COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2439-CR **Cir. Ct. No. 2005CF188**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PRENTICE T. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Prentice Lee appeals from a judgment of conviction of eleven crimes and from an order denying his motion for a new trial

based on a claim of ineffective assistance of trial counsel. Lee argues that the trial court erred in denying his postconviction motion without conducting a ***Machner***[1] hearing. We conclude that Lee was not entitled to an evidentiary hearing because, under the prejudice prong of the ineffective counsel analysis, Lee is not entitled to relief. We affirm the judgment and order.

¶2 Lee was charged for participating in a home invasion by a group of six masked men. The intruders intended to force the female homeowner to open the safe at her place of employment, a check cashing business. It happened just around 5:00 a.m. on February 20, 2005. The occupants of the home, which included children, were tied up and the homeowner was told that if she refused to cooperate in gaining access to her employer's safe, her family would be killed. When police were spotted in the vicinity of the house, the intruders fled. Lee was convicted of kidnapping, burglary, armed robbery, child abuse, and seven counts of taking hostages, all as a party to the crime, as a habitual offender, and by use of a dangerous weapon.

¶3 At trial, defense counsel first indicated that he had no witnesses to call. A short while later, the defense sought to name six witnesses. Defense counsel explained that in preparation for the trial, Lee was restricted in his ability to give counsel information about the potential witnesses and that he had not named the witnesses before trial because he only had their names and no contact information. Defense counsel indicated that witnesses would testify that Lee had been at a party in Chicago the night of the crimes, was very intoxicated at the

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

party, and was put into a car with the understanding that he was being taken home. Although the witnesses would testify that Lee was placed in one of the cars used in the crimes, it was Lee's position that he was passed out in the car and was not involved in the planning, preparation, or execution of the crimes. The State objected to the naming of witnesses for the first time at the start of the trial. The State pointed out that the testimony might serve to contradict the testimony of co-defendant Cedric Stevenson that Lee participated in a discussion the group had at an apartment before leaving for Kenosha. The trial court denied Lee the opportunity to name those witnesses at the last minute and found that their testimony was not relevant because they could not account for Lee's actions after he left the party and at the time of the 5:00 a.m. crimes fifty miles away from where they last saw him.

¶4 At trial, it was explained how the police came to discover the crimes. In the early morning hours of February 20, 2005, it was snowing heavily. A police officer was patrolling an area and discovered suspicious footprints in the snow. He followed those footprints and spotted a person behind a garage. The person ran away from him. The officer gave chase and, although he momentarily lost sight of the runner, the trail led him to discover Lee sitting in a black Monte Carlo. Then the officer followed fresh footprints to the front door of the victim's home. The victim signaled the officer to come into the house.

¶5 Co-defendant Cedric Stevenson testified that between 9:00 p.m. and midnight on February 19, 2005, he met with the five other defendants at an apartment in Chicago where the intended robbery was discussed. He indicated that although he and two others smoked marijuana while at the apartment, Lee did not. He did not see Lee consume any alcohol at the apartment. Between 3:00 and 4:00 a.m. the men left. Stevenson saw Lee get into a gold car with two others,

Louis Delphie and Grayline Thompson. Stevenson rode with his cousin, Ronald Lyons, and Andre Warfield, in his cousin's black Monte Carlo. They drove to Kenosha and all six men entered the house.

¶6 Lee testified that starting at 8:00 p.m. on February 19, 2005, he was at a party. He said he was there until 2:30 or 3:30 in the morning. He was drunk and asked Delphie and Thompson to take him home. By the time they left the party, Delphie and Thompson had to help Lee to the car. He was in the black Monte Carlo with Stevenson, Lyons, and Thompson. He said he fell asleep in the car and woke up not knowing where he was. He got out of the car and threw up on the side of a garage. He returned to the car and fell asleep again. He exited one more time to throw up. The last time he awoke in the car the police were there telling him to get out of the car. He denied ever being in the house where the crimes occurred.

¶7 Lee filed a postconviction motion alleging that his trial counsel was ineffective for failing to investigate a defense, failing to locate witnesses, and failing to timely file a witness list. Lee indicated that he had provided trial counsel with a list of potential witnesses and informed counsel that the witnesses could be located through Lee's girlfriend, Felicia Johnson, or his mother, whose telephone numbers Lee provided to counsel. The motion included the statements of two female witnesses[2] that they observed Lee at a party until at least 1:00 a.m. on February 20, 2005, that Lee was doing drugs and drinking a lot of alcohol that night, that Lee threw up on himself, and that four or five men helped Lee into a

[2] These two women were not among the names of witnesses Lee identified on the first day of trial.

car. Johnson provided a statement that Lee was at the party and had smoked and drank to the point of almost passing out. She indicated that at 2:00 a.m., Delphie, Warfield, and Thompson agreed to take Lee home and carried him out to Delphie's tan Buick Century. Lee was not home when she returned home from the party and she did not hear from him until he called her from the Kenosha police department.

¶8 In a written decision, and without conducting an evidentiary hearing, the trial court denied Lee's postconviction motion. It concluded that the record conclusively demonstrates that Lee is not entitled to relief and that Lee had not shown a "reasonable probability that, but for trial counsel's unprofessional errors, that the trial result would have been different."

¶9 Lee argues that the trial court was required to hold a hearing on his postconviction motion. A hearing is required when a postconviction motion alleges on its face sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether that is the case is a question of law that we decide de novo. ***Id.*** To be sufficient, a postconviction motion must allege the five "w's" and one "h"; that is, who, what, where, when, why and how. ***Id.***, ¶23. The trial court has discretion to

> deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id., ¶12 (footnote omitted). We also decide as a question of law and de novo whether the record conclusively demonstrates that the defendant is entitled to no relief. ***State v. Howell***, 2007 WI 75, ¶78, 301 Wis. 2d 350, 734 N.W.2d 48.

¶10 A claim of ineffective assistance of counsel requires the defendant to show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Allen***, 274 Wis. 2d 568, ¶26. Such a claim presents a mixed question of fact and law. ***State v. Cooks***, 2006 WI App 262, ¶34, 297 Wis. 2d 633, 726 N.W.2d 322. The trial court's findings of fact of what counsel did or did not do are conclusive unless they are clearly erroneous. ***Id.*** The ultimate determination of whether the counsel's performance was constitutionally deficient is a question of law subject to our independent review. ***Id.***

¶11 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. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990); ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). To establish prejudice, "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.'" ***Cooks***, 297 Wis. 2d 633, ¶33 (citations omitted). Here we move directly to the second prong of the test because we conclude that Lee could not have been prejudiced by his trial counsel's performance.

¶12 The witnesses Lee claims should have been presented at trial would have placed Lee at a party in Chicago until the early morning of February 20, 2005. However, those same witnesses placed Lee in the company of Thompson, Delphie, and Warfield, all perpetrators of the crimes. They would place Lee in Delphie's car, a car that was used in the crimes. Moreover, putting Lee in Delphie's car would have contradicted Lee's own testimony that he was put into the black Monte Carlo, that he passed out in the Monte Carlo, and that he woke up in the Monte Carlo. There would be no explanation for how Lee got into the

Monte Carlo. The missing testimony would permit the inference that Lee entered the home and ran back to the Monte Carlo.

¶13 According to the witnesses' statements, Lee left the party before the time that the group of intruders reportedly left Chicago for the drive to Kenosha. Although the witnesses' may have contradicted Stevenson's testimony that Lee spent the evening at the apartment planning the home invasion, their testimony would not change that Lee was with Thompson, Delphie, and Warfield for a period of time sufficient to participate in the crimes. It is his participation and not just planning that makes him criminally responsible.

¶14 The witnesses would have also established that Lee was drunk and doing drugs but still functional. That would have corroborated the testimony of the homeowner that one of the intruders had been drinking heavily and appeared to be on drugs. The missing testimony thus tends to establish that Lee was in the house with the others.

¶15 Finally, the witnesses would not have served to contradict the strong circumstantial evidence that Lee went into the house. Lee was spotted hiding by a nearby garage. He ran from the officer. His flight showed a consciousness of guilt. *See* ***State v. Winston***, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984). Lee's tracks were followed to the Monte Carlo where Lee was found. Moreover, Lee's tracks at the garage were followed back to the front door of the home demonstrating that Lee had run out of the front door of the home. One victim testified that when the intruders fled, one went out the front door. Even if, as Lee suggests, the officer's tracking of fresh prints was suspect given the heavy snow conditions, the reliability of the officer's testimony was tested at Lee's trial.

The testimony of the missing party witnesses would not have touched the integrity of that evidence.

¶16 The measure of prejudice from counsel's deficient performance does not turn on an assessment of whether the defendant will probably be found guilty at a new trial should that trial take place. It involves a determination of confidence in the result of the trial that did take place. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (prejudice is not an outcome determinative test but rather focuses on reliability). Here we have confidence in the outcome of Lee's trial despite the missing testimony from witnesses who saw him at the party in Chicago. That evidence would not have overcome the strong circumstantial evidence pointing to Lee's involvement in the crimes. The trial court correctly concluded that the record conclusively demonstrates that Lee is not entitled to relief and, therefore, properly exercised its discretion in denying Lee's postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).