COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP873-CR **Cir. Ct. No. 2012CF5752**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE JAMES KING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN and M. JOSEPH DONALD, Judges. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Kyle James King appeals from a judgment of conviction, entered upon his guilty plea, on one count of robbery with the use of force. King also appeals from an order denying his postconviction motion without

a hearing. King alleges that trial counsel was ineffective for failing to investigate a third-party-perpetrator defense, and he would not have entered his guilty plea but for counsel's ineffectiveness. We conclude the circuit court properly denied the motion, so we affirm the judgment and order.

BACKGROUND

¶2 On November 19, 2012, at 12:39 a.m., a Speedway gas station was robbed by a perpetrator wearing a black mask, black pants, brown shoes, a black baseball hat, a grey hooded sweatshirt with the words "mean people suck" on it, and possibly gloves, while brandishing a .38-caliber snub-nose revolver. The robber fled the gas station on foot with about $391 in cash.

¶3 Ten minutes later, police tried to stop a 1997 Ford Explorer nearby for speeding and disregarding a stop sign. The vehicle eluded officers, but they had recorded the license plate, which led them to registered owner Daniel DeHorn. Police contacted DeHorn at his residence, and he told them he had sold the vehicle to King. Police were then able to determine King's residence and that he was on extended supervision for felony murder.

¶4 Officers canvassed near King's residence and found a Ford Explorer parked in front of the house. Police made contact with homeowner Bruce Keller and King's girlfriend, Renita Wilson. Wilson told officers that King was not at home, but she and Keller let them in to search for King. King was found in a crawlspace with the key to the Explorer in his pocket. The police also found $266 cash in a desk near his room. In a search of the Explorer, police recovered a black mask, latex gloves, a pistol holder, a grey sweatshirt with the words "mean people suck" on it, unfired ammunition, and a black hat with a brim. Wilson, when interviewed, told police that she received a text from King at 11 p.m. to leave the

door unlocked, she heard him come in the house around 1 a.m., and he had recently shown her a small handgun he had acquired.

¶5 King told police he did not commit the robbery. He said he was at his mother's house when friend Kevin Huttner asked to borrow the Explorer. King agreed and stayed at his mother's house until she could give him a ride home around midnight. King also told police that shortly after he got home, Huttner arrived, returned the key, and said he had been in a high-speed chase with police.

¶6 King was arrested and charged with one count of armed robbery with the threat of force and one count of attempted fleeing or eluding a traffic officer. He agreed to enter a guilty plea to a reduced charge of robbery with the threat of force; the attempted fleeing charge was dismissed and read in. The State agreed to recommend a sentence of twenty-eight months' initial confinement, with the length of extended supervision left to the court's discretion. The circuit court imposed a sentence of six years' initial confinement and five years' extended supervision.[1]

¶7 King filed a postconviction motion to withdraw his plea. He alleged that trial counsel was ineffective for advising him to plead guilty before interviewing two witnesses who could corroborate his claims of innocence. These witnesses were his mother, Michelle King, and Huttner's roommate, Scott Kasulke. King's mother would have corroborated his claim that he was at her house until she drove him home around midnight. Kasulke would have testified that he lives with Huttner; that Huttner borrowed King's Explorer on

[1] The Honorable Charles F. Kahn imposed sentence and entered the judgment of conviction.

November 19, 2012, and was acting kind of funny; that when Huttner returned, he was not driving the Explorer and said he had been in a high-speed chase with police; that on November 19, 2012, Huttner was wearing brown pants and brown shoes; and that Huttner owned a .38-caliber snub-nose revolver.

¶8 King claimed he had asked trial counsel to interview both witnesses before he entered his plea, and he would have gone to trial if counsel had done so. However, King says that because he knew counsel did not contact the witnesses, he pled guilty to mitigate his sentence because he knew he would lose at trial without them.

¶9 The circuit court denied the motion without a hearing.[2] It concluded that King would not have been allowed to present a third-party-perpetrator defense at trial. King appeals.

DISCUSSION

¶10 On appeal, King argues that the circuit court misapplied the standard for third-party-perpetrator evidence. He agues that the circuit court should have held a hearing on the motion because he alleged sufficient material facts, which, if true, established counsel's ineffectiveness for failing to investigate the third-party-perpetrator defense.

I. Standards of Review

¶11 "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to

[2] The Honorable M. Joseph Donald ruled on the postconviction motion.

relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts is a question of law we review *de novo*. *See* ***id.***, ¶9. If the motion does not raise sufficient facts, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the decision whether to grant a hearing is committed to the circuit court's discretion. *See* ***id.*** We review such a decision for an erroneous exercise of discretion. *See* ***id.***

¶12 To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that refusing to allow the withdrawal will result in a manifest injustice. *See* ***State v. Dillard***, 2014 WI 123, ¶83, 358 Wis. 2d 543, 859 N.W.2d 44. One way to show manifest injustice is to show the defendant received ineffective assistance of counsel. *See* ***id.***, ¶84.

¶13 To demonstrate ineffective assistance of counsel, "the defendant must prove (1) that trial counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant." *See* ***id.***, ¶85. An attorney is deficient if he "'made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" ***Allen***, 274 Wis. 2d 568, ¶26 (citations omitted; one set of internal quotation marks omitted). Prejudice is "defined as a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *See* ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted). The movant must prevail on both prongs to secure relief. *See* ***Allen***, 274 Wis. 2d 568, ¶26.

¶14 "When a defendant seeks to present evidence that a third party committed the crime for which the defendant is being tried, the defendant must show 'a legitimate tendency' that the third party committed the crime[.]" ***State v. Wilson***, 2015 WI 48, ¶3, 362 Wis. 2d 193, 864 N.W.2d 52 (citing ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)). In other words, the defendant must show "that the third party had motive, opportunity, and a direct connection to the crime." *See* ***Wilson***, 362 Wis. 2d 193, ¶3. The supreme court has concluded that ***Denny*** correctly sets forth the test for determining admissibility of third-party-perpetrator evidence. *See* ***Wilson***, 362 Wis. 2d 193, ¶52. A circuit court's decision to admit or exclude evidence is reviewed for an erroneous exercise of discretion. *See* ***id.***, ¶47.

II. Third-Party Perpetrator Evidence

¶15 King complains that trial counsel was ineffective for failing to investigate his third-party-perpetrator defense. *See* ***State v. Domke***, 2011 WI 95, ¶41, 337 Wis. 2d 268, 805 N.W.2d 364 ("Counsel must either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary."). Even if counsel were deficient for not speaking to Kasulke and Michelle King, we conclude that the circuit court properly determined that third-party-perpetrator evidence would not be admitted, so counsel's performance is not prejudicial.

¶16 King nevertheless insists that he alleged sufficient facts to satisfy the ***Denny*** test and, when taken as true, those facts are sufficient to entitle him to relief. We disagree that he pled sufficient facts.

A. The Motive Prong

¶17 The first prong of the ***Denny*** test asks whether the third-party perpetrator had "a plausible reason to commit the crime." ***Wilson***, 362 Wis. 2d 193, ¶¶56-57. King asserts that he "established motive by alleging that Mr. Huttner committed a robbery which is, by definition, a profitable crime."

¶18 King's postconviction motion does not directly allege that Huttner committed the robbery. It alleges that Kasulke's statement would have permitted him to allege Huttner committed the robbery. There is also no allegation about why Huttner would have committed a robbery, and Kasulke's statement offers no insight as to a possible motive.[3]

¶19 We are not persuaded that a robbery is, by definition, so profitable a crime that merely alleging someone committed the act also establishes "a plausible reason to commit the crime" for purposes of the ***Denny*** analysis. Robbery is committed by someone who, "with intent to steal, takes property from the person or presence of the owner." *See* WIS. STAT. § 943.32(1) (2013-14). Not all property is of such value as to make a robbery profitable, nor must profit be a motive for every actor. A postconviction motion, to warrant a hearing, must allege sufficient material facts; vague, unpled implications do not suffice. The circuit court was therefore correct to note that "there is absolutely no motive established" by the postconviction motion.

[3] Meanwhile, King's mother's statement offers no insight at all regarding Huttner, and is therefore irrelevant to the third-party-perpetrator discussion.

B. The Opportunity Prong

¶20 The second prong of the ***Denny*** test is about opportunity and asks whether the third-party perpetrators could have committed the crime, either directly or indirectly. *See* ***Wilson***, 362 Wis. 2d 193, ¶58. "In other words, does the evidence create a practical possibility that the third party committed the crime?" ***Id.*** The circuit court appears to have assumed that this prong was satisfied, noting, "Huttner may arguably have had opportunity[.]" We will also assume this prong is satisfied, though we note that Kasulke's statement provides no timeline of Huttner's activities relative to the time of the robbery.

C. The Direct Connection Prong

¶21 The third prong of the ***Denny*** test requires a direct connection, or "evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly." ***Wilson***, 362 Wis. 2d 193, ¶59. "Logically, direct connection evidence should firm up the defendant's theory of the crime and take it beyond mere speculation." ***Id.*** Here, the possibility of Huttner as the robber remains mere speculation.

¶22 As the circuit court noted, all Kasulke's statement offers is a subjective opinion that Huttner was acting strangely, the fact that he had a pair of gloves in his back pocket in November in Wisconsin, and the possibility that he owned the same kind of gun as that used in the robbery. While King claims Kasulke saw Huttner in the same clothes as the robber, Kasulke said King was wearing "brown, khaki pants with brown shoes" while the video, according to police who viewed it, showed a robber with black pants. Even if Huttner's pants and shoes were the same color as those worn by the robber, the robber was

wearing more than a certain color of pants and shoes. Kasulke does not indicate that he ever saw Huttner with a baseball cap, mask, or a grey "mean people suck" sweatshirt.

¶23 We therefore agree with the circuit court that King has not alleged sufficient material facts to establish the admission of third-party-perpetrator evidence.[4] Thus, he has not alleged sufficient material facts to establish prejudice from any deficient performance by trial counsel in failing to investigate Kasulke's possible contributions to what would have turned out to be a non-viable defense. The circuit court properly denied the 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. (2013-14).

[4] We note that the third-party-perpetrator defense is slightly different from an argument that Kasulke and Michelle King would have supported King's claims of innocence. However, to the extent that King also intended to argue that trial counsel was ineffective for failing to pursue these witnesses to corroborate his innocence or provide an alibi, that claim is also insufficiently pled. Kasulke did not purport to have knowledge of King's whereabouts at any time around the time of the robbery, so he cannot say whether King had a role in it. Michelle King could account for her son only through midnight; the robbery occurred about forty minutes later.