COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-3220-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMAR S. POLK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK and STEVEN D. EBERT, Judges. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. Omar Polk, pro se, appeals from a judgment convicting him of one count of armed robbery and two counts of second-degree sexual assault, all as a repeater. He also appeals from the trial court's order denying his motion for postconviction relief. The issue is whether Polk received ineffective assistance of trial counsel. We affirm.

The victim, from Zimbabwe, was attacked as she was entering her apartment building after a late night of studying. She testified at trial that two black men approached her and that one of them grabbed her backpack while the other stood by and watched, despite her pleas for assistance. The men fled in different directions.

The victim followed the man who had taken her backpack, hoping to learn where he lived because he had gone across the street from her home into a large apartment complex. She found him and confronted him in a well-lit area in the apartment complex. She told him to keep her money, but to give back her belongings. The man searched the backpack for money and became angry, believing she was hiding money from him. He then grabbed her breasts, ripped her jeans and underwear, and inserted his finger into her vagina. The victim was screaming as this occurred and the man eventually ran away.

The victim testified that she was able to see the man during the robbery and assault in the lights of the nearby buildings. She explained that she had looked directly into his face in the hope of staring him down. She also testified that she saw the two men walking down the street about a week after the assault and immediately recognized them. She picked Polk's picture from a photo array of fifty to seventy photos and also identified him in court as her attacker. When Polk was arrested, he told the police that he was present when the backpack was taken, but that Alan Lee was the man who committed the robbery and sexual assault, not him. He was the bystander. After a jury trial, Polk was convicted of the charges.

Polk filed a postconviction motion alleging ineffective assistance of trial counsel. He contended that his counsel should have interviewed Lee and had

him testify because Lee admitted to Michael Crawford, a private investigator, that he was the perpetrator. Polk also argued that his counsel should have called the investigator to the stand to testify about Lee's admissions. The trial court denied the motion without a hearing because it concluded that Polk's allegations were not sufficiently detailed to warrant a hearing on the claim. *See* ***State v. Bentley,*** 201 Wis.2d 303, 548 N.W.2d 50 (1996).

In order to prove a claim of ineffective assistance of trial counsel, a defendant must show: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that counsel made errors so serious that he or she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To satisfy the prejudice prong, 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. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

Polk first contends that his counsel was ineffective because he did not interview Lee or call him to the stand as a defense witness. As aptly summarized by the State, however, Polk does not "allege that Allen J. Lee was available to be interviewed, what he would have said in an interview or what the contents of any testimony he might have given at trial would have been." Because Polk did not allege that Lee was available and would have testified that he was the perpetrator, Polk was not entitled to a hearing. *See* ***Bentley***, 201 Wis.2d at 309-311, 548 N.W.2d at 53 (a trial court may deny a postconviction motion without an evidentiary hearing if the motion presents only conclusory allegations).

Polk next argues that his counsel ineffectively represented him because his counsel did not call Michael Crawford, the investigator, to the stand to testify as a defense witness. Polk contends that Crawford would have testified that Lee admitted to Crawford that Lee committed the crimes of which Polk was charged.

Polk has not provided an affidavit from Crawford substantiating that Lee made the admission to him and indicating that he would be willing to testify about it. Absent this, Polk has not made a showing sufficient to warrant a hearing on his claim that his trial counsel's decision not to call Crawford to testify constituted ineffective assistance. *See* ***id.***

Even if Polk had provided an affidavit from Crawford, Crawford's testimony would not have been admissible unless Polk had provided more corroboration for Lee's statements. Crawford's testimony about Lee's admission would have been hearsay and, as such, admissible only if it fell under the hearsay exception for an unavailable declarant who makes statements against his or her penal interest. *See* § 908.045(4), STATS. That exception provides in part that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible *unless corroborated."* ***Id.*** (emphasis added). The supreme court has said that the corroboration must be "sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true." ***State v. Anderson***, 141 Wis.2d 653, 660, 416 N.W.2d 276, 279 (1987).

Polk contends that Lee's admission is corroborated by Polk's own statement to the police and by the fact that Lee knew that the victim was African, a fact he would not have known had he not been the perpetrator. Polk's statement to

police exonerating himself is not sufficient corroboration because it does not "permit a reasonable person to conclude, in light of all the facts and circumstances, that [Lee's] statement could be true." *See* ***id.*** Similarly, Lee's statement that an African woman was involved is not, without more, sufficient corroboration because Lee could have learned that information from many sources as a person in Polk's circle of acquaintances. A statement exposing the declarant to criminal liability and offered to exculpate the accused must be adequately corroborated because, as the State points out, "it does not take much imagination for the defendant to seek an exonerating story from a party who is not exposed to criminal liability by making an unsworn statement that an unavailable third party admitted to the crime in question."

By the Court.—Judgment and order affirmed.

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