COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP704-CR **Cir. Ct. No. 2011CF2029**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMITRIUS V. MATTICX,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Demitrius Matticx appeals the judgment of conviction and the denial of his postconviction motion for a new trial after he was convicted of one count of first-degree intentional homicide as party to a crime and three counts of first-degree recklessly endangering safety by use of a dangerous

weapon as party to a crime. Matticx argues that he is entitled to a new trial because his trial counsel was ineffective by: (1) not moving to strike testimony from Matticx's cellmate, Larry Hilton, and (2) not objecting to a portion of the prosecutor's closing argument referring to a "natural and probable consequence." For the reasons set forth below, we reject Matticx's arguments. Therefore, we affirm.[1]

BACKGROUND

¶2 We briefly summarize the undisputed facts. On October 20, 2011, Jonathan Wilson was shot in the head with a shotgun at close range through the windshield of a car in a parking lot on Vera Court, a cul de sac street in Madison. A criminal complaint was issued for Matticx and six other individuals.

¶3 Matticx testified at trial that he was present at a meeting on October 20, 2011, at Jaclyn Van Dyk's apartment to plan an attack on members of a rival gang. He testified that he brought a shotgun and shells to the meeting, but that he did not leave the meeting with the shotgun nor did he shoot the shotgun. He testified that, after he left the meeting, he and other individuals walked towards Vera Court. Matticx testified that as he was approaching the parking lot on Vera Court, "somebody ran past [him] and started shooting." Matticx does not dispute that at some point during this shooting, Jonathan Wilson was shot in the head with a shotgun at close range through the windshield of a car.

[1] Although Matticx also appeals the judgment of conviction, the only issues on appeal relate to ineffective assistance of trial counsel and whether Matticx is entitled to a new trial. Because we conclude that Matticx is not entitled to a new trial, the judgment remains in place.

¶4 The State presented testimony from many witnesses during the eight-day trial, including several who testified that they were present at the meeting at Van Dyk's apartment and at the shooting. Matticx was convicted of one count of first-degree intentional homicide, as a party to the crime, and three counts of recklessly endangering safety, also as a party to the crime.[2]

¶5 Matticx filed a postconviction motion for a new trial citing ineffective assistance of trial counsel. The circuit court held a ***Machner*** hearing and denied the motion.[3] Matticx appeals.

DISCUSSION

¶6 "A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient and, as a result, that he or she suffered prejudice. If we conclude that the defendant has not proven one prong, we need not address the other. To prove deficient performance, a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citations and quoted source omitted).

¶7 "To demonstrate prejudice, 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. A reasonable probability is a

[2] The jury also found Matticx guilty of one count of first-degree reckless homicide, party to the crime. That charge involves the same victim as the first-degree intentional homicide charge, and therefore, was dismissed on the State's motion at the close of trial.

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

probability sufficient to undermine confidence in the outcome. In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact." ***Id.***, ¶13 (citations omitted).

¶8 "Whether a lawyer gives a defendant ineffective assistance is a mixed question of law and fact. The [circuit] court's findings of fact will be upheld unless they are clearly erroneous. Whether proof satisfies either the deficiency or the prejudice prong is a question of law that this court reviews without deference to the [circuit] court's conclusions." ***Id.***, ¶14 (citations omitted).

¶9 We address the errors alleged by Matticx in the sections that follow and conclude that neither constitutes ineffective assistance of counsel because neither constitutes deficient performance.

A. Failure to Strike Testimony by Larry Hilton

¶10 Matticx argues that his trial counsel was ineffective when he failed to move to strike Hilton's testimony, which would have had the effect of excluding Hilton's out-of-court statements to a police detective relating to an alleged jail-house confession by Matticx. We disagree.

¶11 The State called Larry Hilton as a witness during the trial. Hilton testified on direct examination that he was an inmate at the Dane County Jail in July 2012 and was in the same cell block as Matticx. Hilton testified that he was interviewed by Detective Mindy Winter on July 7, 2012 but that he did not remember any part of that interview. Hilton testified that he again spoke to Detective Winter about one month before the trial, and that he had told her that he "didn't want nothing to do with [this case]" and that he "got a family."

¶12 Detective Winter was then allowed to testify as to the out-of-court statements given by Hilton during the two interviews. Detective Winter testified that Hilton told her that Matticx admitted to Hilton while in jail that Matticx had "ran up on a car and … fired a shot." Detective Winter also testified that Hilton said he did not want to testify because he was "concerned about family members and their safety."

¶13 The parties agree that, as a general rule, "where a witness denies recollection of a prior statement, and where the [circuit] judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976); *see also* WIS. STAT. § 908.01(4)(a). The parties do not appear to dispute that Hilton's trial testimony was inconsistent with what Hilton told the detective. However, Matticx argues that his trial counsel was deficient for not moving to strike Hilton's testimony based on an exception to this general rule, which is, according to Matticx, when the defense is "utterly denied an opportunity to cross-examine" the witness.

¶14 In so arguing, Matticx relies on ***Lenarchick***, in which our supreme court stated that "we should reverse only if we conclude that 'apparent lapse of memory so affected … [the] right to cross-examine as to make a critical difference in the application of the Confrontation Clause ...." 74 Wis. 2d at 444 (quoted source omitted). However, Matticx fails to show that such a situation is present here.

¶15 In ***Lenarchick***, the State's witness asserted lack of recollection, was subject to cross-examination, and was in fact cross-examined by the defendant's counsel. ***Id.*** at 434. On review, the ***Lenarchick*** court explained that it was

"apparent that the purported lapse of memory was selective and was favorable to the defendant" and that it was obvious that counsel carefully avoided cross-examination on issues that were potentially harmful to the defendant. ***Id.*** at 444. The court accordingly held that the "claim of inability to cross-examine is without foundation." ***Id.***

¶16 Matticx asserts that unlike the defendant in ***Lenarchick***, he had an "utter inability to cross-examine Hilton." However, the "right to meaningful cross-examination is not to be equated with a successful cross-examination which tends to support the cross-examiner's case." ***Robinson v. State***, 102 Wis. 2d 343, 352, 306 N.W.2d 668 (1981). Matticx had an opportunity for meaningful cross-examination where, here, Hilton's loss of memory was obviously selective. *See* ***id.*** ("[B]ecause we find the loss of memory to be selective, we are able to find that the confrontation clause was satisfied, because there could have been meaningful cross-examination.").

¶17 More specifically, we conclude that it was reasonable for Matticx's trial counsel not to object to either Hilton's testimony or the testimony of the detective who related Hilton's out-of-court statements. It is clear that the circumstances here closely parallel those in ***Lenarchick*** and that any objection would have been futile. It would have been obvious to Matticx's trial counsel that the circuit court would have viewed Hilton as holding back. It was not believable that Hilton would not have remembered whether Matticx told Hilton he fired a gun. Nor was it believable that Hilton did not remember telling the detective what Matticx said. Indeed, Hilton's trial testimony suggests that his asserted memory loss was prompted by fear for himself and his family. Thus, we see no significant distinction between Matticx's opportunity to cross-examine Hilton in this case and the defendant's opportunity to cross-examine the witness in ***Lenarchick***.

¶18 Therefore, we follow the court's lead in ***Lenarchick*** and conclude that Matticx's claim of inability to cross-examine Hilton is without foundation, and that trial counsel's performance was not deficient in not moving to strike Hilton's testimony.

B. Failure to Object to State's Closing Argument Regarding a "Natural and Probable Consequence"

¶19 As noted, Matticx was charged with first-degree intentional homicide, as a party to the crime. Matticx argues that his trial attorney was deficient in failing to object to the portion of the State's closing argument that, according to Matticx, misled the jury regarding the State's burden to prove that the shooter intended to kill the victim. Matticx contends that the prosecutor misled the jury when referring to a "natural and probable consequence" of the plan carried out and understood by Matticx. The portion of the closing argument that Matticx takes issue with is as follows:

> And so I think those are among the facts and circumstances, ladies and gentlemen, that you should consider in resolving, if you don't – if you aren't convinced that the defendant himself fired the shot that killed Jonathan Wilson, that the plan, as carried out and as understood at Van Dyk's, would *naturally and probably lead to somebody being shot and somebody being killed.*
>
> So even if you are not convinced that the defendant personally shot and killed Jonathan Wilson, you should still find him guilty of the crime of first degree intentional homicide as a party to the crime because he assisted in the planning and in carrying out that plan to shoot to scare, and a *natural and probable consequence of multiple guns being used by multiple people who are shooting to scare is that someone would be shot and killed*.

(Emphasis added.)

¶20 Matticx contends that the State's explanation of the law in this portion of its closing argument is incomplete because the State did not remind the jury that, even if Matticx was not the shooter, the shooter had to have an intent to kill. In other words, Matticx contends that the State suggested to the jury that Matticx "could be guilty of the crime of first-degree intentional homicide if anyone with him had killed Wilson, regardless of [the shooter's] intent." The argument is meritless. Although this part of the State's argument did not mention the intent of the shooter, the State had otherwise made clear to the jury that it had proved, as it must, that the shooter intended to kill.

¶21 Prior to this reference to a "natural and probable consequence," the State properly argued to the jury that Matticx should be found guilty because he intentionally shot and killed Wilson:

> So as to [Matticx], the evidence is clear beyond any reasonable doubt that he is the one who shot and killed Jonathan Wilson and that he *intentionally* did so, and for that reason, you should find him guilty of first degree intentional homicide.

(Emphasis added.)

¶22 The State then argued, in the alternative, that even if Matticx was not the one who shot and killed Wilson, he should still be convicted for first-degree intentional homicide because he assisted in the commission of that crime by someone else who fired the shotgun with an intent to kill Wilson:

> Now, as the Judge has already read to you, the party to the crime instruction, a person can be concerned in a crime if they directly commit it, if they aid and abet, that is, assist, in its commission ….
>
> Let me address that briefly. Even if, ladies and gentlemen, you are not convinced beyond a reasonable doubt that this man [Matticx] had the shotgun, this man fired the shotgun, and this man killed Jonathan Wilson in

> cold blood and *intentionally*, *someone did*. There's no dispute about that. And the law provides that another person who assists or was part of the planning process is as legally responsible, is as guilty, … as the person who actually pulled the trigger.
>
> And as I said at the outset, there could be no doubt that the person who pulled the trigger on the shotgun *intended* to kill Jonathan Wilson, and this man [Matticx] assisted in that by being the person to bring the loaded shotgun to Van Dyk's.

(Emphasis added.) In so arguing, the State presupposed the fact that someone *intentionally* killed Jonathan Wilson. It was in this context that the State then went on to refer to a "natural and probable consequence." Thus, the State did not misstate the law in the closing argument.

¶23 In sum, Matticx fails to show that his trial counsel was deficient for failing to object to the portion of the State's closing argument referring to a "natural and probable consequence," because that portion of the argument was not objectionable. Counsel is not deficient for failing to make an objection that is without merit. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) ("trial counsel was not ineffective for failing or refusing to pursue feckless arguments").

CONCLUSION

¶24 For the reasons set forth above, we conclude that Matticx fails to demonstrate that trial counsel's alleged errors constitute ineffective assistance of counsel. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).