COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

Nos. 99-2332
99-2333
99-2334
99-2335
99-2336

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH D. HAAS,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Waukesha County: LEE S. DREYFUS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Joseph D. Haas appeals pro se from judgments convicting him of eighteen counts of burglary and one count each of felon in possession of a firearm and attempting to elude a police officer. He also appeals from orders denying his postconviction motion for a new trial. On appeal, Haas alleges a Fourth Amendment violation, ineffective assistance of trial counsel and erroneous evidentiary rulings. We reject his claims and affirm.

¶2 Haas's Fourth Amendment claim arises from the attachment of an electronic tracking device by police to a vehicle registered to his companion, Shawn Dennison. Haas often drove Dennison's vehicle, a Hyundai. Police attached the tracking device to the underside of the vehicle after Dennison parked the vehicle in a grocery store parking lot during the day of September 24, 1993. At the time, Haas was a suspect in numerous burglaries in Waukesha county, and although police had followed him on previous occasions, they had lost track of his vehicle. The tracking device transmitted an electronic signal as the vehicle traveled along and assisted law enforcement in maintaining visual contact with the vehicle. State agents assisting the Waukesha police testified that they tracked Haas's vehicle only on public streets and not onto any private property. While under electronic and visual surveillance on the evening of September 24, Haas allegedly committed two burglaries. The police stopped Haas's vehicle that night, but he fled on foot. The goods found in the vehicle were identified as having been stolen in the September 24 burglaries.

¶3 The circuit court denied Haas's motion to suppress evidence of the burglaries due to an alleged Fourth Amendment violation arising from the attachment of the electronic tracking device to his vehicle. The court found that

the use of the tracking device fell within that allowed by the United States Supreme Court, and that the device's sole purpose was to assist police in locating Haas's vehicle. The court found that placing the tracking device on the vehicle while it was parked in a public parking lot was not a search or seizure and did not affect a privacy interest.

¶4 On appeal, Haas argues that attaching the tracking device without a warrant violated the Fourth Amendment's prohibition against unreasonable search and seizure. Haas is wrong. A warrant is not required if a search or seizure does not occur. *Cf.* ***State v. Caban***, 210 Wis. 2d 597, 606, 563 N.W.2d 501 (1997) (Fourth Amendment protection discussed). Using an electronic tracking device to monitor the movements of a vehicle on public streets as occurred in this case is not a Fourth Amendment violation. ***United States v. Knotts***, 460 U.S. 276, 281 (1983). The electronic tracking device did not reveal any information that could not have been obtained through visual surveillance. ***United States v. Karo***, 468 U.S. 705, 707 (1984). Furthermore, "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." ***Knotts***, 460 U.S. at 281. Haas had no reasonable expectation of privacy for the vehicle when it was parked in a public parking lot,[1]

[1] Haas confuses the privacy interest in Fourth Amendment jurisprudence with the concept that shopping mall property is private in a First Amendment context. ***Jacobs v. Major***, 139 Wis. 2d 492, 407 N.W.2d 832 (1987). The two concepts are not related.

and law enforcement was not prohibited from approaching it and affixing a tracking device.[2]

¶5 Haas argues extensively that his trial counsel was ineffective. To establish a claim of ineffective assistance, Haas must show that his counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Even if counsel's performance was deficient, we will not reverse Haas's conviction unless the deficiency prejudiced his defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** "The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶6 A claim of ineffective assistance presents a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The circuit court is the ultimate arbiter of witness credibility, ***State v. Angiolo***, 186 Wis. 2d 488, 495, 520 N.W.2d 923 (Ct. App. 1994), and we will not disturb its findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous, ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determination of

[2] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

whether counsel's performance prejudiced the defendant is a question of law we decide without deference to the lower court. ***Id.***

¶7 We consider the ineffective assistance prejudice prong in the context of the overwhelming evidence of Haas's guilt and the fact that the circuit court found Haas's ***Machner***[3] hearing testimony incredible. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). We take this approach here because even if counsel performed deficiently, which we do not decide, Haas has not demonstrated that it is reasonably probable that he would have been acquitted of any of the charges against him.

¶8 The following evidence was adduced at trial. Police received a tip that Haas was involved in numerous burglaries in Waukesha county. While he was under electronic and visual surveillance on September 24, Haas was observed and identified by a police officer entering the Hyundai carrying goods which turned out to be stolen from two residences. After police stopped the Hyundai that evening, Haas fled on foot. In the vehicle, police found a BB gun and pellets and a wallet containing Haas's driver's license. The police also found property stolen from the two residences burglarized that night. Thereafter, the police recovered property stolen in other Waukesha county burglaries from the room Haas shared with Dennison and from the home of Haas's former wife, Sheila Haas, in California. Police also intercepted a package mailed to Sheila Haas which

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

contained property from burglarized residences. Property owners in seventeen of the eighteen burglaries identified property traced to Haas as property stolen from them. In the one case in which no property was taken, the premises were entered by the use of a BB gun to break the glass, the signature mode of entry in the other burglaries to which Haas was tied.

¶9 Haas left the Waukesha area and was later arrested in Phoenix, Arizona. A Waukesha detective interviewed him in Arizona. Haas waived his ***Miranda*** rights and admitted that he committed the September 24 burglaries while under surveillance and that he fled when police stopped his vehicle. Haas admitted that he used a BB gun to enter the burglarized premises. Haas stated that he used to purchase stolen property from drug dealers but decided in the fall of 1992 to perform the burglaries himself. While declining to discuss any other burglaries, Haas told the detective that police should start looking at burglaries where a BB gun was used to gain entry. All eighteen burglaries with which Haas was charged had a similar modus operandi: entry was gained by breaking glass with a BB gun.

¶10 Haas's defense was that as part of a legitimate business, he innocently purchased what turned out to be stolen property. Haas claimed that he was in the area of the September 24 burglaries to meet his contact to purchase property. Haas sought to establish that he was elsewhere at the time of the sixteen other burglaries. Trial counsel recognized the size of his task when he noted at the postconviction motion hearing that the defense had to account for property stolen in the burglaries being found in the homes of Haas, his companion and his former wife.

¶11 Haas's first ineffective assistance claim arises from his contention that trial counsel did not adequately investigate and obtain testimony from witnesses whom Haas believed could corroborate his defense and his alibis. Haas claimed that he provided counsel with a list of thirty-one witnesses. Trial counsel testified that Haas's list consisted of first names without last names, addresses or telephone numbers, and that Haas did not identify any credible alibi witness from the list. Counsel's investigator also testified that the list contained only first names, and in his meetings with Haas and counsel, he was never given the name of any witness who could verify Haas's whereabouts at the time of a charged burglary.

¶12 The court found trial counsel's testimony credible and found that Haas did not provide the names of individuals who could have been investigated. In light of this credibility finding, which was the circuit court's to make, ***Angiolo***, 186 Wis. 2d at 495, Haas has not shown prejudice from counsel's failure to investigate a list of first names. An alleged failure by counsel to investigate is not ineffective assistance if the defendant does not tell counsel of the existence of witnesses to investigate. ***State v. Hubanks***, 173 Wis. 2d 1, 26-27, 496 N.W.2d 96 (Ct. App. 1992).

¶13 Postconviction, Haas claimed that he also had alibi testimony from his former wife, Sheila Haas, and his companion, Shawn Dennison, which trial counsel failed to present. Both Sheila Haas and Dennison were subpoenaed for trial by the State, but neither appeared to testify. The court found that Haas knew where Dennison was and implicitly found that if Dennison had alibi evidence for trial, she or Haas would have brought such evidence to trial counsel's attention.

Haas did not explain why this evidence was not provided to counsel prior to trial. The court also found that Haas's affidavits stating that Sheila Haas and Dennison would have testified that he was not at the scene of various burglaries were vague.

¶14 Moreover, as the State points out in its respondent's brief and as the circuit court found, none of the "alibi" witnesses Haas presented at the ***Machner*** hearing could establish that Haas was elsewhere at the time of a charged burglary. Haas did not establish that he was prejudiced by counsel's alleged shortcomings in investigating alibi witnesses.

¶15 Haas next argues that trial counsel was ineffective for failing to introduce evidence concerning an uncharged January 1992 burglary which Haas claimed was similar to the charged burglaries. In the 1992 burglary, the homeowner assisted police in the completion of a composite sketch of the suspect, whom the homeowner described as a man younger than the fortyish Haas. Because the suspect did not resemble him, Haas contends that counsel should have introduced the composite to suggest to the jury that another man was responsible for the charged burglaries.

¶16 In trial counsel's estimation, the composite sketch bore a remarkable resemblance to Haas. The circuit court agreed. Haas has not shown that the outcome of the trial would have been different had the sketch been introduced into evidence.

¶17 Haas argues that trial counsel should have introduced evidence concerning uncharged burglaries which occurred on dates when Haas might have had an alibi. However, Haas did not question trial counsel about this at the

Machner hearing. Therefore, we do not address it. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (trial counsel's testimony must be preserved prior to review of a claim of ineffective assistance).

¶18 Haas claims that trial counsel was ineffective because he did not put on evidence of Haas's intent on the night of September 24. Haas claimed at trial that he went out that evening to purchase property from his contact. We fail to see how evidence of Haas's plans for the evening of September 24 would have resulted in a different outcome at trial. Haas was under visual and electronic surveillance and was identified by a police officer at the scene of two burglaries. Property from the burglarized premises was recovered from Haas's vehicle after he abandoned it and fled on foot. It is not reasonably probable that evidence of Haas's plans for the evening would have resulted in an acquittal on the September 24 burglary charges.

¶19 Haas contends that trial counsel was ineffective because he failed to offer evidence relating to the Sugar Hill Company which, Haas contends, would show how he innocently came to possess stolen property. Haas contends that Sugar Hill was a legitimate enterprise involved in the purchase of property. The circuit court found that Haas did not establish at the ***Machner*** hearing that Sugar Hill was a viable and functioning entity in 1993 when Haas was jailed for the burglaries. The court found that Haas did not post any part of his bail after he was arrested in 1993. Rather, family members and friends posted bail. Some of the posted personal property turned out to be stolen. The court found that if Sugar Hill, which was under Haas's control, had significant assets in 1993, Haas would have posted bail sooner. The court also found that even if Sugar Hill had assets, the assets were stolen property. The court found that Sugar Hill existed only in Haas's mind and had no

legitimacy or viability as an ongoing enterprise except as a conduit for stolen goods. Based on these findings, Haas has not established that additional evidence of Sugar Hill would have made it reasonably probable that he would have been acquitted.

¶20 Haas contends that trial counsel was ineffective because he failed to put on evidence that a leg injury would have prevented Haas from fleeing on foot on September 24. The evidence at trial indicated that Haas made his way on foot from the location where the Hyundai was stopped to a restaurant several miles away. However, at the postconviction motion hearing, the court found that Haas did not produce medical records substantiating this injury. Haas has not established prejudice.

¶21 Haas contends that counsel should have put on evidence that a Detroit Tigers baseball cap recovered near the Hyundai did not belong to him. The police officer who observed the burglary suspect on September 24 testified that the suspect was wearing a baseball cap, although the officer could not positively state that the cap recovered near the Hyundai was the suspect's cap. In closing argument, the prosecutor stated that the officer testified that Haas was wearing the cap. In light of evidence that Haas was observed and identified at the scene of the September 24 burglaries, property stolen in those burglaries was found in the Hyundai along with Haas's identification, and the Hyundai was under electronic and visual surveillance, the baseball cap evidence was inconsequential and not prejudicial.

¶22 Haas next challenges trial counsel's handling of the testimony of Officer Jakel, one of the officers who stopped the Hyundai on September 24. None of the officers involved in the stop was able to positively identify Haas. Jakel testified that he tentatively identified Haas after seeing a photograph of Haas

the following day. Haas contends that counsel should have sought an adjournment in order to explore the reliability of Jakel's identification. We are not persuaded.

¶23 Haas's identification as the driver of the Hyundai on September 24 was overwhelming in the evidence without Jakel's identification. The detective on surveillance identified Haas as the driver of the vehicle, Haas testified that he was driving the vehicle that evening, and his wallet and identification were found in the vehicle. Moreover, Haas did not question trial counsel about this issue at the ***Machner*** hearing. We see no prejudice arising from the alleged failure to explore Jakel's identification.

¶24 Haas next argues that trial counsel was ineffective because he failed to impeach Detective Blunt. Detective Blunt interviewed Haas in Phoenix. According to Blunt, Haas waived his ***Miranda*** rights during that interview and made statements that incriminated him in the September 24 burglaries.

¶25 Haas contends that trial counsel should have impeached Blunt with the jail logbook showing that Blunt visited Haas after Blunt denied that he interrogated Haas again in Waukesha. However, Haas did not present Blunt's testimony on this point at the ***Machner*** hearing, and we are left to speculate about whether Blunt interrogated Haas in Waukesha, regardless of what the logbook shows about Blunt's visits to the jail. In the absence of ***Machner*** hearing evidence relating to the basis for the alleged impeachment, Haas has not shown prejudice from counsel's alleged failing.

¶26 Second, Haas faults trial counsel for not impeaching Blunt regarding the time Haas left his apartment complex on September 24. While Blunt was

among those surveilling Haas, he did not testify that he saw Haas leave the complex at a particular time. Therefore, there was no basis for impeaching Blunt as Haas now suggests.

¶27 We conclude that Haas has not sustained his burden to show that he was prejudiced by any alleged error of trial counsel.[4] Because Haas has not established that he was prejudiced by any act or alleged omission of counsel, we reject his ineffective assistance of counsel claims.

¶28 Haas next argues that the circuit court erroneously admitted evidence of a 1979 California conviction for felon in possession of a firearm because the court earlier precluded the State from introducing the nature of Haas's prior convictions. In so arguing, Haas erroneously relies upon the law governing the impeachment of a witness with the number of his or her prior convictions under WIS. STAT. § 906.09 (1995-96).[5]

¶29 To establish a charge of felon in possession of a firearm, WIS. STAT. § 941.29(2) (1993-94), the State had to present evidence that Haas was a convicted felon at the time he possessed the firearm from a burglarized residence. Contrary to Haas's contention that evidence of the California conviction should have been subject to the court's ruling on impeachment with prior convictions, the evidence was admissible to establish an element of the felon in possession of a firearm charge.

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***Waste Mgmt.***, 81 Wis. 2d at 564.

[5] The trial occurred in 1995.

¶30 Haas further argues that he was prejudiced by the revelation that the prior felony was a conviction for felon in possession of a firearm, the same charge pending at trial. Haas contends that the court should have instructed the jury that the California conviction was offered to establish an element of a charged crime, not as proof that Haas committed the charged crime or had a propensity to commit the charged crime. Given the totality of the evidence of the September 24 burglaries in which the weapon was stolen, we cannot say that there is any reasonable possibility that the failure to instruct the jury, if error, contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶31 Haas next complains that the circuit court erroneously excluded evidence of a January 1994 burglary which occurred while he was incarcerated and was sufficiently similar to the charged burglaries. The exclusion of evidence is within the circuit court's discretion, and its ruling will not be overturned on appeal absent a misuse of discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). The court found that the 1994 burglary was not sufficiently similar to the eighteen charged burglaries because the 1994 burglary occurred in the morning hours, not at night, with entry through the front of the house, not at the rear, and there was no signature use of BBs to gain entry. The court applied the correct legal standard to this evidence, *see* ***State v. Scheidell***, 227 Wis. 2d 285, 304-05, 595 N.W.2d 661 (1999) (defendant must show that other acts evidence is similar to the charged crime), and properly exercised its discretion in excluding it.

¶32 Finally, Haas argues that the circuit court should have suppressed his custodial statements to Detective Blunt in Phoenix because Blunt continued to question him after he invoked his right to remain silent. The circuit court denied

Haas's motion to suppress his statements after finding Blunt's testimony about his interaction with Haas more credible than Haas's version of the events. Blunt testified that after being given his ***Miranda*** warnings, Haas told Blunt that he was willing to discuss the burglaries, although not all of the details. Haas never demanded that Blunt's questioning cease. In contrast, Haas contended that immediately after receiving the ***Miranda*** warnings, he told Blunt he did not want to discuss the case for which he was arrested.

¶33 Whether a defendant invoked his or her right to remain silent presents a question of law which we decide by applying the constitutional principles to the facts found by the fact finder. ***State v. Goetsch***, 186 Wis. 2d 1, 7, 519 N.W.2d 634 (Ct. App. 1994). We do not substitute our judgment for that of the circuit court when that court has resolved a conflict about evidentiary facts. ***State v. Echols***, 175 Wis. 2d 653, 671, 499 N.W.2d 631 (1993). The credibility determination was for the circuit court to make. ***Angiolo***, 186 Wis. 2d at 495. The court's finding that Haas did not demand that questioning cease defeats his challenge to the custodial statements.

By the Court.—Judgments and orders affirmed.

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