item." *See* WIS JI—CRIMINAL 1343. Here, the State met its burden of proving possession with the evidence produced at trial. Prince fails to demonstrate that the result of his trial is rendered unreliable by the loss of additional evidence that he exercised some amount of control over the gun. *Cf.* ***Jones***, 2010 WI App 133, ¶16, 329 Wis. 2d at 508, 791 N.W.2d at 395.

¶22 Prince suggests that loss of both the dispatch summary and Woods's testimony cumulatively prejudiced the defense. A determination of cumulative prejudice in this case, however, requires an assessment of "'the totality of the omitted evidence.'" *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 603–604, 665 N.W.2d 305, 321, *citing* ***Washington v. Smith***, 219 F.3d 620, 634–635 (7th Cir. 2000). Because Prince failed to allege the specific testimony omitted by not calling Woods at trial, Prince cannot show that loss of Woods's testimony combines with any other alleged inadequacy to prejudice the defense. We affirm.

By the Court.—Judgment and order affirmed.

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