COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1274-CR **Cir. Ct. No. 2005CF210**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARYISE L. EARL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Daryise L. Earl appeals from a judgment convicting him of first-degree intentional homicide and armed robbery, both as

party to a crime, and from an order denying his motion for postconviction relief. For the reasons set forth below, we affirm the judgment and order.

¶2 In February 2007, a jury found Earl and his cousin Johnny Herring guilty of first-degree intentional homicide in the August 2000 death of Michael Bizzle. Earl brought a postconviction motion seeking a new trial on grounds of ineffective assistance of counsel and prosecutorial misconduct. He claimed that his counsel failed to call four witnesses at trial that would have given testimony deflecting guilt to an alternative suspect, Michael Nesby, and failed to object to testimony from Bizzle's aunt that linked Earl to Bizzle. Earl also argued that he was entitled to a new trial because prejudicial testimony obtained through prosecutorial misconduct so tainted his trial as to deprive him of due process. After a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), the trial court found neither ineffective assistance nor prosecutorial misconduct. The court denied his motion, and Earl appeals.

¶3 To prevail on his ineffective assistance of counsel claim, Earl must satisfy the two-part test of deficient performance and resultant prejudice articulated in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis. 2d 642, 679 N.W.2d 893. "To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall 'outside the wide range of professionally competent assistance.'" ***Taylor***, 272 Wis. 2d 642, ¶13 (citation omitted). To prove prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). If this court concludes that the defendant has failed to prove one prong, we need not address the other. ***Strickland***, 466 U.S. at 697. We will uphold the

trial court's findings of fact relating to counsel's performance unless they are clearly erroneous. ***Taylor***, 272 Wis. 2d 642, ¶14. Deficient performance and prejudice, however, are questions of law that we review de novo. ***Id.***

¶4 Earl was represented at trial by Attorney Jeffrey Jensen. Earl first contends that Jensen rendered deficient performance by not calling four people to testify, despite having included them on the witness list. While in the Racine county jail between 2001 and 2003, the four gave police investigator William Warmington information implicating Nesby in Bizzle's murder. Earl argues that their testimony would have undermined the State's case against him.

¶5 We conclude that Earl fails to demonstrate deficient performance. Jensen testified at the ***Machner*** hearing that by the time of trial in 2007 neither he nor his investigator were able to locate the witnesses. Earl does not show that Jensen's efforts to locate the men lacked diligence nor does he specify what the missing witnesses would have said. Further, Jensen testified that as a matter of strategy he avoids using "jailhouse witnesses" because they often lack credibility and believed the State's "weak" case made implicating Nesby unnecessary.

¶6 We "must review an attorney's performance with great deference, and the defendant must overcome the strong presumption that counsel acted reasonably within professional norms." ***State v. Williams***, 2000 WI App 123, ¶23, 237 Wis. 2d 591, 614 N.W.2d 11. It is not ours to second-guess the court's finding that Jensen's testimony was credible and the defense strategy reasonable. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325.

¶7 Earl also asserts that Jensen should have objected to certain testimony given by Lakeesha Shannon, Bizzle's aunt. Shannon testified about a photo of a watch she had seen a few months earlier at the trial of Herring, Earl's

alleged co-actor. The photo apparently was in a book of evidentiary pictures left in the witness room. Shannon testified that the watch in the photo belonged to Bizzle. The watch was found in Earl's bedroom. Earl claims counsel deficiently failed to object to foundation or that the photo was impermissibly suggestive, thereby prejudicing him because it linked him to Bizzle.

¶8 We disagree. First, the trial court said it would have overruled an objection to Shannon's testimony had counsel raised one. Failing to object, therefore, was not deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Second, Jensen testified that he did not think Shannon was truthful and thus aimed to impeach her on cross-examination. Under his questioning, she conceded that there are "lots of watches like that" and that it was six years ago that Bizzle had one like it. The trial court found the cross-examination "substantial" and "effective." Earl was not prejudiced by any failure to object.

¶9 Earl next asserts that he is entitled to a new trial because testimony unfairly prejudicial to him was obtained by dint of prosecutorial misconduct. Herring, Earl's alleged co-actor, was in custody following his conviction in Bizzle's murder and indicated his desire to speak to someone. Two prosecutors and police investigator Warmington visited him in jail. The next day, Herring testified under a grant of immunity that Nesby, not Earl, killed Bizzle. The prosecutor asked if he remembered implicating Earl when they talked in jail. Herring professed not to recall. Warmington then took the stand and testified that Herring told him and the prosecutors that Earl robbed and shot Bizzle.

¶10 The prosecutorial misconduct angle to Earl's claim is that no one ascertained that Herring in fact was represented by postconviction counsel. Earl

argued that so egregious an infringement on Herrring's constitutional rights to counsel and to remain silent poisoned the evidence obtained and thus violated his own due process right to a fair trial. The State responded below that Earl had no standing to challenge violations of Herrring's constitutional rights but that, even so, the prosecutor's conduct was not so outrageous as to compromise the integrity of the trial. The trial court concluded that Earl had standing by virtue of his interest in the outcome of his trial but that under the totality of the circumstances, his right to due process was not abridged.

¶11 We do not decide here whether Herring's constitutional rights were violated or, if so, whether Earl had standing to challenge it. *See, e.g.*, ***State v. Samuel***, 2002 WI 34, ¶¶2, 9, 12, 252 Wis. 2d 26, 643 N.W.2d 423. Instead, we focus only on Earl's claim that he was denied due process.

¶12 Prosecutorial misconduct can rise to such a level so as to deprive a defendant of the due process right to a fair trial if the misconduct "poisons the atmosphere of the trial"; the seriousness of the misconduct and the weakness of evidence of guilt makes us question the trial's fairness; and the State cannot show beyond a reasonable doubt that the error was harmless. ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). Determining whether prosecutorial misconduct occurred and whether it requires a new trial is within the trial court's discretion. ***Id.*** On review, we will sustain the court's discretionary act if the court examined the relevant facts, applied a proper standard of law and reached by a rational process a conclusion a reasonable judge could reach. ***Id.***

¶13 We see no erroneous exercise of discretion. Earl has not shown that any conduct by the prosecutor denied him a fair trial. He points to nothing to establish anything but that the prosecutor believed that Herring did not have

postconviction counsel. The prosecutor testified that she checked automated circuit court records (CCAP) to determine if he had counsel, believing CCAP to be more current than the paper file. She testified that she saw no entry reflecting the appointment of counsel, and thus concluded he was not represented. She was mistaken. The court found her testimony credible.

¶14 Further, the alleged misconduct could have had no bearing on the outcome of Earl's trial. Herring's testimony that Nesby killed Bizzle and that Earl was not even present favored Earl. Although Warmington's testimony from his notes of the jail meeting contradicted Herring's version, it was for the jury to determine their credibility, as well as of the dozens of other witnesses who testified over the five-day trial. *See* ***State v. McAllister***, 153 Wis. 2d 523, 533, 451 N.W.2d 764 (Ct. App. 1989). The jury could have accepted any of the testimony wholly or in part, and also was free to entirely reject it. *See* ***id.*** Far more damaging to Earl was other witnesses' testimony that he had made statements to them admitting killing Bizzle. Earl's claims fail.

By the Court.—Judgment and order affirmed.

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