COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1573-CR **Cir. Ct. No. 2009CF5830**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. DENGSAVANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and ELLEN R. BROSTROM, Judges. *Judgment affirmed; order reversed and cause remanded for further proceedings*.

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

¶1 PER CURIAM. Michael S. Dengsavang appeals a judgment convicting him of attempted first-degree intentional homicide, armed robbery with

use of force, and burglary-building or dwelling, all as a party to a crime. *See* WIS. STAT. §§ 940.01(1)(a), 939.32, 943.32(1)(a), 943.10(1m)(a), & 939.05 (2009-10).[1] He also appeals an order denying his motion for postconviction relief.[2] We conclude Dengsavang was entitled to a ***Machner*** hearing on his claim that his trial counsel gave him ineffective assistance when he opened the door to otherwise excluded shoe-print report evidence. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). We therefore affirm in part, reverse in part and remand for further proceedings.

BACKGROUND

¶2 According to the complaint, during the night of December 13, 2009, and the early morning hours of December 14, 2009, three separate incidents occurred: a Happy Wok restaurant and its owners' residential apartment were robbed and a police officer was shot. Dengsavang and two others were charged with the crimes.

Pretrial Hearing

¶3 A hearing was held at the request of the defense five days prior to the start of the trial. At the hearing, counsel for one of Dengsavang's co-defendants, Ann Bowe, informed the court that the day before the hearing, in violation of a discovery order that was in place, the State produced a report from

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable Rebecca F. Dallet presided over Dengsavang's jury trial, sentenced him, and entered the judgment of conviction. The Honorable Ellen R. Brostrom entered the order denying Dengsavang's motion for postconviction relief.

the State Crime Laboratory, which analyzed images of the shoe prints found in the snow near the crime scenes.[3] After listening to the objections to the shoe-print report raised by counsel, the circuit court ruled that it would consider allowing the State to introduce the report only if the defense "opened the door":

> [T]his … [shoe-print] report and the person that offered it, that's all we're talking about here.…
>
> I'm going to order the State can't use it in its case in chief. If for some reason the defense put on somebody or questioned somebody who talks about analyzing shoes or says something to the effect of well, you could have analyzed them, why didn't you analyze them, … those would be the kind of situations I will entertain an opening-the-door type issue.

To clarify, the circuit court continued:

> If someone wants to start down the road why weren't the shoes analyzed or you can analyze the shoes by an expert. I mean something very specific like that about an expert, that's the only way this expert's opinion is going to get … in[].
>
> I'm not making any limitations on the prints themselves or the shoes themselves. That stuff you've had. The only thing that's new is this expert analysis of the prints.

At this point, Attorney Bowe responded, "[t]hat's fine."

¶4 The attorney who represented Dengsavang at trial was not present for the circuit court's pretrial ruling related to the shoe-print report.[4]

[3] It appears Dengsavang's two co-defendants subsequently entered pleas, leaving Dengsavang as the sole defendant tried by a jury in this matter.

[4] Dengsavang was represented by one of trial counsel's associates at the hearing.

Trial Testimony

¶5 The focus of this appeal largely centers on the trial testimony of Detective Lisa Hudson, who was called by the State as a witness. Detective Hudson explained that she was the crime scene investigator for the Wauwatosa Police Department. During direct examination, the State did not ask and Detective Hudson did not offer any testimony concerning the shoe-print report.

¶6 During cross-examination, however, defense counsel elicited testimony from Detective Hudson about the shoe-print report, stressing that the report could not definitively match Dengsavang's shoes with the scene shoe prints:

> Q Moving on, you testified to numerous footwear impressions that you saw, is that correct?
>
> A Correct.
>
> Q And one of the shoe print impressions is, as [the prosecutor] referred to, the two round circle shoe print?
>
> A Correct.
>
> Q In other words, similar to the Nike shoes that were recovered from Mr. Dengsavang, correct?
>
> A Correct.
>
> Q Now, I noticed on direct you indicated that in your opinion that the footwear impressions that had the two round circles on it were visually matched to the footwear impressions you saw in the snow, is that correct?
>
> A Correct.
>
> Q When you say "visually match," that means to your eye it looked similar to you?
>
> A Correct.
>
> Q But scientifically matches, it has never been scientifically matched, is that correct?

A I can't answer that, because I am not a footwear expert.

Q Okay. Were you aware that impressions were sent to the crime lab or those photos and shoes were sent to the crime lab?

A Yes.

Q And were you aware that the examiner said that he could not make a positive identification?

A Correct.

….

Q All right. You're aware the crime lab could not positively identify those pictures to the shoes, correct?

A Correct.

Q All right. And you're aware too that obviously Nike is a popular selling shoe, correct?

A Correct.

Q And many people, perhaps even yourself, own Nike shoes?

A Correct.

Q And a lot of the Nike shoes have similar or the same model, would have probably similar sole—similar soles as this Nike shoe in question, correct?

A Correct.

Q Because Nike shoes are mass produced, are they not?

A Correct.

Q They are not—if somebody is making pottery, you might make one pot one way, another one a different way. When you mass produce a shoe, like an automobile, you can make literally millions of those the same way?

A Correct. There was only one shoe print and one person under a tree.[5]

Q Well, like we said, all you could do is visually match that shoe print, correct?

A Correct.

Q No positive identification has been made of that footwear impression, has it?

A Not positively, no.

¶7 On redirect, the prosecutor questioned Detective Hudson concerning the shoe-print report. Detective Hudson acknowledged that the State Crime Laboratory could not definitively identify Dengsavang's shoes as the only shoes that could have made the shoe prints at the scene. The prosecutor, however, elicited testimony that Dengsavang's shoes were not ruled out as capable of making the prints.

¶8 The jury ultimately found Dengsavang guilty of attempted first-degree intentional homicide, armed robbery with use of force, and burglary-building or dwelling, all as a party to a crime.

Postconviction Motion

¶9 In his motion for postconviction relief, Dengsavang argued that a Detective Hudson's testimony during trial about shoe-print evidence amounted to improper opinion evidence from a lay witness and violated the court's pretrial order excluding such testimony.[6] The State responded by asserting that the

[5] Police found Dengsavang hiding under a tree.

[6] On appeal, Dengsavang abandons the other arguments made in his motion for postconviction relief. As such, we do not discuss them in this decision.

defense opened the door to this evidence during its cross-examination of Detective Hudson and that the State merely responded to it during its redirect. In his reply brief, Dengsavang argued, to the extent defense counsel opened the door to the excluded shoe-print evidence, trial counsel gave him ineffective assistance. By opening the door, Dengsavang asserted that his trial counsel allowed the State to solicit prejudicial testimony from Detective Hudson concerning the shoe-print report that trial counsel was not prepared to respond to with an expert of his own.

¶10 The circuit court denied Dengsavang's motion in a written order. The circuit court agreed with the State that trial counsel opened the door to allowing Detective Hudson to testify concerning the shoe-print evidence. Notably, the court stated:

> At a hearing on June 2, 2010, the court precluded the State from using its footwear expert or his report during its case-in-chief unless the defendant "opened the door" about the analysis of the shoes. That is exactly what happened during the trial. The prosecutor made no mention of the expert or his report during Detective Hudson's direct examination. He merely questioned Detective Hudson about her own observations of the shoe[ ]prints based on her investigation of the crime scenes. This was an appropriate line of inquiry and not in violation of the court's ruling. The *defense* made first mention of the State Crime Lab findings during its cross-examination of Detective Hudson, asking her if she was aware that the defendant's shoes and the photos of the shoe[ ]prints that appeared to visually match his shoes were sent to the crime lab for comparison. Detective Hudson stated that they were sent to the crime lab and that a positive identification could not be made. It was only on redirect, *after the defense had opened the door to the issue*, that the State questioned Detective Hudson about the crime lab's findings. Again, Detective Hudson testified that the crime lab could not make a positive identification. On cross-examination, Detective Hudson acknowledged that she was not a footwear expert…. The defense opened the door to questioning about the crime lab findings, which was permissible under the court's prior ruling.

(Emphasis in original; record citations omitted.) The circuit court further concluded that trial counsel's performance did not prejudice Dengsavang because even if the testimony had not been permitted, "there is no reasonable probability that the outcome of the trial would have been different given the compelling circumstantial evidence of guilt."

DISCUSSION

¶11 On appeal, Dengsavang first challenges the circuit court's pretrial evidentiary hearing, which ultimately allowed the State to introduce evidence of the shoe-print report at trial "despite the fact that the report was not provided to the defense until after the discovery deadline had passed, and without first considering whether the State demonstrated excusable neglect for violating the discovery order." Second, he challenges the circuit court's determination that trial counsel performed effectively. In that regard, Dengsavang submits that trial counsel "presumably failed to make himself aware of the [c]ourt's pretrial rulings and was therefore unable to secure Dengsavang the benefit of an important pre[]trial evidentiary ruling that was in Dengsavang's favor." Finally, Dengsavang asserts that the circuit court erred when it denied his postconviction motion without an evidentiary hearing.

¶12 In concluding that Dengsavang's first argument fails, we note the inherent contradiction between it and his second argument: the first challenges the circuit court's pretrial evidentiary ruling and the second describes this same ruling as "an important pre[]trial evidentiary ruling that was in Dengsavang's favor." Dengsavang did not object at the time of the pretrial evidentiary hearing or otherwise challenge the circuit court's ruling regarding the admissibility of the shoe-print report in the record before us. *See* ***State v. Conway***, 34 Wis. 2d 76,

82-83, 148 N.W.2d 721 (1967) (basis for rule that courts refuse to review issues for the first time on appeal is that the trial court has not had the opportunity to give it due consideration or form a proper factual foundation); *see also* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656 (A defendant must raise an issue with enough prominence to ensure that the circuit court understands it is asked to make a ruling.). To the contrary, after the circuit court made its decision, which by Dengsavang's own acknowledgement was an important pretrial evidentiary ruling *in his favor*, there is no indication that he pursued the matter further. Consequently, his position on appeal appears inconsistent. *See generally* ***Siegel v. Leer, Inc.***, 156 Wis. 2d 621, 628, 457 N.W.2d 533 (Ct. App. 1990) ("A party will not be heard to maintain a position on appeal inconsistent with that taken in the trial court.").

¶13 Consequently, we focus our attention on whether Dengsavang's trial counsel gave him ineffective assistance when he opened the door to the otherwise excluded shoe-print evidence.

¶14 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 circuit 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 circuit court has the discretion to grant or deny a hearing." ***Allen***, 274 Wis. 2d 568, ¶9. We review the

court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.***

¶15 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.***

¶16 Here, the parties agree that trial counsel's questioning opened the door to allowing the otherwise excluded testimony concerning the shoe-print report to be presented to the jury. However, they disagree as to the reasoning, or lack of reasoning, behind this line of questioning.

¶17 Dengsavang asserts that trial counsel "presumably failed to make himself aware" of the circuit court's pretrial evidentiary ruling. The State, responding to what it describes as Dengsavang's "speculation" in this regard, theorizes that a reasonable strategic basis existed for opening the door to evidence of the shoe-print report. We conclude that speculation and theorizing—by either party—cannot substitute for testimony from Dengsavang's trial counsel at a ***Machner*** hearing addressing the questioning that opened the door to allowing the otherwise excluded evidence. *See* ***id.***, 92 Wis. 2d at 804 (In determining the reasons underlying counsel's handling of a case, "it is the better rule, and in the

client's best interests, to require trial counsel to explain the reasons."). Consequently, we remand for a hearing on this specific issue.

¶18 Upon review of the record, we conclude that the circuit court erred in denying this allegation of ineffective assistance of counsel without an evidentiary hearing. Because Dengsavang's motion alleged sufficient facts, that if true, would entitled him to relief on his claim of ineffective assistance of counsel, we reverse and remand for an evidentiary hearing.

¶19 We note that Dengsavang also argues—in what amounts to one paragraph, without any citation to legal authority—"that [t]rial [c]ounsel further prejudiced him by failing to object to Detective Hudson's testimony concerning the shoe prints as within the purview of an expert. As a lay-witness, Detective Hudson was not qualified to testify concerning it." (Record citations omitted.) We agree with the State that this argument is undeveloped and will not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments).

By the Court.—Judgment affirmed; order reversed and cause remanded for further proceedings.

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