COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1175-CR **Cir. Ct. No. 2012CF8**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES LAMAR HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. James Lamar Henderson appeals his judgment of conviction for attempted first-degree intentional homicide, first-degree recklessly endangering safety, and first-degree reckless injury, all by use of a dangerous weapon, and three counts of misdemeanor bail jumping. He also appeals the

circuit court's denial of his postconviction motion for a new trial, alleging that his trial counsel was ineffective for not moving to sever the bail jumping counts from the felony charges and for not advising him to testify. We affirm.

¶2 Henderson was alleged in a criminal complaint and information to have committed two counts of attempted first-degree intentional homicide, one count of first-degree reckless injury, and one count of first-degree reckless endangerment, all by use of a dangerous weapon, in connection with a shooting outside the American Legion Club in Racine. Henderson was also charged with four counts of misdemeanor bail jumping as at the time of the shooting, Henderson was released on bond pending trial on the condition that he not commit any crimes.

¶3 At trial, S.M. testified that he and his fianceé, B.S., were leaving the American Legion on New Year's Eve when a man called out a greeting to B.S. S.M confronted the man and was approaching him when shots rang out. S.M. was hit five times. B.S. identified the man as Henderson and said she saw Henderson leaning over a car door with a gun at the time of the shooting.

¶4 An off-duty police officer working at the club testified that he witnessed a small, green Honda leaving the scene of the shooting at a high rate of speed. The vehicle was traced to Devlon Driggers and was located near a rooming house where Driggers and Henderson resided in separate rooms. During a search of Henderson's room, police found a nine-millimeter Kel-Tec semiautomatic handgun. A crime lab examiner linked a bullet removed from S.M.'s arm to the handgun.

¶5 Driggers, who was granted "use immunity" by the State, testified that he drove alone on New Year's Eve to the American Legion, where he met

Henderson. He testified that they hung out, danced, and played pool before deciding to leave together. They were in Driggers' car, listening to music in the parking lot, when Driggers said that Henderson saw a woman that he knew and spoke to her. Driggers testified that he saw Henderson fire his gun when a man started rushing toward the car.

¶6 Some of Driggers' testimony was contradicted by a video from the club that showed he and Henderson arriving together and by a statement that Driggers gave police that he did not see Henderson with a gun until after he got back into the car.[1] Additionally, both S.M. and Driggers testified that they each had numerous criminal convictions—S.M., eight, and Driggers, nine. The lead investigator into the shooting also testified that Henderson initially lied to police, claiming that he had been home at the time of the shooting.

¶7 A jury convicted Henderson of attempted first-degree intentional homicide, first-degree recklessly endangering safety, and first-degree reckless injury, all by use of a dangerous weapon, and three counts of misdemeanor bail jumping. Postconviction, Henderson sought to vacate his conviction on the ground that his trial counsel was ineffective for not seeking to sever the bail jumping counts from the rest of the charges and for not advising him to testify. At the ***Machner***[2] hearing, Henderson's trial counsel conceded that he should have

[1] The record reflects that a video of Driggers' statements to police was played at trial and entered into evidence. This court was unable to play the video, which also provided problems for the State at trial. It is the appellant's responsibility to present us with a record that we can review. ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). This includes ensuring that electronic evidence is in a reviewable format. We note that Henderson did not specifically cite to any of the video evidence.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

moved for severance, but that he was "not sure it would have been granted." Counsel also testified that he told Henderson that it was his choice whether to testify and that Henderson "indicated from the first time I met him, basically, that he was not going to testify." Henderson stated at the hearing that his trial counsel had told him he could not testify because he "would be eaten alive in the courtroom."

¶8 The court determined that even if counsel performed deficiently in not moving to sever the charges, Henderson was not prejudiced. The court also found that although Henderson might have been warned by counsel about the consequences of testifying, it was ultimately Henderson's decision to not testify at trial. Accordingly, the court denied the motion. Henderson appeals.

¶9 To be successful on a claim of ineffective assistance of counsel, a convicted defendant must show that his or her counsel was deficient and that this deficient performance was prejudicial. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will uphold a circuit court's findings of fact unless they are clearly erroneous, but whether counsel's performance was deficient and prejudicial are questions of law subject to de novo review. ***State v. Hunt***, 2014 WI 102, ¶22, 360 Wis. 2d 576, 851 N.W.2d 434.

¶10 Henderson argues that his trial counsel was ineffective when he failed to move for severance of his misdemeanor bail jumping charges from the other counts alleged in the complaint. We disagree. Joinder of two or more crimes for trial is allowed for the same type of offenses, occurring over a relatively short period of time, where the evidence for the offenses overlaps. ***State v. Locke***,

177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). When a motion to sever crimes is made, the circuit court must weigh any potential prejudice from a trial on the joint offenses against the public interest in conducting a trial on the multiple counts. ***Id.*** at 597. The court presumes that proper joinder will not prejudice the defendant, ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985), and the defendant bears the burden of proof on the prejudice analysis, ***State v. Bellows***, 218 Wis. 2d 614, 624, 582 N.W.2d 53 (Ct. App. 1998).

¶11 Henderson concedes that "each bail jumping charge is directly tied to a charge related to the events occurring on January 1, 2012." But he contends that he was prejudiced when the jury heard that he had been charged with crimes for which he was out on bail as "they were less likely to properly consider the lies, inconsistencies, being provided immunity, and lack of observation of the key witnesses." We disagree.

¶12 We note that the evidence related to Henderson's misdemeanor charges for hit-and-run and obstructing an officer, which formed the basis for the bail jumping counts, comprises less than five pages of the transcript from the three-day trial. Testimony at trial was overwhelmingly centered on whether Henderson committed four serious, violent felonies, epitomized by the State's only reference to the bail jumping counts during closing argument: "if you find him guilty of the primary crime, you will also find him guilty of the bail jumping offense. If you find him not guilty of any of the primary crimes, you should also not find him guilty of the bail jumpings." Additionally, the jury was instructed to consider the elements of each offense and to not allow its decision on one count to affect its decision on any other count. This instruction presumptively cured any prejudice suffered from joinder of the counts. *See* ***State v. Hoffman***, 106 Wis. 2d

185, 213, 316 N.W.2d 143 (Ct. App. 1982). Henderson has not demonstrated otherwise.

¶13 Henderson also alleges that his counsel was ineffective for not "presenting a legally sufficient defense" by having him provide testimony to contradict Driggers' account that he was the shooter or to explain why he lied in his initial statement to police. Henderson's argument fails as he does not explain how he would have testified nor how there is a reasonable probability that his testimony would have changed the trial's outcome, which is necessary to establish prejudice. *See* ***Strickland***, 466 U.S. at 694. Furthermore, the court found it was Henderson's choice to not testify at trial, a finding of fact that is supported by the record. A defendant cannot base a claim of ineffective assistance of counsel on his or her own choice to not testify. *See* ***State v. Krancki***, 2014 WI App 80, ¶¶10-11, 355 Wis. 2d 503, 851 N.W.2d 824.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).