COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2017AP2221-CR
2017AP2222-CR

Cir. Ct. Nos. 2016CF002789
2016CF003737

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY DONTE DIXON,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*

¶1 DUGAN, J.[1] In this consolidated appeal, Anthony Donte Dixon appeals the judgments of conviction for knowingly violating a domestic abuse

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

order and disorderly conduct in Milwaukee County case No. 16CF2789 arising out of events on June 16, 2016 (the "June 2016 case"), and the judgment of conviction in Milwaukee County case No. 16CF3737 for knowingly violating a domestic abuse order arising out of events on August 13, 2016 (the "August 2016 case").[2] He also appeals the orders denying his motions for a new trial.[3]

¶2 On appeal, Dixon contends that the trial court did not conduct a proper inquiry into his request for substitute counsel. He also contends that the trial court erred when it did not find that trial counsel was ineffective, based on counsel's failure to investigate and call an alibi witness at trial. We disagree and affirm.

¶3 The following background provides context for the issues in this case. We refer to additional relevant facts in the discussion.

BACKGROUND

¶4 On June 27, 2016, the State charged Dixon in the June 2016 case with knowingly violating a domestic abuse injunction and disorderly conduct, both as a domestic abuse repeater. Then, on August 19, 2016, the State charged Dixon

[2] Dixon's amended notice of appeal in the August 2016 case states that the judgment included a disorderly conduct conviction. However, that judgment does *not* include a disorderly conviction because the jury found that Dixon was *not guilty* of disorderly conduct (and criminal damage to property and that the domestic abuse repeater enhancer did not apply). We have corrected the error.

[3] Dixon's amended notices of appeal do not mention the postconviction motions for a new trial that he filed in each case. However, because the issues on appeal were raised in those motions and Dixon's appellate brief refers to the motions, we have construed his notice of appeal as including an appeal from the denial of the postconviction motions. However, we note that because the same motion was filed in each case, we refer to those motions as the postconviction motion.

in the August 2016 case with knowingly violating a domestic abuse injunction, criminal damage to property, and disorderly conduct, all as a domestic abuse repeater. Both cases involved victim MKL, who had obtained a restraining order against Dixon in July 2014. Both cases were assigned to the same trial court.

¶5 At the joint final pretrial conference, trial counsel appeared on behalf of Dixon and informed the trial court that he had not met with Dixon yet because he had just received a working phone number for Dixon. The trial court asked Dixon why he had not called trial counsel between the December 1, 2016 preliminary hearing and the January 12, 2017 final pretrial conference. Dixon said that he was "busy" working long hours in a factory from six at night to six in the morning. The trial court then asked Dixon whether he worked seven days a week. Dixon replied, "no"; he worked three days and then had two days off. The court then asked Dixon why he had not attempted to call trial counsel when he was not working. Dixon responded that he had been tired. The trial court stated that it was concerned that Dixon was not taking his cases seriously. The trial court then told Dixon that,

> If [trial counsel]'s not ready to go to trial on the 15th [February 15, 2017]—because you won't talk to him, or you're not available, we're going to trial on the 15th.
>
> And I don't have a record that he's not able to do a good job for you because you haven't done your job. You better take this seriously, sir. These are very serious charges.
>
> And if you think it's a joke, show up on the 15th, sit there looking like you're looking now, acting like this is a joke, and see what the jury does.

¶6 Trial counsel then advised the trial court that Dixon had alibi witnesses, but that trial counsel did not have any information about them. The trial court cautioned that it was "just about too late to file an alibi." The trial court

also stated that, although there was a "little bit of time left," if Dixon did not cooperate with trial counsel he would not be able to file a notice of alibi. The trial court also warned Dixon that he needed to take the case seriously because it was going to trial on February 15, 2017.

¶7 When the trial court convened the proceedings on February 15, 2017, the State informed the trial court that it was ready to proceed to trial. However, trial counsel informed the trial court that Dixon wanted to "fire" him. As will be further explained, trial counsel summarized the facts underlying the circumstances and the trial court engaged Dixon in a dialog. Dixon told the trial court that he wanted to fire trial counsel and hire a different attorney, but could not provide the attorney's name and said that he did not know if that attorney would be ready to go to trial that day. He also stated, "[b]ut I know I can get a lawyer." The trial court then stated that Dixon was going to trial that day and that he had two options, either he could have trial counsel represent him or he could represent himself. The trial court also stated that trial counsel was a "very competent lawyer, a very good lawyer."

¶8 Dixon elected to represent himself. After conducting a colloquy with Dixon, the trial court determined that Dixon could represent himself. Dixon also agreed that trial counsel would stay to give him advice during the trial.

¶9 Before the trial began, the trial court informed Dixon that he could not tell the jury that he was someplace else on June 16, 2016, or August 13, 2016, because he had not given the State notice of an alibi. However, the trial court said that Dixon could say he was not present at the scene of the incidents.

¶10 The jury trial lasted two days. Trial witnesses included MKL; her friend, Angel Hubanks; police officers; and Dixon. In the June 2016 case, the jury

found Dixon guilty of knowingly violating a domestic abuse order and disorderly conduct. In the August 2016 case, the jury also found Dixon guilty of knowingly violating a domestic abuse order. However, the jury found Dixon was not guilty of the criminal damage to property and the disorderly conduct charges in the August 2016 case, and that none of the charged acts in either case were acts of domestic abuse.

¶11 On April 11, 2017, the trial court imposed a global sentence of eighteen months to be served at the Milwaukee County House of Correction. Thereafter, Dixon filed a postconviction motion contending that the trial court did not conduct a proper inquiry into his request for substitute counsel and trial counsel was ineffective, based on a failure to investigate and call an alibi witness at trial. Dixon filed his affidavit with the motion. The trial court denied the motion without a hearing.

DISCUSSION

¶12 Dixon contends that the trial court failed to conduct a proper hearing into his request for substitute counsel because his request was timely, the lack of communication with trial counsel prevented an adequate defense from being raised, and the trial court's inquiry was inadequate.

I. The Trial Court Properly Exercised its Discretion in Denying Dixon's Request for Substitute Counsel

A. Standard of Review

¶13 Whether to permit substitution of counsel is a matter of the trial court's discretion. ***State v. Jones***, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378. The defendant has the burden of showing good cause to substitute counsel.

State v. Lomax, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). The reviewing court considers the following factors in evaluating whether the trial court properly exercised its discretion in addressing a request for new counsel: (1) the adequacy of the trial court's inquiry into the defendant's request; (2) the timeliness of the defendant's request; and (3) "whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." ***Id.*** at 359. These factors are considered separately, they are not balanced against each other. ***Jones***, 326 Wis. 2d 380, ¶30.

¶14 Additionally, if substituting counsel would require a continuance, the trial court must balance the defendant's right to new counsel against society's "'interest in prompt and efficient administration of justice.'" ***State v. Darby***, 2009 WI App 50, ¶30, 317 Wis. 2d 478, 766 N.W.2d 770 (citation omitted). In making this assessment, the trial court should consider the following factors: (1) the length of the requested delay; (2) whether competent counsel is prepared to try the case; (3) whether the defendant has requested and received other continuances; (4) "[t]he convenience or inconvenience to the parties, witnesses and the court;" (5) whether there are legitimate reasons for the delay; and (6) "[o]ther relevant factors." ***Lomax***, 146 Wis. 2d at 360 (citations omitted).

B. The Record Supports the Trial Court's Denial of the Request to Substitute Counsel

¶15 The record regarding Dixon's request for a substitute attorney was made immediately before the trial began. Trial counsel informed the trial court that Dixon wanted to fire him, explaining that the issue stemmed from the fact that Dixon felt trial counsel should have done more to secure his alibi witnesses. Trial counsel explained that Dixon told him that he wanted his witnesses to testify,

suggested that he had alibi witnesses, and provided him with the names and numbers of the potential witnesses. However, when trial counsel called them, he was only able to connect with one witness who "simply gave [trial counsel] her information." The other two witnesses did not return his calls. Trial counsel stated that two weeks before the trial date, he called Dixon and told him that he needed to get the other witnesses to contact trial counsel. However, none of the witnesses contacted trial counsel.

¶16 The trial court then asked Dixon to explain the issue. Dixon responded, "I feel like counsel, I don't feel like he did his job. I gave him the names, numbers and witnesses I wanted to come testify on my behalf and he simply didn't get in contact with them." The trial court told Dixon that all that trial counsel could do was try to contact the witnesses, but he "can't make people contact him back."

¶17 When the trial court again stated that the case was proceeding to trial that day, Dixon asserted that he had "another attorney ready to go." The trial court asked who the attorney was and Dixon responded that he had to call him, provided no name, and stated he was not sure that the attorney would be able to try the case that day. The trial court restated that the case was going to trial.

¶18 Dixon responded by raising the absence of his witnesses and again stated that trial counsel had not called him. The trial court stated that based on its many years of experience with trial counsel, he was "a man of his word" and "he's always prepared." The trial court specifically found that trial counsel tried to contact the witnesses that Dixon identified, but he could not reach them. It also found that trial counsel contacted Dixon and told him to have the witnesses contact trial counsel. Dixon then interjected that trial counsel had lied when he

stated that he was only able to contact one witness. Dixon stated that he knew that trial counsel contacted two of the witnesses because he talked to the witnesses. When the trial court asked Dixon if he talked with the witnesses, Dixon said that, "yes" he did. The trial court then commented "Mr. Dixon, you talked to them, but you didn't get them to contact [trial counsel]. So we are proceeding to trial today." The trial court also stated that "what I'm seeing and feeling here is that because the State is ready to go to trial today, suddenly you don't want to go to trial and you want to find a way to have another, to get another date to see if maybe the witnesses won't come back that day. We are not doing that. We are not going to let you play that game with this court."

¶19 In reviewing the trial court's determination, the first factor is the adequacy of the hearing. As suggested by ***Lomax***, the trial court made the inquiry when Dixon requested substitute counsel. *See* ***id.*** at 362. It directly asked Dixon to explain his issue with trial counsel. Dixon not only explained the issue, but disputed trial counsel's statement that he had told Dixon to have the potential witnesses call him because they had not returned his calls. The trial court found that trial counsel's version of the communications was credible. The trial court also stated that Dixon's sudden dissatisfaction with trial counsel was motivated by Dixon's intent to avoid going to trial that day. When the trial court acts as the finder of fact, it is "the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony" ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶20 Dixon asserts that the trial court failed to *fully* investigate his claims that trial counsel was not communicating and failed to contact important witnesses. However, the record establishes that it was Dixon who was not communicating with trial counsel. At the final pretrial conference, trial counsel

advised the trial court that he had not met with Dixon yet because he had just received a working telephone number. When the trial court asked Dixon why he had not called trial counsel, Dixon said he worked long hours and was too tired to call. Moreover, Dixon admitted that he spoke with the witnesses but never told them to call trial counsel. We conclude that the trial court conducted an adequate hearing.

¶21 The second factor is the timeliness of Dixon's request. "Eleventh-hour requests are generally frowned upon as a mere tactic to delay the trial." ***Lomax***, 146 Wis. 2d at 361-62. Dixon asserts that he presented his request for substitute counsel to the trial court shortly after it became apparent that trial counsel failed to secure his witnesses for trial. However, this assertion is belied by the record. Rather, the issue of the alibi witnesses and communication between trial counsel and Dixon was discussed at the final pretrial conference, which was held more than a month before the trial. At that time, trial counsel told the trial court that he just received a working phone number for Dixon. When Dixon told the trial court that the reason he did not call trial counsel was because he was "busy" working long hours and was tired on his days off, the trial court urged Dixon to communicate with counsel. Further, if Dixon felt that the problem rested with trial counsel, he should have requested substitute counsel earlier. Moreover, the trial court found that Dixon's sudden desire for a new attorney was an attempt to get an adjourned trial date in the hope that the witnesses who were present for trial might not come back on the adjourned date. Thus, we conclude that Dixon's request for substitute counsel on the morning of the trial was not timely.

¶22 The third factor is whether the lack of communication prevented an adequate defense. Dixon asserts that the main source of conflict was trial counsel's failure to secure alibi witnesses prior to trial. Dixon's contention is

based on his version of the communications with trial counsel—that they only met once and there was no further communication. However, the trial court found trial counsel's version of the communications credible and that the responsibility for the failure to obtain those witnesses rested with Dixon, not lack of communication with trial counsel. *See* ***Peppertree Resort Villas, Inc.***, 257 Wis. 2d 421, ¶19. Moreover, as will be discussed in the next portion of this opinion, throughout these proceedings Dixon has not provided *any* description of the facts that his alibi witnesses would testify about at trial.

¶23 We also note that the trial court considered the additional factors that are to be addressed when substitution of counsel would require a continuance of the trial. *See* ***Darby***, 317 Wis. 2d 478, ¶30. The trial court found that the length of the delay was indeterminate, competent trial counsel was ready to try the case, it and the State were ready to proceed to trial, and there was no legitimate reason for the delay. *See* ***Lomax***, 146 Wis. 2d at 360. While Dixon had not sought prior continuances, the trial court could reasonably conclude that the interest in a prompt, efficient trial process and the inconvenience to the victim, witnesses and the court, outweighed Dixon's interest in having new counsel. *See* ***Darby***, 317 Wis. 2d 478, ¶36.

¶24 Based on the foregoing, we conclude that the trial court properly exercised its discretion when it denied Dixon's request for substitute counsel.

II. The Trial Court Properly Rejected Dixon's Ineffective Assistance of Counsel Claim

¶25 Dixon also contends that the trial court erred when it did not find that trial counsel was ineffective, based on a failure to investigate and call an alibi witness at trial.

A. Standard of Review

¶26 "Wisconsin has adopted the United States Supreme Court's two-pronged ***Strickland*** test to analyze claims of ineffective assistance of counsel." ***State v. Williams***, 2015 WI 75, ¶74, 364 Wis. 2d 126, 867 N.W.2d 736. *See also* ***Strickland v. Washington***, 466 U.S. 668 (1984). "To prevail under ***Strickland***, a defendant must prove that counsel's representation was both deficient and prejudicial." ***Williams***, 364 Wis. 2d 126, ¶74. "Prejudice means that, but for counsel's unprofessional errors, there is a reasonable probability that the trial's outcome would have been different." ***Id.*** "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted).

¶27 A defendant is not automatically entitled to an evidentiary hearing. A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. *See also* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. The court stated:

> To establish deficient performance, the movant must show facts from which a court could conclude that counsel's representation was below the objective standards of reasonableness. To establish prejudice, the defendant must show facts from which a court could conclude that its confidence in a fair result is undermined. If the motion raises such facts, the [postconviction] court must hold an evidentiary hearing.

Wesley, 321 Wis. 2d 151, ¶23 (internal citations omitted). "This is a question of law that we review *de novo*." *See* ***id.*** "If, however, the record conclusively demonstrates that the movant is not entitled to relief, the [postconviction] court

has the discretion to grant or deny a hearing." ***Id.*** To obtain a hearing, the defendant must allege facts in his postconviction motion that "allow the reviewing court to meaningfully assess [the defendant's] claim." ***Allen***, 274 Wis. 2d 568, ¶21. A postconviction motion sufficient to meet this standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶23 (citation omitted). Whether a motion alleges sufficient facts that, if true, would entitle the defendant to an evidentiary hearing presents a question of law that we review *de novo*. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

B. Dixon did not Present Sufficient Facts to Entitle Him to Relief

¶28 Dixon cites ***State v. Jenkins***, in support of his claim that trial counsel was ineffective regarding his alibi defense. *See* ***id.***, 2014 WI 59, ¶45, 355 Wis. 2d 180, 848 N.W.2d 786. However, in ***Jenkins***, the defendant attached signed statements of an eyewitness and two other potential witnesses to his motion and the court held a ***Machner*** hearing. *See* ***Jenkins***, 355 Wis. 2d 180, ¶¶23-29. The record in ***Jenkins*** established that trial counsel knew who the witness was, he knew that she was an eyewitness to the charged murder, he knew she could testify about the shooting, and he also knew that she would contradict or impeach the eyewitness upon whom the State's entire case rested. ***Id.***, ¶42. Furthermore, he also knew that the witness had not identified the defendant as the shooter on the night of the shooting and that she had not identified the defendant as the shooter when she examined the photo array. ***Id.*** In contrast, Dixon has not presented any signed statements of the alibi witnesses or otherwise made a factual showing regarding those witnesses that would provide a basis for holding a ***Machner*** hearing.

¶29 Dixon also cites ***State v. Cooks***, 2006 WI App 262, 297 Wis. 2d 633, 726 N.W.2d 322. However, affidavits of the alibi witnesses and the specific facts that they would testify about, accompanied that defendant's postconviction motion. Based on that record, the trial court held a ***Machner*** hearing. *See* ***Cooks***, 297 Wis. 2d 633, ¶¶20-24. Unlike ***Cooks***, Dixon has not provided any facts about his claimed alibi witnesses.

¶30 In contrast to the cases Dixon cites, his postconviction motion and affidavit did not present sufficient facts to entitle him to relief on his ineffective assistance of counsel claim. He failed to "allege the five 'w's' and one 'h.'" *See* ***Allen***, 274 Wis. 2d 568, ¶23. Dixon neither identifies by name nor describes his alibi witnesses. He does not state which incident the witnesses would have testified about, what they would have testified to, or how they would have corroborated Dixon's alibi testimony. Dixon's motion is devoid of the type of factual allegations required for a defendant to obtain an evidentiary hearing on an ineffective assistance of counsel claim. *See* ***id.*** Absent such facts, the trial court properly exercised its discretion in denying Dixon's ineffective assistance of counsel claim, without a hearing. *See* ***id.***

¶31 Furthermore, because Dixon offered only conclusory statements, he has not established that there is a reasonable probability that the outcome of the trial would have been different, but for trial counsel's alleged deficiencies. *See* ***Williams***, 364 Wis. 2d 126, ¶74. Dixon testified at trial that he had no knowledge of the June 16, 2016 incident because it was more than likely that he was coming home from work, he went home, and he fell asleep. He works a third-shift job and he has "no time." He also said that on August 13, 2016, he was also coming from work and going to sleep. Dixon has not provided any factual basis for this court to conclude that the alibi witnesses would have supported his testimony. *See* ***Wesley***,

321 Wis. 2d 151, ¶23 (stating that to establish prejudice, the defendant must show facts from which a court could conclude that its confidence in a fair result is undermined). In fact, Dixon concedes that "there is nothing in the record touching on exactly what the testimony from [his] witnesses would have contained[.]"

¶32 Based on the foregoing we conclude that, as a matter of law, the trial court properly denied Dixon's ineffective assistance of counsel claim without a hearing.

CONCLUSION

¶33 For the reasons set forth, we affirm the trial court's judgments and orders.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.