COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1043-CR **Cir. Ct. No. 2009CF2976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY SIMONE WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jerry Simone Wilson appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree reckless homicide and two counts of first-degree recklessly endangering safety, all with the dangerous weapon enhancer. Wilson also appeals from an order denying without

a hearing his motion for a new trial on the basis of ineffective assistance of counsel. We agree with the circuit court that Wilson's motion was insufficient to garner relief; therefore, we affirm the judgment and order.

BACKGROUND

¶2 Wilson was alleged to have killed one person and wounded two others when he ran up to a large group of people outside a residence and fired seven or eight shots from a handgun. Wilson was identified by Antwan Smith-Curran, one of the State's main witnesses at trial. The matter was tried to a jury, which convicted Wilson of all three counts identified above. He was sentenced to twenty years' initial confinement and eight years' extended supervision for the homicide and four years' initial confinement and two years' extended supervision for each endangering safety count, all to be served consecutively.[1]

¶3 Postconviction counsel moved for a new trial, alleging ineffective assistance of trial counsel in three areas: failure to corroborate a possible alibi, failure to sufficiently investigate the possible misidentification of Wilson as the perpetrator, and failure to thoroughly cross-examine Smith-Curran.[2] The circuit

[1] Contrary to the representation made to this court, Wilson was not given the maximum sentences. The reckless homicide count is a Class B felony, punishable by up to sixty years' imprisonment, forty of which can be initial confinement. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b), & 973.01(2)(b)1. (2009-10). Recklessly endangering safety is a Class F felony, punishable by up to twelve years and six months' imprisonment, seven years and six months of which can be initial confinement. *See* WIS. STAT. §§ 941.30(1), 939.50(3)(f), & 973.01(2)(b)6m. (2009-10). The "dangerous weapon" enhancer, WIS. STAT. § 939.63(1)(b) (2009-10), increases the maximum possible imprisonment for each of these counts by five years.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Counsel indicated that the motion was brought pursuant to WIS. STAT. § 974.06. The circuit court properly construed the motion as one brought under WIS. STAT. RULE 809.30 instead.

court rejected the motion without a hearing, deeming the allegations conclusory and insufficient. We address each of the three claims in turn.

DISCUSSION

¶4 We utilize a two-part test for ineffective-assistance claims. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Id.*** Prejudice is defined as "'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***Id.*** (citation omitted). Wilson must prevail on both prongs to secure relief. ***Id.***

¶5 A hearing on a postconviction motion like Wilson's is required "only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***Id.***, ¶14; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion does not state sufficient material facts, or presents only conclusory allegations, the circuit court may in its discretion deny a hearing. ***Allen***, 274 Wis. 2d 568, ¶9. Whether a motion alleges sufficient facts on its face is a question of law we review *de novo*. ***Id.***

I. The Alibi Witness

¶6 Wilson's postconviction motion alleged that trial counsel was ineffective for failing to track down alibi witness "Patricia," a woman Wilson claimed to have been with at the time of the shooting. Though Wilson gave counsel Patricia's approximate address and his family was willing to help counsel track her down, trial counsel did not investigate Patricia's whereabouts. This issue, however, is not raised on appeal. Therefore, it is waived. *See* ***Reiman***

Assocs., Inc. v. R/A Advert., Inc., 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1991) (issues not briefed deemed abandoned).[3]

II. The Misidentification Defense

¶7 Wilson complains that trial counsel "failed to investigate the possibility that he was misidentified" and "did not provide ample witnesses to support this [misidentification] theory, even in spite of the large number of people who witnessed the events that transpired."[4] He also asserts that there "is no doubt that but for [trial counsel's] failure to conduct a thorough investigation and interview witnesses with possible exculpatory information that there is a reasonable probability that the result of the trial would have been different."

¶8 Despite a lengthy recitation of the standards set forth in ***Bentley*** and ***Allen*** for a sufficient postconviction motion, Wilson fails to make sufficient allegations to warrant relief. A defendant alleging ineffective assistance of counsel for counsel's failure to investigate "'must allege *with specificity* what the investigation would have revealed.'" ***State v. Thiel***, 2003 WI 111, ¶44, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted, emphasis added). Wilson does not identify *who* the additional witnesses might be, *what* evidence they would

[3] We agree with the State that a vague argument about trial counsel's "failure to follow-up and interview witnesses believed to have valuable and credible information" is ambiguous as to whether it is meant to refer to the potential alibi witness or the misidentification defense. To the extent it was meant to refer to "Patricia," it is undeveloped. We will not consider it further.

[4] Wilson also complained that counsel "ignored his client's wishes to add material witnesses to the defense's witness list." Aside from the fact that counsel is not required to call a witness or otherwise present evidence merely because his client desires it, Wilson does not identify who these witnesses were or why they were "material."

have contributed, or *how* any of it would have made a different result at trial a reasonable possibility.[5]

¶9 Indeed, the jury had already heard: evidence that one victim could not identify the shooter because of dark conditions; trial counsel's cross-examination of Smith-Curran on his ability to identify Wilson; that there was no physical evidence, like DNA or fingerprints to link Wilson to the crime; and that a ballistics report indicated that more than one gun may have been used. Despite that evidence, the jury convicted Wilson. Thus, even if we accepted Wilson's conclusory allegations as sufficiently establishing a deficiency by trial counsel, he has not sufficiently alleged what prejudice exists to justify relief.

III. Cross-Examination of Smith-Curran

¶10 Finally, Wilson complains that trial counsel failed to reveal to the jury the "bias and ill-will" that eyewitness Smith-Curran had toward Wilson. Wilson also asserts that Smith-Curran had a reason to lie when he identified Wilson as the perpetrator, but trial counsel failed to show the "bad blood" between the two men to the jury.

¶11 We agree with the circuit court that this claim is undeveloped. On its face, it is conclusory and self-serving. Even on appeal, Wilson does not identify the source of the bias or ill-will, the reason Smith-Curran had to lie, or the basis for the "bad blood" between the two men. The motion in this respect is wholly inadequate.

[5] The description of *possible* exculpatory evidence suggests that Wilson himself has no knowledge of what the witnesses could contribute.

¶12 Because the allegations in the postconviction motion were insufficient under ***Bentley*** and ***Allen***, whether to grant a hearing was committed to the circuit court's discretion. We discern no erroneous exercise of that discretion.

By the Court.—Judgment and order affirmed.

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