COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2767-CR
2011AP2768-CR

Cir. Ct. Nos. 2009CF2092
2009CF2267

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK A. MOORE,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: JEAN A. DiMOTTO and CHARLES F. KAHN, JR., Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Frederick A. Moore[1] appeals from amended judgments of conviction for two counts of being a felon in possession of a firearm, two counts of felony bail jumping, and one misdemeanor count of possessing marijuana, contrary to WIS. STAT. §§ 941.29(2), 946.49(1)(b), and 961.41(3g)(e) (2009-10).[2] Moore also appeals from an order denying his postconviction motion.[3] Moore argues that his trial counsel provided ineffective assistance and he seeks a new trial or a ***Machner*** hearing.[4] We affirm.

BACKGROUND

¶2 It is undisputed that in April 2009, Moore, a felon, was stopped for speeding and gave police officers permission to search the vehicle he was driving. Officers found a TEC-9 semiautomatic handgun in a towel that was concealed underneath the hood of the vehicle. Moore was charged with being a felon in possession of a firearm and was released on bail.

¶3 Less than two weeks later, Moore was driving the same vehicle with his girlfriend, Cassandra Todd, as his passenger. He was stopped for failing to

[1] The judgments of conviction identify the defendant's first name as Fredrick, while the appellate filings identify him as Frederick.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] Moore does not challenge that portion of the trial court order that granted his motion to vacate the DNA surcharge.

The Honorable Jean A. DiMotto presided over the trial and sentencing, while the Honorable Charles F. Kahn, Jr., vacated the DNA surcharge and denied the remainder of the motion for postconviction relief.

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

stop at a stop sign. Police officers saw a cigar that contained what officers suspected was marijuana sticking out of Moore's coat pocket. He was arrested. Police officers talking to Todd obtained her permission to search her apartment where, Todd said, she and Moore lived. At the apartment, officers found a piece of mail addressed to Moore and some of his clothes. They also found a Smith & Wesson semiautomatic handgun and ammunition in a bedroom closet. Moore told a police officer that it was his gun and that he put it in the bedroom, but then he later said that the gun belonged to someone else and Moore only handled it.

¶4 Moore was charged with four crimes related to the discovery of the gun in the bedroom closet: being a felon in possession of a firearm, possession of marijuana, and two counts of bail jumping for committing those crimes while on bail for the April 2009 gun charge.

¶5 The case proceeded to trial. Moore's defense, which he supported with his own testimony, was that the guns were not his and that the statements he made to the police were made to protect Todd, who was also a felon, and in response to coercion from the police. The jury found Moore guilty of all charges.

¶6 The trial court imposed five consecutive sentences, including: five years of initial confinement and two years of extended supervision for the first firearm possession charge; five years of initial confinement and three years of extended supervision for the second firearm possession charge; three years of initial confinement and nine months of extended supervision on each of the bail jumping charges; and nine months in the House of Correction on the marijuana possession charge.

¶7 Postconviction counsel was appointed for Moore. Moore filed a postconviction motion alleging that trial counsel provided ineffective assistance for not objecting to a series of questions posted by the State concerning gunshot residue testing and for not objecting and moving to strike testimony from officers that referenced "a larger investigation" and "matters not before this court." The trial court denied the motion without a hearing, for reasons discussed below. This appeal follows.

LEGAL STANDARDS

¶8 At issue is whether the trial court erred when it denied Moore's postconviction motion without a hearing. Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief. ***Id.*** This is a question of law that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion raises such facts, the trial court must hold an evidentiary hearing. ***Id.*** However, if the motion does not raise facts sufficient to entitle the defendant to relief, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***Allen***, 274 Wis. 2d 568, ¶9. We review the trial court's discretionary decision "under the deferential erroneous exercise of discretion standard." ***Id.***

¶9 Moore's postconviction motion alleged that he was entitled to relief based on the ineffective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's

performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove prejudice, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

DISCUSSION

¶10 Moore argues that his trial counsel provided ineffective assistance in two ways at trial. We consider each allegation in turn.

I. Alleged failure to object to the prosecutor's questions about gunshot residue testing.

¶11 The State called police sergeant Aaron Berken as one of its witnesses. Berken conducted a search of Moore's vehicle during the April 2009 traffic stop and was the officer who found the gun under the hood of the car. On cross-examination, trial counsel asked a series of general questions about whether there was a way to determine if a gun had been fired recently. Then trial counsel began a line of questioning concerning whether there is a way to tell if a particular person recently fired a gun, which led to the following exchange:

> [Trial counsel]: What about if somebody had shot a gun? I mean, I always -- You know, they talk about gunpowder residue on somebody's hands. Would that be the case with a gun like this?
>
> [State]: Objection, outside of the scope of this witness's experience.

> [Trial court]: If you -- If he knows, he can answer. And if he doesn't, he can say he doesn't know.
>
> [Berken]: Yeah, I don't know. I don't know how that test is performed, when it's performed.
>
> I know there is such a test, but that's not my area of expertise.
>
> [Trial counsel]: Are you aware of if anybody … in the car was tested for such a substance?
>
> [Berken]: I am not aware whether they were or not.

Trial counsel then turned to other lines of questioning.

¶12 On redirect, the State asked Berken a series of questions about gunshot residue testing, to which trial counsel did not object:

> [State]: You indicated that you weren't familiar with the gunshot residue test. Is that correct?
>
> [Berken]: Correct.
>
> [State]: So you're not familiar with the fact that it's been construed junk science; is that correct?
>
> [Berken]: Yeah, I don't know much about that.
>
> [State]: And you're not familiar with the fact since 1994, state crime labs even tested guns and people for gunshot residue, are you? [sic]
>
> [Berken]: Oh, no, I never even --
>
> [State]: And you're not aware of the fact the F.B.I. doesn't even use that test any more because it's considered such junk science, S[e]rge[a]nt, correct?
>
> [Berken]: Correct.

¶13 In his postconviction motion, Moore alleged that his trial counsel provided ineffective assistance by failing "to object to the introduction of what would otherwise be expert testimony by the assistant district attorney during the

course of and under the guise of questioning a lay witness" and "to object to and move to strike the introduction of prohibited character evidence by the State's witness[]." (Bolding omitted.) Moore asserted that by asking Berken about the reliability of gunshot residue tests and referring to "junk science," the prosecutor introduced expert testimony.

¶14 In its response to Moore's motion, the State argued that Moore could not show deficient performance or prejudice. It argued that trial counsel's cross-examination of Berken opened the door "for the State to expose just how little [Berken] knew about the test and to explore his claim that the test, in fact, exists." The State added:

> To the extent [Moore] claims that the State's questions as to the reliability of the gunshot residue test constituted the introduction of expert testimony, [Moore] again ignores his questioning of the witness, introduced over the State's objection, wherein [Berken] claimed that there is a test to determine, in [trial counsel's] words, "if somebody had shot a gun" based upon "gunpowder residue on [his] hands."

(Third set of brackets in original.) The State argued that even if trial counsel had objected to the State's questions, the objection would have been overruled. Further, the State asserted, if the objection had been sustained, the State was prepared to call an analyst from the state crime lab to rebut Berken's testimony concerning gunshot residue testing.

¶15 The State argued that Moore could not demonstrate prejudice from trial counsel's failure to object to the State's questions and Berken's answers concerning gunshot residue. It explained: "The issue of potential gunpowder residue on [Moore's] hands is, at best, of little probative value…. [T]he State never mentioned during closing argument anything about the gunshot residue test

and the Court instructed the jury that 'remarks or conduct of an attorney during a trial are not evidence.'"[5] Finally, the State concluded that there was "no reasonable probability that the outcome of the proceeding would have been different but for the alleged error by trial counsel."

¶16 The trial court agreed with the State, noting: "[T]he defendant decidedly opened the door to the State's questioning of Sergeant Berken, and as the State indicates, even if the defense would have objected, the State would have called someone from the crime lab to substantiate what had been said."

¶17 Like the trial court, we conclude that "the record conclusively demonstrates that the defendant is not entitled to relief." *See* ***Allen***, 274 Wis. 2d 568, ¶9. Specifically, Moore has not shown that he was prejudiced by trial counsel's failure to object to the State's questions and Berken's answers concerning gunshot residue. The jury had to decide whether Moore possessed the gun that was found under the hood of the car he was driving and the gun that was found in the closet.[6] Whether either gun was ever fired and by whom were not issues in the case. Further, the jury was instructed that remarks and conduct of counsel are not evidence, and we presume that juries follow jury instructions. *See* ***State v. Deer***, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985) ("It is presumed that juries look to the plain meaning of the jury instructions and once

[5] Likewise, trial counsel in his closing argument did not mention gunshot residue testing or make any arguments about either gun being fired.

[6] Berken was called as a fact witness concerning only the gun found in the vehicle, but we recognize that his testimony about gunshot residue was general and, therefore, his testimony in theory could have affected the jury's analysis of both gun possession charges. We conclude, however, that the testimony did not affect the outcome of the trial on either gun charge.

instructed follow these instructions."). We are unconvinced that the jury would have considered the State's questions to be admissible evidence and, moreover, we are not persuaded that Berken's testimony about the gunshot residue affected the outcome of the trial.

¶18 In summary, because Moore has not shown that he was prejudiced by trial counsel's alleged deficient performance, he has not shown that he was denied the effective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687. The record conclusively demonstrates that Moore was not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Thus, it was within the trial court's discretion to deny the postconviction motion without a hearing, *see* ***id.***, and we discern no erroneous exercise of discretion.

II. Alleged failure to object to witnesses' statements about issues not before the court.

¶19 Moore's postconviction motion alleged that his trial counsel provided ineffective assistance with respect to testimony from two officers. He asserted: "Repeated references by the State's witnesses to 'a larger investigation' and 'matters not before this court' involving [Moore] constituted impermissible character testimony, were objectionable, and [trial] counsel's failure to object and move to strike that testimony constituted deficient and prejudicial performance." (Bolding omitted.) He cited three specific examples of testimony that he claims was objectionable.

¶20 First, Moore complains that police officer Kyle Mrozinski's testimony indicated knowledge of "a larger investigation" that involved Moore. This phrase was used when the State conducted redirect examination after trial counsel on cross-examination asked Mrozinski why he asked Todd if he could

search her apartment. The State on redirect asked whether it was standard procedure to ask every person stopped during a traffic stop if the police could search the person's residence. The officer replied: "Not all the time." The State continued:

> [State]: All right. You do that under certain circumstances, correct?
>
> [Mrozinski]: Correct.
>
> [State]: There was a larger investigation in this case; is that correct?
>
> [Mrozinski]: Yes, sir.
>
> [State]: And that's the reason why you asked in this case; is that correct?
>
> [Mrozinski]: Correct.

Trial counsel did not object to the State's questions or Mrozinski's answers.

¶21 Second, Moore argues that his trial counsel should have objected when detective David Kolatski mentioned "another investigation" when he was answering a question posed by the State concerning Kolatski's interrogation of Moore about the TEC-9 gun recovered from the vehicle. The State asked: "[W]hat was his explanation? What did he say about that TEC-9?" Kolatski responded:

> The explanation that Mr. Moore had given to me regarding the TEC-9, it came up as part of another investigation that's not part of this court. However, Mr. Moore indicated to me that he did not have possession of that gun until two days after the other investigation that I was interested in and that he had subsequently been stopped and arrested with the gun in his car approximately two days after that.

Once again, trial counsel did not object or move to strike Kolatski's answer.

¶22 The third incident occurred when Kolatski was testifying as a rebuttal witness. On cross-examination, trial counsel asked Kolatski about an audio recording of Kolatski's interrogation of Moore that was played for the jury. Trial counsel asked: "How long after the snippet we just heard did your conversation -- approximately how long after did it end?" Kolatski replied: "I can't say for sure. Mr. Moore and I were discussing several things, at least one of which is not here before the Court. And we kind of jumped back and forth between some of the things that we had been discussing."

¶23 Moore argued that these three references to things outside the scope of the trial "were, in fact, prohibited character testimony" and, therefore, "they were objectionable." He explained:

> These references clearly established that [Moore] was a person in whom the police were interested for reasons other than the charges before the court. References to "a larger investigation," "another investigation that's not part of this court," "several things, at least one of which is not before the court" strongly suggest the existence of additional criminal conduct by [Moore]. Since these references were, by the witnesses' own admissions, unrelated to the cases for which [Moore] was being tried, they were not relevant to this trial. They had, they could have had, no purpose other than to portray [Moore] as a person of criminal character. They invited the jury to find [Moore] guilty not merely because of the evidence in this case but because he was the type of person that committed crimes. They painted a picture of [Moore] as someone involved in a great many shadowy criminal endeavors, a threat to the community and someone who, therefore, deserved to be punished.

¶24 The trial court concluded that Moore had not shown that he was prejudiced by trial counsel's alleged failure to object and move to strike the references listed above. The trial court explained: "[T]he testimony was too

vague for this court to find that confidence in the verdict was undermined by reference to another or larger investigation."

¶25 We agree with the trial court. Neither officer stated that Moore was the focus of another criminal investigation. At best, the jurors learned that the police were talking to Moore about a police matter; they were not told if Moore was a witness, a suspect, or even an informant. Like the trial court, we are unconvinced that but for trial counsel's alleged errors, "there is a reasonable probability that the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. The record conclusively demonstrates that Moore was not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Therefore, it was within the trial court's discretion to deny the motion without a hearing, *see* ***id.***, and we conclude that the trial court did not erroneously exercise its discretion.

By the Court.—Judgments and order affirmed.

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