

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1457-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE S. GRAY, JR.,

DEFENDANT-APPELLANT,

**CARMELLA ELIZABETH GRAY AND
LATASHA BROWN,**

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and JEFFREY A. WAGNER, Judges.
Affirmed.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. Willie S. Gray, Jr. appeals from a judgment entered after a jury found him guilty of two counts of armed robbery, while concealing identity, as party to a crime, contrary to §§ 943.32(1)(b), 943.32(2), 939.05, and 939.641, STATS. He also appeals from an order denying his postconviction motion. Gray claims: (1) the trial court erroneously exercised its discretion when it admitted certain evidence; and (2) the trial court erred when it summarily denied his postconviction motion alleging ineffective assistance of counsel. Because admission of the challenged evidence was harmless, and because Gray's postconviction motion was insufficient to warrant a hearing, we affirm.

I. BACKGROUND

In January 1997, Gray and two accomplices, Carmella Gray and Latasha Brown, robbed a Dunkin' Donuts and a Little Caesars. Carmella and Latasha also committed two additional armed robberies without any assistance from Gray. Gray confessed to his involvement in the Dunkin' Donuts robbery. All were charged.

Gray pled not guilty and his case was tried to a jury. During the trial, Carmella and Latasha testified against Gray. During the redirect testimony of Latasha, the State questioned Latasha about two additional robberies that she and Carmella had committed. These included robbing a gas station, which occurred shortly before the Dunkin' Donuts robbery. Latasha testified that Gray was filling up the car with gas while she and Carmella were robbing the gas station. Latasha testified that Gray did not know about this robbery. Latasha also testified about another robbery that she and Carmella had perpetrated on a woman in a parking lot near East Capitol Drive. Latasha testified that Gray was not

present for that robbery. Although defense counsel objected to this line of questioning, the trial court admitted the evidence.

Gray was convicted. He filed a postconviction motion alleging his trial counsel was ineffective for failing to investigate his claimed alibi witnesses. Gray submitted an affidavit, contending that his two alibi witnesses, Christina Gray and Jerome Davis, “would testify as to the location of the defendant during each of the armed robberies.” The trial court denied the motion without a hearing, concluding that the postconviction motion contained merely conclusory allegations. Gray now appeals.

II. DISCUSSION

A. *Challenged Evidence/Harmless Error.*

Gray contends that the trial court erroneously exercised its discretion when it admitted the evidence regarding the accomplices’ commission of two additional robberies. We reject this contention however, because, even if erroneously admitted, the challenged evidence was harmless. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

Gray confessed to his involvement in the Dunkin’ Donuts robbery. Carmella and Latasha testified for the State that Gray was the one who opened the cash register drawer at Dunkin’ Donuts. Both witnesses also attested to Gray’s involvement in the Little Caesars robbery. Gray stated that he knew that a robbery was going to occur at Little Caesars when he saw Latasha putting something over her face. Therefore, admitting the testimony that Carmella and Latasha had also perpetrated additional robberies was harmless. There is no reasonable possibility that this evidence contributed to the result. The evidence did not implicate the

defendant, but related to the witnesses against Gray. Therefore, we reject Gray's assertion that admission of this evidence requires reversal of the judgment.

B. Ineffective Assistance.

Gray also contends that the trial court erred when it summarily denied his ineffective assistance claim. Specifically, Gray argues that trial counsel failed to contact or call his alibi witnesses and failed to investigate his alibi defense. We conclude that the trial court did not err when it summarily denied Gray's ineffective assistance of trial counsel claim.

Our supreme court set forth the relevant standard for reviewing this claim in *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.

However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard.

Id. at 310-11, 548 N.W.2d at 53 (citations omitted). The three factors referenced in *Bentley* that a trial court can base its decision to deny a postconviction motion on are: (1) if the defendant fails to allege sufficient facts to raise a question of fact; (2) if the defendant presents only conclusory allegations in the motion; or (3) if the record conclusively demonstrates that the defendant is not entitled to relief. See *State v. Washington*, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993).

In the instant case, the trial court did not erroneously exercise its discretion when it denied Gray a hearing on his postconviction motion. The motion, which alleged ineffective assistance of counsel, was insufficient to require a hearing. It did not allege sufficient facts and was conclusory in nature. To succeed on an ineffective assistance of counsel claim, Gray must allege that trial counsel's conduct was both deficient and prejudicial. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Gray's motion falls short of alleging sufficient facts on both *Strickland* prongs. Gray alleges that his two alibi witnesses "would testify as to the location of the defendant during each of the armed robberies." He also claimed that his trial counsel had not contacted the witnesses "to determine viability of defendant's alibi defense," and that, as a result, he was forced to testify.

Gray, however, does not elaborate on what the witnesses would say if called to testify. He does not attest that either witness would in fact testify, nor does he provide affidavits from the alleged alibi witnesses. Gray's postconviction motion was factually vague and insufficient to satisfy the criteria required by *Bentley*. Further, when a defendant is claiming that trial counsel was deficient for failing to locate and present testimony from a witness, the defendant must allege with specificity the particular witness counsel should have located, and what the witness would have said if called to testify. See *State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). Gray has failed to provide the requisite specificity. Therefore, we reject his claim.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 98-1457-CR(CD)

SCHUDSON, J. (*concurring in part; dissenting in part*). Although I also reject Gray's claim regarding the "other acts" evidence, I do not agree with the majority's rationale. Additionally, I do not agree with the majority's conclusion regarding Gray's ineffective assistance of counsel claim.

Regarding the first issue, I would embrace the State's argument that Gray's claim may not even raise an "other acts" issue, given the case law permitting "evidence of the wrong doing [sic] of others when the purpose is to establish a context for the charged offenses or when the defendant's knowledge of the other act is being used to show that a person had the requisite knowledge to be an aider and abettor in the charged offense." These "other acts," one of which was in Gray's presence, were those of Gray's accomplices. Thus, regardless of whether we view this as an "other acts" issue, or simply a relevance issue, the evidence was admissible—both to establish the context of the crimes, and to counter the accomplices' implications that Gray had no knowledge that the armed robberies at Little Caesars and Dunkin' Donuts were to be committed.

Regarding the second issue, the trial court, in its written decision denying Gray's postconviction motion, concluded that "[t]here is not a reasonable probability that the jurors would have believed his alibi witnesses (sister and friend) based on the other evidence presented." This conclusion, however, is problematic in two respects: (1) without an evidentiary hearing, the trial court could not evaluate the credibility of the alibi witnesses; and (2) whether the jurors "would have *believed* [Gray's] alibi witnesses" is not the issue. The issue is

whether there is a reasonable probability that the jurors, in considering all the evidence, would have had a reasonable doubt about Gray's guilt based on the testimony of the alibi witnesses.

Although, as the majority correctly observes, Gray failed to elaborate what his alibi witnesses would have said, he did allege, in his postconviction motion, that they "would testify as to the location of the defendant during each of the armed robberies." In my estimation, that allegation, in combination with Gray's trial testimony and postconviction affidavit, provided enough to gain an evidentiary hearing.¹

Accordingly, I respectfully concur, in part, and dissent, in part.

¹ Ironically, in his reply brief, Gray argues that an evidentiary hearing "is not necessary because the appellant has proven both prongs of ineffective assistance of counsel." I disagree, and can only attribute such an unfounded assertion to the misunderstanding of appellate counsel. In a related regard, I would also admonish Gray's appellate counsel regarding the preparation of the briefs to this court. They contain countless drafting errors that are so serious as to render numerous sentences incoherent. For example:

On redirect, over the objection of the defendant's attorney, the two robberies which she and Carmella Gray were convicted were discussed and not the defendant were discussed.

Defendant's counsel stated the defendant was not involved, he received different answers than the state.

The state said it was raised because of the gun issue and the defense the defendant did not what was going on with the other two.

It was recognized by the court the testimony did not establish facts which would make the defendant guilty and at best he knew as to what happened.

