COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP40-CR **Cir. Ct. No. 2015CF51**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVONTE M. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and JANET C. PROTASIEWICZ, Judges.[1] *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

[1] The Honorable Rebecca F. Dallet presided over the trial. The Honorable Janet C. Protasiewicz decided the motion for postconviction relief.

¶1 PER CURIAM. Devonte M. Wilson appeals a judgment convicting him after a jury trial of three counts of recklessly endangering safety, use of a dangerous weapon, and one count of disorderly conduct, as an act of domestic abuse. Wilson also appeals an order denying his postconviction motion. Wilson argues that the circuit court erred in denying his postconviction motion alleging ineffective assistance of trial counsel without a hearing. We affirm.

¶2 After a jury trial, Wilson was convicted of several crimes for firing multiple shots into an apartment building where his ex-girlfriend lived with their child. The shots hit a neighboring apartment, which was occupied by three people at the time of the shooting. They were not wounded from gunfire but one of them was injured by shattered glass.

¶3 A defendant claiming ineffective assistance of trial counsel must show both that his lawyer performed deficiently and "that the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. "To demonstrate prejudice, a 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." ***State v. Nielsen***, 2001 WI App 192, ¶13, 247 Wis. 2d 466, 634 N.W.2d 325. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** If a court concludes that the defendant has not proven one prong of

the ***Strickland*** test, it need not address the other prong. *See* ***Strickland***, 466 U.S. at 697.

¶4 Wilson argues that his trial counsel should have moved to exclude the testimonies of E.M., who lived in the neighboring apartment, and Detective Eric Draeger because they were not on the State's witness list. *See* WIS. STAT. § 971.23(1)(d) (2015-16).[2] That statute provides that, if demanded by the defendant, the district attorney shall provide to the defendant "[a] list of all witnesses … the district attorney intends to call at the trial." ***Id.*** The statute further provides that "[t]he court shall exclude any witness not listed … unless good cause is shown for failure to comply." WIS. STAT. § 971.23(7m)(a).

¶5 As an initial matter, we address the State's argument that Wilson has not shown that he complied with WIS. STAT. § 973.23(1)(d) by demanding the State's witness list. The State did not raise this argument before the circuit court. Wilson has not had an opportunity to refute this factual claim. Therefore, we will not address this issue on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶6 Turning to Wilson's claim that he received ineffective assistance of counsel, we agree with Wilson that his trial lawyer's performance was deficient for failing to move to exclude the testimony of E.M. and Detective Draeger on the ground that they were not named on the State's witness list as required by WIS. STAT. § 971.23(1)(d). A reasonably prudent lawyer would have done so because their testimony would have been excluded under WIS. STAT. § 971.23(7) unless

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the State was able to show good cause for its failure to name them. However, even if Wilson's lawyer had objected and the circuit court had excluded the testimony from the State's case-in-chief, there is no reasonable probability that the result of the proceeding would have been different.

¶7 E.M. testified that she encountered Wilson's ex-girlfriend in the hallway outside of her apartment immediately after the shooting. E.M. testified that Wilson's ex-girlfriend told her that Wilson had fired the shots into the building. The jury heard this information from two other sources. Police Officer Joseph Spingola testified that he interviewed Wilson's ex-girlfriend immediately after the shooting and she told him that Wilson fired the shots. She also told him that she saw Wilson's car on the street in front of her apartment complex and saw him walking on the east side of her building carrying a silver semi-automatic pistol before the shots were fired.

¶8 In addition, the jury heard a recording of a 911 call made by Wilson's ex-girlfriend when she saw Wilson outside her building with the gun, but before the shots were fired. During the call, she told the dispatcher that Wilson was outside her apartment with a gun.[3] Because the jury would have heard the same information from Officer Spingola and the 911 recording, there is not a reasonable probability that the result of the trial would have been different if E.M.'s testimony had been excluded. *See* ***Nielsen***, 247 Wis. 2d 466, ¶13 (to demonstrate prejudice, a defendant must show that there is a reasonable

[3] The recording of the 911 call is not part of the appellate record. The parties do not dispute the content of the call, and references to the call's content can be found throughout the record. Where, as here, a record item is missing, we assume that it supports the circuit court's decision. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

probability that the result of the proceeding would have been different had the improper testimony been excluded).

¶9 Turning to Detective Draeger, even if the circuit court had excluded his testimony in Wilson's case-in-chief, Draeger's testimony would have been admissible to rebut Wilson's testimony that he was not near his ex-girlfriend's house at the time of the shooting. Detective Draeger, who has specialized training in examining cell phone information, obtained Wilson's cell phone records because cell phone records provide a general indication of a cell phone's location when they are in use. Wilson's cell phone records showed that his cell phone was in the general vicinity of his ex-girlfriend's house shortly before and after the shootings. Detective Draeger could have been called to rebut Wilson's claim because the State is not required to place potential rebuttal or impeachment witnesses on its witness list under the express terms of WIS. STAT. § 971.23(1)(d) ("This paragraph does not apply to rebuttal witnesses or those called for impeachment only."); *see also* ***State v. Novy***, 2013 WI 23, ¶31, 346 Wis. 2d 289, 827 N.W.2d 610. Accordingly, Wilson cannot show that he was prejudiced because Detective Draeger's testimony would have been admissible to impeach Wilson. *See* ***Nielsen***, 247 Wis. 2d 466, ¶13 (to show prejudice, there must be a reasonable probability that the result of the proceeding would have been different).[4]

[4] The circuit court denied the postconviction motion on the ground that the State would have been able to show good cause for failing to name E.M. and Detective Draeger as witnesses. We agree with Wilson that without a fact-finding hearing we do not know why the State failed to name them, and therefore the State cannot meet its burden of showing good cause on this record. Nevertheless, we affirm the judgment of conviction and order denying postconviction relief because the circuit court reached the right result. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995) (we will affirm if the circuit court reaches the right result for the wrong reasons).

By the Court.—Judgment and order affirmed.

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