COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1713 **Cir. Ct. No. 2006CF1238**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL HALE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael Hale, pro se, appeals a judgment convicting him of armed robbery, armed burglary, and four counts of false imprisonment while using a dangerous weapon, all as party to a crime, and of

possession of THC, possession of a short-barreled shotgun/rifle and felon in possession of a firearm. He also appeals an order denying his motion for postconviction relief. We disagree that his trial counsel's performance was constitutionally ineffective and reject as untimely his request for sentencing modification. We affirm.

¶2 A jury believed that Hale was one of three armed men, bandanas covering their faces, who entered an apartment, awakened its occupants—Shawn Tate, Shamika Williams and Williams' two children—held them at gunpoint and stole money and marijuana. It found him guilty of all nine charges. Postconviction, Hale moved for a new trial on grounds that the prosecutor failed to disclose exculpatory evidence. The trial court denied the motion and Hale appealed. This court summarily affirmed the judgment and order; the supreme court denied his no-merit petition for review.

¶3 Hale then filed this motion pursuant to WIS. STAT. § 974.06 (2009-10).[1] He alleged that postconviction counsel was ineffective for not challenging the ineffective assistance of trial counsel and that the trial court erroneously exercised its discretion by ordering him to pay the DNA surcharge without adequate explanation. The trial court summarily denied the motion. He appeals.

¶4 WISCONSIN STAT. § 974.06(4) "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). If a defendant was afforded a direct appeal, a motion brought

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

under § 974.06 is procedurally barred unless the defendant shows a sufficient reason why he or she did not raise the issues in the motion preceding the first appeal. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Ineffective assistance of postconviction counsel may constitute a "sufficient reason" for not previously raising an issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To succeed on his claim that postconviction counsel was ineffective, Hale first must establish that trial counsel was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶5 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove prejudice, the defendant must show that, but for counsel's unprofessional errors, "'there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on the reliability of the proceedings. ***Thiel***, 264 Wis. 2d 571, ¶20.

¶6 The trial court denied Hale's postconviction motion without a ***Machner***[2] hearing. The court must hold a hearing if the defendant alleges facts that, if true, would entitle him or her to relief. ***State v. Allen***, 2004 WI 106, ¶9,

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion is sufficient in that regard is a question of law that we review de novo. ***Id.*** If the motion is not sufficient, or if it presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief, it is within the trial court's discretion to grant or deny a hearing. ***Id.*** We conclude that the trial court properly exercised its discretion in summarily denying Hale's postconviction motion.

¶7 Hale first argues that trial counsel was ineffective for failing to advance an "alternative perpetrators" defense. A defendant may present evidence that a third party committed the crime if he or she can show a "legitimate tendency" that the third person could have committed the crime—*i.e.*, that the third party had the motive and opportunity and can be directly connected to the crime. *See* ***State v. Denny***, 120 Wis. 2d 614, 622-24, 357 N.W.2d 12 (1984). Said another way, the proffered evidence must be excluded if it is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime. *See* ***id.*** at 624.

¶8 Shamika Williams testified that three men entered the apartment and that she recognized Daron Travis. Tate testified that three men entered the apartment and that he recognized Travis and William Phillips. Travis testified that he, Phillips and Hale planned the robbery, that all three participated in carrying it out and that Hale supplied the gun. A police officer testified that the shotgun found in the car was loaded with a "Federal" brand shotgun shell; another officer testified that a "Federal" brand shell was found in a pocket of the jacket Hale wore. Testifying in his own defense, Hale told the jury that: Shanell Tolefree drove him, Travis and Phillips to Tate's apartment to buy marijuana; he was wearing a jacket he "found" in the backseat of Tolefree's car; the three men exited the car together; he did not go inside the building but waited outside in "a little

field"; and when Travis and Phillips returned about ten minutes later, the three went back to the car, where Tolefree waited. Tolefree testified that there was no jacket lying in her car.

¶9 Hale does not assert that he asked his counsel to pursue an "alternative perpetrator" defense, show a "legitimate tendency" that a third party committed the crime or even hint at who that third party might have been.[3] Evidence that simply would have afforded a possible ground of suspicion against some other person likely would not have been admissible. *See* ***id.*** at 623. Counsel is not ineffective for failing to raise a meritless issue. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶10 Hale's next claim of ineffectiveness relates to the party-to-a-crime jury instruction. Six of the nine offenses were charged as PTAC. Hale contends that trial counsel should have objected to the trial court's "fail[ure] to instruct the jury on the element of conspiracy under the [PTAC] reading for every count Hale was charged with." It is not clear whether Hale's complaint goes to the fact that the court omitted the conspiracy theory portion of the PTAC instruction or that the court gave the PTAC instruction only once instead of six times. Either way, his challenge fails.

¶11 The court did not fail to instruct the jury on the "element" of conspiracy. Hale was charged as a party to a crime under WIS. STAT. § 939.05. An individual is considered a party to a crime under that statute in one of three

[3] Because the undisputed testimony was that three men entered the apartment, we interpreted Hale's argument to be that some unnamed party was the third man. If he meant that Travis and Phillips were the "alternative perpetrators" while he simply accompanied them, unaware of their mission, Hale's being charged as PTAC eliminates any merit to that claim.

ways: if he or she "(a) [d]irectly commits the crime; *or* (b) [i]ntentionally aids and abets the commission of it; *or* (c) [i]s a party to a conspiracy with another to commit it …." Sec. 939.05(2) (emphasis added). The State proceeded under the aiding-and-abetting theory of PTAC. The court instructed the jury accordingly. As the court did not err, there was nothing to which counsel should have objected.

¶12 The court also did not err by giving a single PTAC instruction. A trial court has wide discretion in issuing jury instructions based on the facts and circumstances of the case. ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). The discretion applies to both choice of language and emphasis. ***Id.*** at 690. The question is whether, considering the instructions in their entirety, the overall meaning they communicated was a correct statement of the law. *See* ***State v. Hatch***, 144 Wis. 2d 810, 826, 425 N.W.2d 27 (Ct. App. 1988).

¶13 The court explained that it would not reiterate the PTAC instruction for each crime because "it would be boring, and I would lose the jury's attention." If Hale is suggesting that he might have benefited from six repetitions that he could be found guilty whether he directly committed the crimes or intentionally aided and abetted their commission, we do not see how. Even if the jury missed the aiding-and-abetting message, it already must have concluded the evidence was sufficient to convict him of *directly* committing the crimes. Our confidence in the outcome is not undermined.

¶14 Hale next contends his trial counsel ineffectively failed to challenge the chain of custody for a shotgun shell police officer Timothy Schaal testified he found in Hale's jacket pocket. The shell was among the contents of an unsealed evidence bag labeled as an exhibit at trial. The exhibit also included duct tape, a pack of cigarettes and a bandana Schaal testified he removed from Hale's pockets

and a pack of gum Schaal could not recall the source of. Hale argues that the unsealed bag and Schaal's testimony undermine the integrity of the evidence, that the original items were tampered with and that the shotgun shell was planted.

¶15 Counsel attempted to exclude the evidence by objecting to the admission of the exhibit. The trial court overruled the objection. If there was error, it was the court's and it cannot be visited on counsel. Moreover, this all played out before the jury. Alleged gaps in a chain of custody "go to the weight of the evidence rather than its admissibility." ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (citation omitted). Inconsistencies and contradictions in witnesses' statements simply create a question of credibility. *See* ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980). The weight of the evidence and credibility issues are matters reserved for the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

¶16 Hale has failed to establish that trial counsel was ineffective in any respect. Accordingly, his claim that postconviction counsel was ineffective necessarily fails. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶17 Finally, Hale raises a challenge to the trial court's sentencing discretion. He complains that the court stated no reason for imposing the DNA surcharge when it sentenced him in April 2008. When the felony for which a defendant is being sentenced does not involve certain enumerated sex crimes, the trial court has the discretion to decide whether to impose the DNA surcharge. ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393; *see also* WIS. STAT. § 973.046(1g). A proper exercise of discretion requires the court to give an on-the-record explanation for imposing the surcharge. *See* ***Cherry***, 312 Wis. 2d 203, ¶¶9-10.

¶18 This issue is untimely. A motion to vacate a DNA surcharge seeks sentence modification. Hale could have obtained postconviction review of his sentence within the time limits of a direct appeal, *see* WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, or moved for sentence modification within ninety days after sentencing, pursuant to WIS. STAT. § 973.19. He did neither.

¶19 Instead, Hale first raised the issue in the WIS. STAT. § 974.06 motion underlying this appeal, over three years after being sentenced. While a § 974.06 motion is not time sensitive, it is limited to constitutional and jurisdictional challenges, ***State v. Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765, which Hale has not advanced. Furthermore, the ***Cherry*** decision neither presents a "new factor" nor announces a new procedural rule warranting retroactive application.[4] ***Nickel***, 330 Wis. 2d 750, ¶8. Hale is foreclosed from challenging the DNA surcharge.

By the Court.—Judgment and order affirmed.

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

[4] Hale was sentenced on April 1, 2008. ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, was released on April 8, 2008.