COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP310-CR

Cir. Ct. No. 2014CF2530

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERTINO LAVON OLIVER,

DEFENDANT-APPELLANT.

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

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Albertino Oliver appeals a judgment convicting him of attempted first-degree intentional homicide by use of a dangerous weapon

and possession of a firearm by a felon. He also appeals an order denying his motion for postconviction relief. Oliver argues his trial attorney was ineffective in two respects. We reject his arguments and affirm.

BACKGROUND

¶2 An amended Information charged Oliver with armed robbery, attempted first-degree intentional homicide by use of a dangerous weapon, and possession of a firearm by a felon. The charges stemmed from a June 4, 2014 incident during which A.R. was shot in a Milwaukee apartment.

¶3 At trial, A.R. testified he was in possession of Oliver's truck on the day of the shooting because he had recently performed some repairs on it. However, Oliver had not paid him for the work, and A.R. was unwilling to return the truck until he received the money Oliver owed. A.R. testified he was at his friend J.M.'s apartment on June 4, 2014, when Oliver arrived. According to A.R., Oliver

> walked in the door holding a gun in his hand and asked me where his truck was, and I said you know it was somewhere put away, you know. I said, Where my money? And he said, You know you ain't going to get no money. Then he asked me for the keys to my truck. I said, no. You are not taking my truck. And that's when he just said, Die, motherfucker, and pulled the trigger.

¶4 A.R. testified Oliver was about six feet away from him when Oliver fired the gun. A.R. explained he put his right arm up before Oliver pulled the trigger because he did not want to be shot in the face. He testified the bullet entered his right hand and then traveled through his arm and into his chest before exiting through his side. After A.R. fell to the floor, Oliver continued saying "Die,

motherfucker." Oliver then took A.R.'s keys out of A.R.'s pocket and drove away in A.R.'s truck.

¶5 On cross-examination, A.R. confirmed he had spoken with detective Robert St. Onge two days after the shooting. When defense counsel observed that St. Onge's report did not indicate A.R. told him that Oliver said "Die, motherfucker" before the shooting, A.R. responded, "I don't know what he wrote." A.R. then affirmatively testified he did tell St. Onge that Oliver said "Die, motherfucker." St. Onge did not testify during Oliver's trial.

¶6 J.M., who lived in the apartment where the shooting occurred, testified Oliver asked her to call him if A.R. came over so that Oliver "could find out where his truck [was]." She therefore called Oliver after A.R. arrived at her apartment on June 4, 2014. Oliver subsequently arrived at J.M.'s apartment, and at some point J.M. saw that Oliver had a gun in his hand. J.M. then went into the bathroom. While there, she could hear Oliver and A.R. "talking and talking, and then it kind of got louder and then it got louder," and then J.M. heard a gunshot. When J.M. came out of the bathroom, Oliver was gone, and A.R. was on the floor "whining" because "[h]e was shot."

¶7 Oliver testified he contacted A.R. in April 2014 and arranged to have A.R. fix his truck. When Oliver attempted to pick up his truck approximately five days later, the repairs were not done, and A.R. would not explain why. Oliver admitted he went to J.M.'s apartment on June 4, 2014. However, he asserted he was not carrying a weapon, and he did not expect A.R. to be there. When he arrived at the apartment and saw A.R., he asked, "What's up with my truck?" A.R. responded that it had been towed.

¶8 Oliver testified his conversation with A.R. became "boisterous" and "loud." At some point, Oliver told A.R. "I should have whooped your ass," and A.R. responded that Oliver "wasn't gonna do shit to him." Oliver then "ran up on" A.R., at which point A.R. "jumped up" out of his chair with a gun in his right hand and pointed it at Oliver. Oliver testified he "slapped" A.R.'s hand and then "grabbed his arm 'cause when I slapped him, the gun didn't fall out [of] his hand." A struggle ensued, during which Oliver "tried to bend [A.R.'s] hand to make him drop the gun." However, while Oliver was doing so "the gun went off" and A.R. "shot hisself." Oliver explained he was "shell-shocked" following the shooting and therefore left the scene. He denied saying words to the effect of "I'll kill you, motherfucker." He also denied taking the keys to A.R.'s truck.

¶9 The jury found Oliver not guilty of armed robbery, but guilty of attempted first-degree intentional homicide by use of a dangerous weapon and possession of a firearm by a felon. Oliver subsequently moved for postconviction relief, arguing his trial attorney was ineffective in two respects. First, he asserted trial counsel should have called detective St. Onge to testify about whether A.R. told him Oliver said "Die, motherfucker" before the shooting. Second, Oliver claimed trial counsel was ineffective by "admitt[ing]" during his opening statement that Oliver had a gun on the day in question.

¶10 The circuit court denied Oliver's postconviction motion without a hearing. The court concluded trial counsel's performance was not deficient, and, in any event, counsel's alleged deficiencies did not prejudice Oliver. Oliver now appeals.

DISCUSSION

¶11 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

¶12 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show 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. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶13 A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing on that claim. A court is required to hold an evidentiary hearing only if the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A court need not hold an evidentiary hearing "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." ***Id.*** Whether a postconviction motion raised sufficient facts so as to require an evidentiary hearing is a question of law that we review independently. ***Id.***

¶14 Here, we conclude the circuit court properly denied Oliver's postconviction motion without a hearing because the facts alleged in Oliver's motion, if true, do not demonstrate that Oliver's trial attorney was ineffective.[1] Oliver first claims his trial attorney was ineffective by failing to call detective St. Onge to testify at trial. He contends that, had St. Onge testified, defense counsel could have questioned St. Onge about whether A.R. told him Oliver said "Die, motherfucker" before the shooting. Oliver argues A.R.'s assertion that he said those words was "essential to the State's case because the State had to prove that Oliver attempted to cause A.R.'s death and that he acted with the intent to kill A.R. rather than acting recklessly."

¶15 We agree with the circuit court that, even accepting the facts alleged in Oliver's postconviction motion as true, he has failed to demonstrate that his trial attorney performed deficiently by failing to call St. Onge as a witness. Oliver assumes St. Onge would have testified that A.R. did not tell him Oliver said "Die, motherfucker" before the shooting, thus impeaching A.R.'s testimony to that effect. However, as the circuit court correctly noted, Oliver's assumption in this regard is "speculative at best." Oliver's postconviction motion did not include any affidavit or other evidence indicating what testimony St. Onge would have

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[1] We also observe that Oliver failed to file a reply brief and therefore has not responded to any of the State's arguments that his trial attorney was not ineffective. We could reject Oliver's ineffective assistance claims on this basis alone. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

provided had he been called as a witness at trial.[2] Contrary to Oliver's assumption, if called as a witness St. Onge may have testified A.R. *did* report that Oliver said "Die, motherfucker," but for some reason St. Onge failed to include that fact in his report. Alternatively, St. Onge may have simply testified he could not remember whether A.R. told him Oliver said those words. Ultimately, it is not clear that St. Onge's testimony would have been helpful to Oliver's case, and it may actually have been harmful, particularly where it was likely St. Onge would again be asked to relate the victim's account of the shooting. On these facts, the circuit court properly determined Oliver failed to sufficiently allege that his trial attorney performed deficiently by failing to call St. Onge as a witness.

¶16 Oliver also claims his trial attorney was ineffective by "admitt[ing]" during his opening statement that Oliver had a gun on the day of the shooting. Counsel stated, in relevant part:

> It is true [A.R.] had my client's vehicle. He had the vehicle for over two months … without any resolution or without any final payment or anything like that. Why? Why did this fester and go on for two months? What happened to the vehicle? My client never got it back. Does [A.R.] still have the vehicle? I don't know. We don't know what has happened to this vehicle. Maybe we will find out today what eventually happened to that vehicle and whether or not did [A.R.] do anything if he says it was like this. *He came in with a gun to his side.* What attempts did he do to resolve the situation, you know, to get out of the residence or anything like that or say, okay, man. Yeah. Yeah. If a gun was pointed at me, I probably would say you can have

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[2] Oliver argues he should not be faulted for failing to obtain an affidavit from St. Onge because "Milwaukee police officers will not sign affidavits; they will only give testimony under oath in a courtroom." However, he provides no record citation in support of his assertion that Milwaukee police officers refuse to sign affidavits. We therefore decline to consider this argument. *See* ***Dieck v. Antigo Sch. Dist.***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990) (court of appeals need not consider arguments that are not supported by citations to the record).

> your car back. No worries. We will resolve this. You know one way or another we'll resolve this. No need for anything to go beyond this. Let's just settle this like adults, but no. They argued over the vehicle.

(Emphasis added.) Oliver asserts that, by stating Oliver "came in with a gun to his side," trial counsel admitted Oliver possessed a firearm. Oliver argues this constituted ineffective assistance because the defense's theory at trial "was that A.R. had the gun and any shooting was in self-defense."

¶17 As an initial matter, we agree with the circuit court that the challenged statement—"He came in with a gun to his side"—is "completely ambiguous." It is unclear whether "he," the subject of that sentence, was meant to refer to Oliver or A.R. In both the previous sentence and the following sentence, trial counsel used the pronoun "he" to refer to A.R., rather than Oliver. Under these circumstances, counsel's statement that "[h]e came in with a gun to his side" could reasonably be interpreted as asserting that A.R., not Oliver, had a gun. On the other hand, when read in context, the challenged statement could also be interpreted as merely indicating that A.R. *claimed* Oliver had a gun, rather than as admitting Oliver actually did have a gun.[3] In short, the challenged statement is far from a clear admission that Oliver possessed a firearm.

¶18 Regardless, even assuming trial counsel performed deficiently by making the challenged statement, the record conclusively shows that Oliver cannot establish prejudice. Oliver argues he was prejudiced by counsel's remark because

[3] Immediately before saying, "He came in with a gun to his side," defense counsel stated, "Maybe we will find out today what eventually happened to that vehicle and whether or not did [A.R.] do anything *if he says it was like this*." (Emphasis added.) Taken together, one could reasonably interpret these two sentences as conveying that A.R. "says it was like this"—i.e., that Oliver "came in with a gun to his side."

it "set the tone for Oliver's case" and "the jury was led to believe that Oliver was admitting to Felon in Possession of a Firearm." However, the jury was instructed that remarks made by attorneys are not evidence and that it should base its verdict on "the evidence and the instructions given … by the Court." "We presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶19 Moreover, to the extent trial counsel's opening statement created any confusion about whether Oliver admitted to possessing a firearm, Oliver clearly testified in his own defense that he did not have a gun on the day of the shooting and that A.R. shot himself when Oliver pushed his hand away in self-defense. Trial counsel emphasized Oliver's testimony to that effect during his closing argument. Trial counsel also argued in closing that Oliver's version of events—i.e., "that he wasn't the one with the gun, that it was, in fact, [A.R.] who had the gun and … pulled the trigger"—was "just as credible and likely to have happened as the State's rendition of what it says occurred." On this record, it would have been amply clear to the jury by the end of Oliver's trial that he did not admit to possessing a firearm.

¶20 Furthermore, we agree with the circuit court that Oliver's theory that A.R. shot himself "was simply incredible." Oliver testified that A.R. was holding the gun in his right hand, that Oliver "tried to bend [A.R.'s] hand to make him drop the gun," and that, as Oliver was bending A.R.'s hand, "the gun went off" and A.R. shot himself. However, A.R. testified—and Oliver does not dispute—that the bullet entered A.R.'s right hand and then traveled through his arm and into his chest before exiting through his side. No rational jury would believe that A.R.—who Oliver testified was holding the gun in his right hand—could have shot himself in the same hand as a result of Oliver bending his hand in an attempt

to make him drop the gun. In other words, Oliver's theory of the case simply cannot be reconciled with the undisputed evidence regarding A.R.'s injuries. Under these circumstances, it is not reasonably probable the result of Oliver's trial would have been different absent trial counsel's remark during opening statements that "[h]e came in with a gun to his side."

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).