COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2633 **Cir. Ct. No. 2004CF1891**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE ADAMS,
DEFENDANT-APPELLANT.

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

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Willie Adams appeals from a judgment of conviction and from an order denying his motion for postconviction relief. He claims that he received ineffective assistance from his trial counsel and that the circuit court erred by denying this claim without a hearing. He further claims that

the circuit court should have suppressed his custodial statements. We reject his contentions and affirm.

BACKGROUND

¶2 Adams shot and killed LaShaun Hayes on April 2, 2004, outside of a Milwaukee tavern. Adams fled to Chicago, where he was apprehended several weeks later. The State charged Adams with first-degree intentional homicide while armed with a dangerous weapon.[1]

¶3 Adams moved to bar the State from using his custodial statements at trial, asserting that the statements were obtained in violation of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966). At the suppression hearing, Milwaukee detectives testified that they questioned Adams at a Chicago police station in April 2004, and at the Milwaukee Police Administration Building in May 2004. The detectives described advising Adams of his ***Miranda*** rights, including his right to consult with a lawyer and his right to have a lawyer present during questioning. *See* ***id.*** at 444-45. According to the detectives, Adams made statements on both occasions without ever requesting a lawyer. Adams, by contrast, testified that he asked for a lawyer during his contacts with detectives in both Chicago and Milwaukee. Additionally, he described calling and meeting with a lawyer, Attorney Earl Washington, while in the Chicago jail.[2]

[1] The State initially charged Adams with first-degree reckless homicide while armed with a dangerous weapon, but subsequently amended the charge.

[2] Attorney Earl Washington did not testify at the suppression hearing. Adams's counsel told the circuit court that Attorney Washington was "vehement in indicating that he doesn't recall conversations with Mr. Adams."

¶4 The circuit court rejected Adams's testimony and credited the testimony of the detectives. The court found that Adams was advised of his rights and that he waived them freely, voluntarily, and intelligently. Accordingly, the court denied the motion to suppress Adams's custodial statements.

¶5 Adams's trial began in March 2006, and lasted for eight days. We summarize here only the evidence necessary to an understanding of the issues on appeal.

¶6 Adams described spending the evening of April 2, 2004, at Mike's Huh Tavern with several companions, including Valerie Burgess and Charnaye Vogelmann. As the evening progressed, Adams grew suspicious that some in the tavern might be planning to rob or assault him. Adams testified that he and Burgess left the tavern for a time, leaving Vogelmann behind playing pool.

¶7 According to Adams, he returned to the tavern to get Vogelmann. Because Adams still feared a robbery, he brought a gun. As he approached the tavern, its front door flew open and Hayes emerged. Adams testified that Hayes swore and pulled out a gun. To prevent Hayes from firing his weapon, Adams pulled out his own gun and fired numerous shots towards Hayes. Adams then fled the scene.

¶8 The State's theory was that Adams shot Hayes on sight without justification. The State relied, in part, on one of Adams's custodial statements, in which Adams admitted that he fired his weapon without knowing whether Hayes had a gun.

¶9 Paul Hnanicek testified for the State. He told the jury that he was following Hayes out of Mike's Huh Tavern when Adams began shooting.

Hnanicek testified that Hayes had a gun, but never took it out of his waistband. Hnanicek also testified that Vogelmann was still inside the tavern playing pool at the time of the shooting.

¶10 Vogelmann herself did not testify. The State called her grandson, Troy Warren, who testified that Vogelmann had cancer in April 2004, and did not go to taverns at that time. Warren asserted that Vogelmann was not at Mike's Huh Tavern on the night of the shooting.

¶11 The State called Burrell Maull, who told the jury that he and Adams had been friends for many years. Maull testified that he was at Mike's Huh Tavern on April 2, 2004. He described walking out of the tavern behind Hayes and Hnanicek when he heard shooting. According to Maull, Hayes came back into the bar immediately after shots were fired and dropped a gun that Maull retrieved and later traded for crack cocaine.

¶12 Maull's testimony did not conform to the State's expectations, and much of Maull's time on the stand was consumed by exploration of his prior statements. Maull acknowledged that when he spoke to police shortly after the shooting he described fighting and drug dealing in the tavern. He acknowledged that he told no one that Hayes had a weapon until the day before trial, when he disclosed to the prosecution that he "saw something silver" in Hayes's waistband that he believed was a gun. Maull further acknowledged that he never reported finding Hayes's gun on the floor, or exchanging the gun for drugs, until he so testified at trial.

¶13 The jury returned a verdict rejecting first-degree intentional homicide and convicting Adams of the lesser offense of first-degree reckless homicide while armed with a dangerous weapon. The circuit court imposed a

thirty-five-year term of imprisonment, bifurcated as twenty-five years of initial confinement and ten years of extended supervision.[3]

¶14 Adams filed a postconviction motion, claiming that his trial counsel was ineffective in two respects. First, he claimed that counsel should have called Maull as a defense witness to testify that Vogelmann was at the tavern on April 2, 2004. Adams argued that this testimony would have bolstered his credibility and corroborated his claim to have shot Hayes in defense of Vogelmann. Second, Adams asserted that trial counsel should have called another tavern patron, Lorenzo Conley, as a defense witness. According to Adams's offer of proof, Conley saw two silhouettes outside of the tavern door that Conley assumed were Hayes and Hnanicek. These figures were "motioning" in a way that led Conley to believe that they were arguing with somebody. Moments later, Conley heard gunshots. Adams contended that this evidence would have corroborated his version of Hayes's actions immediately preceding the shooting.

¶15 The circuit court denied Adams's motion without a hearing. The court concluded that Adams was not prejudiced by trial counsel's failure to present the proposed testimony from Maull and Conley. Adams now appeals, challenging both the circuit court's decision to admit his custodial statements and the effectiveness of his trial counsel's performance.

[3] In its postconviction order, the circuit court stated that it imposed a sixty-year sentence in this case. The record is clear that the circuit court imposed a thirty-five year sentence.

DISCUSSION

¶16 We first address Adams's contention that his custodial statements should have been suppressed because they were obtained after he invoked his right to counsel in violation of ***Miranda***. In reviewing a ***Miranda*** challenge, we are bound by the circuit court's factual findings unless they are clearly erroneous. ***State v. Ross***, 203 Wis. 2d 66, 79, 552 N.W.2d 428 (Ct. App. 1996). We independently determine whether the facts resulted in a constitutional violation. ***State v. Backstrom***, 2006 WI App 114, ¶9, 293 Wis. 2d 809, 718 N.W.2d 246.

¶17 When the State seeks to admit a defendant's custodial statements into evidence, the State must show, first, that "the accused was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them." ***State v. Santiago***, 206 Wis. 2d 3, 18, 556 N.W.2d 687 (1996). The necessary advisements include the right to counsel and the right to remain silent. ***Ross***, 203 Wis. 2d at 73-74. Second, the State must show that the accused's custodial statements were given voluntarily. ***Santiago***, 206 Wis. 2d at 19. In this appeal, Adams limits his challenge to a contention that detectives continued to question him after he asserted his right to an attorney. Officers must cease questioning a suspect who has invoked the right to counsel. ***Ross***, 203 Wis. 2d at 74.

¶18 At the suppression hearing, two detectives described advising Adams of his rights prior to interrogating him and three detectives testified that Adams never requested an attorney before or during the interrogation. On appeal, Adams acknowledges the detectives' testimony, but points to his own, contrary testimony. He insists that he told the detectives that he wanted to "exercise his rights" and that he wanted an attorney.

¶19 The circuit court found the detectives credible. We are bound by that finding. "[A]s to the credibility of disputed testimony in relation to evidentiary facts, this court will not substitute its judgment for that of the [circuit] court." ***Turner v. State***, 76 Wis. 2d 1, 18, 250 N.W.2d 706 (1977). Based on the detectives' testimony, the circuit court determined that Adams was advised of his rights and that Adams did not ask for an attorney. These findings are supported by the credible evidence and, accordingly, they are not clearly erroneous. *See* ***Backstrom***, 293 Wis. 2d 809, ¶11. In light of the circuit court's factual findings, we are satisfied that Adams's statements were obtained without constitutional taint. Therefore, the circuit court properly denied the motion to suppress.

¶20 We turn next to Adams's claims that his trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show both deficient performance by counsel and prejudice as a result of the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, Adams must show that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *See* ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82 (citation omitted). To prove prejudice, Adams must show "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." *See* ***Strickland***, 466 U.S. at 694. Adams must satisfy both the deficiency and the prejudice components of the test to be afforded relief. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. We may choose to examine either component first. *See* ***Pote***, 260 Wis. 2d 426, ¶14. If Adams's showing is inadequate on one, we need not address the other. *See* ***id.***

¶21 The circuit court denied Adams's claims of ineffective assistance of counsel without conducting a hearing.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Allen, 274 Wis. 2d 568, ¶9 (citations omitted).

¶22 Adams asserts that his trial counsel should have called Maull as a defense witness to testify that Vogelmann was at Mike's Huh Tavern on April 2, 2004. Adams claims that this testimony was necessary to support the theory of defense of others and to corroborate Adams's own testimony. We agree with the circuit court that Adams has not established any prejudice from the omission of Maull's proposed testimony.

¶23 First, the circuit court did not instruct the jury regarding defense of others. Indeed, the record reflects neither a request nor a basis for such an instruction. Adams had a privilege to use deadly force in defense of Vogelmann only if Adams reasonably believed that the force was necessary to prevent actual or imminent harm to her. *See* WIS JI—CRIMINAL 830. As the circuit court

observed, "there was no evidence presented of any threat to [Vogelmann] at all."[4] Because Maull's proposed testimony would not have furthered any viable theory of defense, actual or potential, Adams was not prejudiced by the loss of the evidence. *See* ***State v. Keeran***, 2004 WI App 4, ¶¶17, 20-21, 268 Wis. 2d 761, 674 N.W.2d 570 (defendant not prejudiced by failure to offer additional evidence when that evidence does not support a viable defense).

¶24 Second, the circuit court characterized Maull's testimony for the State as "confusing" and "implausible." It discussed the timing of Maull's belated reports that the victim had a gun and observed that "[Maull's] testimony left the distinct impression that he was lying." The circuit court's credibility assessment is a factual finding to which we owe deference unless it is clearly erroneous. *See* ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. The court's conclusion here is not clearly erroneous. In fact, Adams's counsel addressed Maull's lack of credibility in closing argument: "[i]s Mr. Maull a liar? Absolutely. Absolutely. There is no doubt in this world." In light of Maull's lack of credibility as a witness for the State, counsel's failure to recall him as a defense witness does not undermine our confidence in the outcome of the trial.

¶25 Third, Adams has not identified any gap in the evidence that Maull's testimony would have filled. Two witnesses testified that Vogelmann was in the tavern on the night of the shooting: Adams himself, and Hnanicek, a State's witness. Adams does not demonstrate that a second corroborating witness,

[4] We observe that Maull's proposed testimony would not have supplied evidence to support an argument that Adams acted in defense of Vogelmann. The offer of proof reflects that Maull could offer nothing more than that Vogelmann was in Mike's Huh Tavern at some point in the evening of April 2, 2004. Maull "is not sure if [Vogelmann] was still at the bar when the shooting happened."

particularly a witness who lacked credibility, was necessary to ensure a reliable trial outcome.

¶26 Adams also claims that his trial counsel was ineffective in failing to call Conley as a defense witness. According to Adams's proffer, Conley saw two silhouettes standing outside of the tavern before the shooting, "assumed" that the figures were Hnanicek and Hayes, and "believed" that their motions indicated an argument with a third, unseen individual. We agree with the circuit court's assessment of this proposed testimony as nothing more than Conley's suppositions. As such, the proffered testimony was too inconclusive and speculative to have probative value. *See* ***State v. Schael***, 131 Wis. 2d 405, 412, 388 N.W.2d 641 (Ct. App. 1986). Counsel's failure to offer Conley's testimony therefore does not undermine our confidence in the outcome of the proceedings. *See* ***Strickland***, 466 U.S. at 694.

¶27 Adams did not establish a reasonable probability that the result of the trial would have been different had the jury heard the evidence proffered in the postconviction motion. Therefore, the circuit court did not err in concluding that a hearing on Adams's claims was unnecessary. Accordingly, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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