COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP843-CR **Cir. Ct. No. 2012CF977**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIN DEVON WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. A jury found Javin Wilson guilty of charges related to the stabbing of TS. At trial, Wilson's defense was that he was not involved in the stabbing, and, more specifically, that he was wearing black clothing at the time of the stabbing and a man who was then wearing red clothing stabbed TS. After

the jury returned a guilty verdict, Wilson filed a postconviction motion alleging that his trial counsel provided ineffective assistance for failing to present evidence that the man who wore red clothing and who stabbed TS was Nathan Harden. After an evidentiary hearing, the circuit court denied Wilson's motion. Wilson renews his ineffective assistance of counsel argument on appeal. We reject Wilson's argument and affirm.

BACKGROUND

¶2 Javin Wilson was charged with first degree reckless injury and aggravated battery against TS, and aggravated battery as party to a crime against NJ and ZJ, all as a repeater and with use of a dangerous weapon. The charges arose from a fight among approximately fifteen people one night in December 2011, in which three persons were stabbed: TS, NJ, and ZJ.

¶3 The charges were tried to a jury. At trial, evidence was presented showing that Wilson was stopped by a police officer as he was walking quickly away from the scene of the stabbings; that while Wilson was standing by the police officer, TS pointed to Wilson and said that he was the person who had stabbed TS; and that Wilson's fingerprint was on a black knife found at the scene with TS's blood on it.

¶4 The officer who stopped Wilson testified that Wilson gave false and inconsistent answers about what he had being doing earlier that night, whether he had consumed any alcoholic beverages, and whether he had seen any of the fighting. More specifically, the officer testified that Wilson first said that he had not seen anything, but then said that he did see the fight but "did not see who it was between." The officer testified that Wilson was dressed all in black, including

wearing a black cap; his clothing did not appear to be disheveled; and there appeared to be no blood on him. Wilson did not testify at trial.

¶5 The defense sought to undermine TS's identification of Wilson by eliciting testimony that TS was in shock, intoxicated, and far from Wilson at the time of the identification, and that TS did not recall at trial whether he had pointed out Wilson to the officer. The defense called a witness who testified that he saw a person wearing a red hat fighting with TS. In addition, one of the stabbing victims, ZJ, testified that he saw a man in a red hat push TS to the ground and then others ran over and started fighting, and that ZJ pointed out the man in the red hat to a police officer. The officer testified that he stopped the man pointed out by ZJ, who was wearing a red cap; identified the man as Antonio Walker; and after further questioning let Walker go.[1]

¶6 In closing argument, Wilson's trial counsel emphasized that none of the witnesses at trial testified that they had seen anyone, including Wilson, with a knife, or that they saw anyone, including Wilson, stab anyone. Defense counsel asked the jury to infer from the evidence that it was "the man in the red cap" who stabbed TS, not Wilson.

¶7 The jury convicted Wilson of the two charges involving TS and acquitted Wilson of the charges involving NJ and ZJ.

¶8 Wilson filed a postconviction motion for relief based on ineffective assistance of trial counsel, alleging that his trial counsel was ineffective for failing to present evidence that a man named Nathan Harden was the person who stabbed

[1] The defense also challenged the scientific basis for fingerprint identification.

TS. The circuit court held an evidentiary hearing and denied Wilson's motion. Wilson appeals.

DISCUSSION

¶9 Wilson renews on appeal his postconviction argument that his trial counsel was ineffective for failing to "raise the issue that a third party, namely Nathan Harden, was the person who stabbed TS" and failing to present evidence supporting that proposition. We reject Wilson's argument for reasons we now explain.

¶10 Under both the Wisconsin and United States Constitutions, in order for a court to find that counsel rendered ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

¶11 To prove deficient performance, a defendant must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, a defendant must establish "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.

¶12 The defendant bears the burden of proving both of these elements. ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111. If we conclude that the defendant has not proved one prong, we need not address the

other. ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325.

¶13 A claim of ineffective assistance of counsel presents a mixed question of law and fact. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Thiel***, 264 Wis. 2d 571, ¶21; ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. The determination of counsel's effectiveness is a question of law, which we review de novo. ***Kimbrough***, 246 Wis. 2d 648, ¶27.

¶14 As we discuss in more detail below, Wilson argues that it was deficient performance for his trial counsel to fail to introduce a statement that Nathan Harden made to police several weeks after the fight, and to fail to call as witnesses two persons who saw some of the fighting and made statements to police within a few hours after the fight.[2] Wilson argues that if all of this evidence had been presented to the jury, then the jury would have had a basis to find that Harden stabbed TS with the knife that Harden had somehow obtained from Wilson, providing an innocent explanation for Wilson's fingerprint that was found

[2] In his initial appellant's brief, Wilson explains why Harden's statement would have been admissible at trial, and the State does not address the admissibility issue in response. Accordingly, we assume without deciding that Harden's statement would have been admissible at the trial.

The parties do not dispute that the statements by Harden and the two witnesses had been provided to Wilson's trial counsel before trial.

on the knife.[3] We will first review the three statements, and then explain why Wilson fails to show that his trial counsel was deficient for failing to use these statements at trial, or that the failure to use these statements at trial prejudiced Wilson.

¶15 *Harden's Statement.* A few weeks after the fight, a police officer questioned Harden. Harden said that he had left a bar with Wilson; he got into an argument with a man; the man pushed Harden and Harden pushed him back, leading to a fight with a group of men who "swarmed" Harden; Harden fought "for a little while" as he tried to get away from the group before "the police showed up and everybody ran"; and Harden walked off. Harden said that he hit one of the men in the face with his fist; that he never had a knife or stabbed anyone; that he did not see anyone with a knife; that Wilson was carrying Wilson's black-handled knife and had played with it earlier that night; that on the day after the fight, Wilson told Harden that he had stabbed some people during the fight and "threw his knife"; and that Wilson told Harden to make up an alibi for Wilson. Harden also said that, on the night of the fight, Harden was dressed all in black with no hat. Harden did not testify at trial, and no witness at trial identified Harden by name as being involved in the fight.

[3] While there was conflicting evidence on the topic presented at the postconviction hearing, the circuit court found that neither Wilson nor anyone else told Wilson's trial counsel before or at trial that Harden was the person who stabbed TS, that the knife belonged to Harden, or why Wilson's fingerprint was on the knife. Wilson does not challenge those findings on appeal, and, with one exception noted below, argues from the apparent premise that no such information was available to trial counsel in time for use at trial. *See* ***State v. Eison***, 2011 WI App 52, ¶21, 332 Wis. 2d 331,797 N.W.2d 890 (an attorney is not ineffective for not pursuing something that the defendant knew, but did not reveal to the attorney).

¶16 *Nathan Thieler's Statement*. Thieler told police shortly after the fight that he was on the scene at the time of the fight, and that a man wearing a red hat and red jacket shoved TS and began fighting with TS. The jury did not learn of this statement.

¶17 *Brock Kingsley's Statement.* Kingsley told police shortly after the fight that he saw TS fighting with a man wearing a "red hat and a red ... jacket." The jury also did not learn of this statement.

¶18 Wilson argues that all of this evidence taken together would have supported a jury finding that Harden stabbed TS with a knife that had been recently touched by Wilson. Wilson's argument does not withstand scrutiny, for at least the following reasons.

¶19 First, Wilson argues that his trial counsel was deficient for failing to present evidence that would have shown that Harden was the stabber because he was wearing red clothing. More specifically, Wilson argues that Thieler's and Kingsley's statements, if presented to the jury, would have provided the jury with a description of the person fighting with TS that matched a description of Harden rather than Wilson, because the jury heard evidence that Wilson was wearing all black and Thieler and Kingsley described the man fighting with TS as wearing red. However, what is obviously missing from this argument is any link between a man wearing red and Harden, or that Harden had an altercation with TS.

¶20 Wilson did in fact present at trial the defense that someone wearing red was the stabber, and not Wilson. But Wilson identifies no evidence from any source showing that Wilson's trial counsel was aware or should have been aware, in advance of trial, of evidence that *Harden* was wearing red clothing of any type at the time of the fight or that Harden had physical contact with TS. Moreover, in

Harden's own statement he said that he was wearing all black at the time of the stabbings. Thus, Wilson fails to demonstrate that his trial counsel could have presented evidence suggesting that Harden was the man Thieler and Kingsley referred to in their statements.

¶21 On appeal, Wilson asserts that "Wilson described the color of [Harden's] clothing as red hat, black jacket and a red sweatshirt." However, Wilson made that statement when testifying at the postconviction motion hearing, based on a video clip that he produced at that hearing, which he asserted shows Harden, while wearing red, enter a bar with Wilson a couple of hours before the fight took place. At the hearing, Wilson identified one man in the video as himself and testified that he was wearing all black, and identified the second man in the video as Harden and testified that Harden was shown on the video wearing a red hat, black jacket, and red sweatshirt. However, the digital version of the video clip that is in the record, when played on this court's system, shows only black and white images.[4] Even if the video clip could be played on different equipment so as to show the colors of the clothing, it would not affect the result here because Wilson did not testify that he told his trial counsel what color clothing Harden was wearing prior to or during the trial.

¶22 Because Wilson points to no evidence supporting the view that, prior to trial, he alerted his trial counsel to the possibility that Harden was wearing red clothing at the time of the altercation, there is no starting point for his argument

[4] This court has a vantage point equal to that of the circuit court in reviewing the video clip as part of our evaluation of the legal question as to whether counsel was ineffective. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (1999) (when the only evidence on a factual question is reflected in a video recording, the court of appeals is in the same position as the circuit court to determine that question based on the recording).

that his trial counsel performed deficiently in failing to present the statements of Harden, Thieler, and Kingsley.

¶23 Second, Wilson argues that his trial counsel was deficient for failing to present evidence that would have shown that Harden obtained the knife from Wilson before the fight. More specifically, Wilson argues that *Harden's statement* would have given the jury a reason to find that Wilson was with Harden before and during the fight, that Harden obtained the knife from Wilson, that Wilson had touched the knife before the fight, and that Harden was involved in the fight. But a significant problem with this argument is that the third proposition—that Harden obtained the knife from Wilson—would have been pure speculation. That is, even if there were some merit to Wilson's dubious theory that Harden's statement about seeing Wilson with a knife before the stabbings qualifies as exculpatory evidence, any exculpatory inference flounders on the absence of any indication in Harden's statement that he obtained a knife from Wilson.

¶24 This leads to another significant problem with this argument, which is that Harden's statement strongly incriminates Wilson. Trial counsel had good reason not to introduce Harden's statement because Harden's statement contained powerfully incriminating statements about Wilson: that Wilson had his black-handled knife with him the night of the fight, that Wilson admitted he stabbed someone at the fight, and that Wilson asked Harden to provide an alibi for Wilson. As Wilson's trial counsel testified at the postconviction motion hearing, Harden's statement "would be damaging." We agree with the State that "it helped Wilson's defense to keep the jury from hearing Harden's statement implicating Wilson."

¶25 In light of these problems with Wilson's exculpatory evidence theory based on Harden's statement, Wilson's trial counsel could not have been deficient for failing to present Harden's statement in support of that theory.

¶26 Finally, even if Wilson could show that his trial counsel was deficient for failing to present the evidence described above, Wilson fails to show prejudice. That is, Wilson fails to show that there is a reasonable probability that the presentation at trial of the statements of Harden, Thieler, and Kingsley, either individually or together, would have changed the outcome in light of (1) the absence of any evidence from which the jury could infer that Harden was the man wearing red who was seen fighting with TS, or of any explanation of how Harden obtained the knife from Wilson, and (2) strongly incriminating evidence that included Wilson's inconsistent statements to police, TS's identification of Wilson as the person who stabbed him, and Wilson's fingerprint on the knife with TS's blood on it.

¶27 In sum, we conclude that Wilson fails to show that his trial counsel was ineffective for failing to introduce Harden's statement and to call Thieler and Kingsley as witnesses.

CONCLUSION

¶28 For the reasons stated, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).