COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1388-CR **Cir. Ct. No. 2007CF2226**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLAY E. RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Clay E. Russell was convicted of burglary. In a *pro se* postconviction motion, Russell claimed twenty-one instances of ineffective assistance of trial counsel. The circuit court denied Russell's motion without a hearing. On appeal, Russell focuses on a single occurrence—the destruction of the

sliver of glass from which a blood sample was taken at the scene of the burglary—and asserts that his rights to due process and to the effective assistance of counsel were violated. For the reasons stated below, we affirm.

BACKGROUND

¶2 In the early morning hours of July 5, 2005, someone threw a rock through a glass door to gain entry into the Milwaukee Youth Arts Center. Once inside, the person entered several interior offices by breaking the glass office doors with either a microphone stand or a broomstick. Motion sensors were ripped from the wall and the computer that controlled a not-yet-activated security system was among the stolen computers. Computers and other equipment valued at over $30,000 were stolen from the Center.

¶3 Ronald Laura, a detective investigating the scene, discovered a "very small speck of red on the glass" remaining in one of the interior office doors. Thinking that it "would possibly be blood evidence," Detective Laura took a picture of the sliver and then directed an evidence technician to collect the possible blood evidence. In Detective Laura's presence, the technician used a moistened cotton swab to collect the evidence. That swab and an unused swab were sealed into a container and placed into an envelope. Detective Laura testified that the envelope was ultimately delivered to the State Crime Laboratory and a deoxyribonucleic acid (DNA) profile was extracted from the blood. In the spring of 2007, a "cold hit" linking Russell to the blood evidence was generated from the database of DNA samples. After the cold hit, a buccal swab was obtained from Russell, and further testing confirmed that the blood found on the glass sliver came from Russell. On cross-examination, Detective Laura admitted that the

sliver of glass from which the blood was collected was not preserved, and "[i]n hindsight" saving the glass "would have been a better way to go."

¶4 Gretchen DeGroot, a supervisor at the Crime Lab, testified that the envelope containing the burglary-scene swabs was delivered to the Crime Lab by a Milwaukee police officer, and she described the testing process performed by an analyst and the results obtained from the test. DeGroot also testified about the testing process performed on Russell's buccal swab, and that the buccal swab test confirmed that the blood obtained from the scene of the burglary was Russell's blood. DeGroot testified that after a cold hit, a second test is required because the Crime Lab cannot establish the chain of custody for the information compiled in the DNA database. She also testified that Crime Lab personnel preferred that blood evidence be submitted for testing in swabs rather than on items such as broken glass "for safety issues."

¶5 During her cross-examination of both Detective Laura and DeGroot, Russell's trial attorney questioned the chain of custody of the blood evidence. The circuit court denied Russell's motion to dismiss based on an improper chain of custody. The DNA evidence was the only evidence linking Russell to the burglary, and the jury found Russell guilty.

DISCUSSION

A. Ineffective Assistance of Counsel.

¶6 As noted above, Russell raised twenty-one claimed instances of ineffectiveness of trial counsel in his postconviction motion. On appeal, however,

he pursues a single argument—that his attorney was ineffective for not seeking the production of the sliver of glass from the State.[1] We are not persuaded.

¶7 In order to prevail on a claim of ineffective assistance of counsel, Russell must show that his attorney's performance was deficient and that he was prejudiced as a result of the attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). If Russell fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. *See* ***Strickland***, 466 U.S. at 697. To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, Russell must demonstrate that the deficient performance made the result of the proceeding unreliable. *See* ***id.*** at 687. There is no prejudice when an attorney fails to bring a motion that would have been denied. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994). Both the question of whether trial counsel's performance was deficient and whether Russell was prejudiced are questions of law that this court reviews *de novo*. *See* ***Pitsch***, 124 Wis. 2d at 634.

¶8 As our summary of the evidence suggests, the chain of custody for the blood swabs was vigorously challenged by Russell at trial. During cross-examination of both Detective Laura and DeGroot, Russell questioned whether the blood sample submitted to the Crime Lab on the swabs came from the glass sliver found at the scene of the burglary by Detective Laura. Because the only evidence

[1] The claims not raised on appeal are deemed abandoned. ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

linking Russell to the burglary was the blood evidence, the guilty verdict necessarily means that the jury concluded that the chain of custody was intact and that the blood on the swab was the blood lifted from the sliver of glass in one of the interior doors of the Center.

¶9 We further conclude that Russell's postconviction motion consisted of wholly speculative and conclusory allegations. Russell alleged that his trial attorney was ineffective because she "failed to demand … the actual glass evidence allegedly linking defendant to the burglary scene" and "failed to demand a retest of the broken glass which allegedly linked defendant to the burglary." Russell's motion, however, does not allege what a demand for the glass or for a retest would have accomplished. As such, it is insufficient. *See* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477 (A defendant alleging that his or her attorney should have taken a certain action must show with specificity what the action would have accomplished if it had been taken and how the result of the proceeding would have been altered.).

¶10 We concur with the observations made by the circuit court in its postconviction order:

> The defendant maintains that counsel should have demanded the actual glass evidence or should have demanded a retest of the broken glass which linked him to the burglary. It is undisputed that the glass evidence was destroyed after the blood sample was taken. It is also undisputed that it was the blood, not the glass, which constituted the evidence in this case. The defendant fails to specify what relevance the actual piece of glass would have had on the outcome of the trial and how its presence would have created a reasonable probability of a different result at trial. Moreover, he has presented nothing in his favor showing that a retest of the blood found on the glass would have made a difference. Nor has he provided any authority

> for his entirely conclusory statement that that DNA swabs were insufficient to substitute the glass evidence to link him to the burglary. (Emphasis added.)

The blood evidence conclusively linked Russell to the crime. As the circuit court noted, Russell did not elaborate as to how the sliver of glass, as opposed to the blood evidence, would have been relevant.

B. Due Process.

¶11 Russell contends that the sliver of glass had "obvious exculpatory value," and that the failure to preserve it "deprived him of any possibility of independent testing." Russell asserts that the State violated his due process rights by not preserving the sliver of glass. We are not persuaded.

¶12 It is undisputed that the sliver of glass was not preserved by Detective Laura. The Due Process Clause does not require the preservation of "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." ***Arizona v. Youngblood***, 488 U.S. 51, 57 (1988). A defendant's due process rights are not violated when such potentially exculpatory evidence is not preserved unless the police have acted in bad faith. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994). A showing of bad faith requires both an awareness by the police "of the potentially exculpatory value or usefulness of the evidence they failed to preserve" and that the police "acted with official animus or made a conscious effort to suppress exculpatory evidence." ***Id.*** at 69. Because

Russell made no such allegations in his postconviction motion, he has not shown a due process violation.[2]

CONCLUSION

¶13 Because we conclude that Russell's trial attorney was not ineffective and because Russell's due process rights were not violated, we affirm the judgment of conviction and postconviction order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[2] We note that nothing in the trial testimony of either Detective Laura or DeGroot would support a finding of bad faith.