COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP852-CR **Cir. Ct. No. 2013CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLEVELAND F. POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Price County: ANN KNOX-BAUER, Judge. *Reversed and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Cleveland Powell, convicted by a jury of three counts of burglary of a building or dwelling and one count of theft of movable property, appeals his convictions and the order denying his postconviction motion for a new trial. Powell alleges his trial attorney was ineffective for failing to call

Nicholas Raimondi as a witness at trial and for failing to introduce DNA evidence from a state crime lab report. We agree with Powell's claim concerning his attorney's failure to call Raimondi as a witness. We therefore reverse the judgment of convictions and order denying postconviction relief, and remand to the circuit court for further proceedings.[1]

BACKGROUND

¶2 The Information charged Powell with burglary of a building or dwelling; misdemeanor theft; burglary of a dwelling as a party to a crime; and burglary—arming self with a dangerous weapon as a party to a crime. The State alleged that on January 14, 2013, Cleveland Powell, together with his son, Kevin Powell, stole a flat screen television from L.S.'s home and a snowblower from her garage.[2] The State also alleged that Cleveland stole money and firearms from the home of K.P. that same day.

¶3 Prior to the trial, Cleveland's attorney received statements from Nicholas Raimondi indicating Raimondi participated in the burglaries with Kevin Powell, and that Cleveland was not present at the burglaries. Cleveland's attorney submitted a witness list, which included Raimondi.

¶4 At trial, Donald Farina, a neighbor of L.S., testified that at 3:20 p.m. on January 14, 2013, he observed a Dodge Durango pull in front of L.S.'s house.

[1] We decide this case on other grounds, and therefore, we need not address the issue of whether Cleveland was prejudiced as a result of his counsel's claimed ineffective assistance in failing to introduce the DNA results. ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate courts need not address every issue raised by the parties when one is dispositive).

[2] Because this decision often refers to Cleveland Powell and his son, Kevin Powell, in places we will refer to them by their first names.

Farina observed a younger male knock on the door of the home, while a second man remained in the driver's seat. Farina estimated the age of the driver as fifty years old. He observed the driver, whom he described as having a limp, go into the garage and then come out pushing a snowblower. He stated the other man came out of the home with a flat screen television on his shoulder. Farina was unable to identify the suspects from a photo line-up.

¶5 Craig Langsdorf testified he lived near L.S., and that between 3:00 p.m. and 4:00 p.m. on January 14, 2013, he saw a man with a limp pushing a snowblower down the alley by his house. Langsdorf knew Cleveland and stated he recognized a Durango he saw as belonging to Cleveland. Langsdorf was familiar with Cleveland's appearance. Langsdorf stated that Cleveland has a "very bad limp and walks funnier than most people," although at the time he observed the man pushing the snowblower, he did not identify the man as Cleveland. Langsdorf testified he had a home surveillance system on his house that recorded the traffic outside. When he reviewed the surveillance video for that time period, he recognized Cleveland's Durango.

¶6 Jerome Ernst, a police officer, responded to the L.S. residence. He testified that when he heard the physical description of the suspect—five foot eight or nine inches, heavy-set with a distinct limp, driving a Dodge Durango—he immediately thought of Cleveland Powell, whom he had known for at least five years. Ernst testified that Cleveland has a prosthetic left leg, but that he does not drag that leg when he walks.

¶7 L.S. testified that the day after her television was taken, she found a small black grommet from her television on the floor of her home. Officer Ernst testified he found a small black grommet in Cleveland's vehicle, identical to the one L.S. found in her home. On January 15, Ernst located the snowblower at the home of Josh Powell, another of Cleveland's sons.

¶8 Crista Hoefs testified that on January 14, 2013, the day of the burglaries, Cleveland offered to sell her and her friend a flat screen television. Hoefs was with Cleveland the next day when they picked up a snowblower from Josh Powell's house and dropped it off elsewhere.

¶9 K.P. testified that on January 14, 2013, guns were stolen from his home. He stated he left his home between 8:30 and 9:00 a.m. and returned at 5:00 p.m. Deputy Seth Dabler testified that on January 15, he drove by the K.P. residence and noticed an unoccupied home with a broken garage window. The homeowner, Dannilyn Fischer, testified that on January l4, she was moving out of the home and noticed a silver Durango stop in front of her house around 2:30 p.m. She did not see who was in the vehicle.

¶10 Gregory Wirsing, an investigator with the Price County sheriff's office, testified that he examined tire tracks outside the K.P. residence and the tracks were similar to tracks at the L.S. residence. Wirsing testified the tire tracks left at the crime scenes were consistent with the tires on Cleveland's Durango.

¶11 At the L.S. residence, officer Ernst observed and photographed two distinct footwear impressions in the snow. Ernst testified that one set of footprints matched Kevin Powell's shoes, but he did not find shoes matching the other footprints. Officer Robert Hawn testified he searched for shoes and boots in Cleveland's home consistent with the impressions found at the L.S. residence, but he never found any footwear that was consistent with the impressions from the scene of the robbery. He also stated that he did not see anything unusual about the footprints that appeared to be from the person who pushed the snowblower.

¶12 Investigator Wirsing testified that he found the two footwear patterns at each of the scenes distinct. Wirsing stated one set of shoe prints was consistent with shoes recovered from Kevin Powell. Wirsing stated he never identified who owned the shoes that left the second set of prints. Wirsing stated that based on a

couple of observations, he believed that, even though Cleveland walked with a limp, his feet generally came down in the same place as a person walking without a limp. After examining the second set of shoes, Wirsing stated the heel of the right shoe was worn more than the heel of the left shoe, and there was a little more wear on the inner sole area of the right shoe.

¶13 Wirsing also identified a still photograph from a video recording taken at 2:19 p.m. on January 14, 2013, from a business in Park Falls. The photo showed Cleveland and Kevin together outside of a Dodge Durango, shortly before the burglaries.

¶14 Kevin Powell testified he committed the burglaries with Nicholas Raimondi. Kevin further stated he borrowed his father's silver Dodge Durango on January l4. He stated that at around 2:00 p.m., his father picked him up, they stopped at a gas station, and then he and Raimondi dropped his father off at Shopko prior to committing the burglaries. He explained that the morning after the burglaries, Raimondi sold the snowblower to Kevin's father. Kevin identified the shoes that he had previously shown to officer Wirsing as belonging to his father. He noted the shoes contained an insert to make them more comfortable for Cleveland's right foot because all of his weight went on that foot. Kevin further stated that his father had trouble walking and would sometimes drag his feet. Despite naming Raimondi as a witness, Cleveland's attorney did not call Raimondi to testify.

¶15 Cleveland was convicted on four counts: misdemeanor theft, contrary to WIS. STAT. § 943.20(1)(a); burglary of a building or dwelling; and two

counts of burglary of a dwelling as a party to a crime, all contrary to WIS. STAT. § 943.10(1m)(a).[3]

¶16 Cleveland subsequently brought a postconviction motion for a new trial alleging, in part, his trial attorney was ineffective for failing to call Raimondi as a witness. At the postconviction motion hearing, Powell's trial attorney admitted that he did not try to subpoena Raimondi for the trial. Cleveland's attorney admitted that his trial strategy was to show that Raimondi, and not Cleveland, committed the crimes. The State stipulated that Raimondi would have testified consistent with his signed statements, indicating that he and Kevin committed the burglaries without Cleveland.

¶17 The circuit court denied Cleveland's motion in a written decision. The court's decision did not specifically find Cleveland's attorney's performance deficient. However, the circuit court held that any failure attributed to Cleveland's counsel would not have changed the outcome of the jury's verdict. Therefore, we interpret the circuit court's decision as concluding that, assuming counsel's deficient performance, Cleveland suffered no prejudice under the applicable legal standards. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶18 As to the failure to call Raimondi as a witness, the circuit court held that because of prior inconsistent statements by Raimondi as to his involvement in the crimes, "… it is likely that the jury would have disregarded Raimondi's testimony that the defendant was not involved …." Therefore, the circuit court also concluded that Cleveland was not prejudiced in that regard. Cleveland now appeals.

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[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

DISCUSSION

¶19 Cleveland argues that his trial attorney's deficient performance in failing to call Raimondi was prejudicial to him. Therefore, Cleveland claims he is entitled to a new trial.

¶20 A defendant claiming ineffective assistance of counsel must first show that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. Wisconsin applies the two-part test described in ***Strickland*** for evaluating claims of ineffective assistance of counsel. ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. A defendant's claim of ineffective assistance of counsel fails when he has not satisfied either prong of the two-part test. *See* ***Strickland***, 466 U.S. at 697.

¶21 Whether Cleveland received ineffective assistance of counsel is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We uphold a circuit court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. However, whether those facts meet the legal standard for ineffective assistance of counsel is a question of law that we review de novo. ***Id.***

¶22 To establish deficient performance, Cleveland must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to him] by the Sixth Amendment." *See* ***Strickland***, 466 U.S. at 687. In other words, Cleveland must show his counsel's "representation 'fell below an objective standard of reasonableness' considering all the circumstances." *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 688).

¶23 With respect to the prejudice component of the test, Cleveland must demonstrate that the alleged defects in counsel's performance "actually had an adverse effect on the defense." *See* ***Strickland***, 466 U.S. at 693. A defendant cannot meet his or her burden by merely showing that the errors had "some conceivable effect on the outcome"; rather, he or she must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 693-94. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶24 Cleveland's attorney did not subpoena Raimondi to testify at the trial. Raimondi did not appear for the postconviction hearing, despite being subpoenaed. However, the State does not contend that Raimondi was unavailable to be subpoenaed for trial by Cleveland's attorney. In addition, the State claims in one of its argument headings that Cleveland's attorney's performance was not deficient. However, the State fails to address why the conduct of Cleveland's attorney in failing to call Raimondi to testify did not constitute deficient performance under the ***Strickland*** standards. The State merely argues that any deficiency in this regard was not prejudicial to Cleveland. As such, we perceive the State's arguments as addressing only the prejudice prong of ***Strickland***, not the deficiency prong. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶25 We therefore address whether counsel's deficient performance in failing to have Raimondi testify was prejudicial to Cleveland. The record does not indicate Cleveland's attorney attempted to subpoena Raimondi. The State does not claim Raimondi was not available to be subpoenaed. Further, the State stipulated that, had Raimondi testified, he would have testified consistent with his signed and notarized statement, which indicated he and Kevin Powell committed

the burglaries without Cleveland. Therefore, we conclude the failure to subpoena Raimondi prejudiced Cleveland's ability to introduce a material witness's statements directly inculpating that witness and exculpating Cleveland.

¶26 In addition, we cannot know whether Raimondi would have honored a subpoena to appear at trial. Moreover, even if Raimondi appeared at trial, we cannot know if he would have asserted his privilege against self-incrimination. By failing to subpoena Raimondi, Cleveland's attorney was precluded from attempting to submit Raimondi's written statements into evidence under the exception to the hearsay rule for out-of-court statements by unavailable witnesses under WIS. STAT. § 908.045. In ***State v. Guerard***, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12, the defendant's brother made an out-of-court confession to an investigator that he, not the defendant, committed the charged offenses. ***Id.***, ¶¶2, 14. The defendant's brother then refused to testify during trial, claiming his privilege against self incrimination. ***Id.***, ¶¶3, 12. The defendant's attorney then failed to submit the brother's out-of-court statement into evidence. ***Id.***, ¶¶3, 14-15. The circuit court held there was no prejudice because the hearsay statement was not sufficiently corroborated by "independent" evidence to be admissible under WIS. STAT. § 908.045. ***Id.***, ¶¶4, 17. The court of appeals affirmed, but the Supreme Court reversed on that point. ***Id.***, ¶¶4, 18, 50.

¶27 Here, the State did not contend in the circuit court or—more important for our current decision—on appeal, that Cleveland's attorney could not have submitted Raimondi's written statements into evidence under WIS. STAT. § 908.045 without Raimondi's testimony. This would include any scenario in which Raimondi would have been "unavailable," such as due to a failure to comply with the subpoena or from appearing but invoking his right against self-incrimination. Rather, the State's only argument regarding potential prejudice from defense counsel's failure to subpoena Raimondi is that, even with his testimony or prior statements as evidence, there is no reasonable probability that

the jury would have decided differently, as his statements "do[] not erase all of the evidence against Powell." We therefore assume even if Raimondi was "unavailable" at trial, his statements would have been admitted into evidence for the jury's consideration under § 908.045.

¶28 Before trial, Raimondi gave two other statements to the police that he was not involved in the burglaries. If Raimondi had testified, Raimondi would have been subject to impeachment with his prior inconsistent statements. So, even if Raimondi testified that he and Kevin committed the burglaries without Cleveland, or if Raimondi's written statements to that effect were admitted into evidence, the State argues there is little reason to believe the jury would have found Raimondi's "story" credible.

¶29 In response, Cleveland emphasizes there was no eyewitness identification or DNA evidence directly connecting him to the crimes. While that is true, the State points to the following circumstantial evidence connecting Cleveland, rather than Raimondi, to the crimes: (1) The surveillance photo showed Cleveland with Kevin near the Durango shortly before the burglaries; (2) Cleveland walked with a limp. Farina testified he saw a man with a limp pushing the snowblower from L.S.'s garage. Langsdorf, too, saw a man with a limp pushing the snowblower. There was no evidence whether Raimondi walked with a limp; (3) Hoefs testified she was with Cleveland when they picked up a snowblower; and (4) Hoefs also told police Cleveland offered to sell her and her friend a flat screen television on January 14, 2013. The State argues there was sufficient circumstantial evidence against Cleveland that resulted in the jury rejecting Kevin Powell's testimony that his father was innocent. The State therefore contends the result of the trial would probably have been the same even with Raimondi's testimony or statements.

¶30 Cleveland, however, relies on ***State v. Guerard***, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12, as to the issue of defense counsel's ineffectiveness in failing to present an exculpatory witness whose testimony would be consistent with the theory of the defense. In ***Guerard***, Joseph Guerard was tried for armed burglary, armed robbery, aggravated battery, and theft. ***Id.***, ¶7. The victim and her mother both identified Joseph Guerard in photo arrays and a line-up. ***Id.***, ¶11. The State built its case around the victim's testimony. ***Id.***, ¶8. The defense strategy was to show that Guerard's brother, Daniel, was the perpetrator. ***Id.***, ¶12. Joseph's trial attorney possessed a statement wherein Daniel admitted that he, and not Joseph, committed the crimes. ***Id.***, ¶14. At the trial, Joseph testified that he did not participate in the crimes, and implicated his brother. ***Id.***, ¶16. The victim's testimony was noted as "compelling." ***Id.***, ¶47. Daniel's statement contained inconsistencies with the victim's testimony. ***Id.***, ¶45. In addition, Daniel had previously denied any involvement in the crimes when interviewed by a police investigator, thus providing the State with fertile grounds for impeaching him during cross-examination. ***Id.*** Joseph's attorney did not introduce Daniel's prior self-inculpatory statement, exculpating Joseph.

¶31 A unanimous supreme court held that trial counsel's failure to use Daniel's statement exculpating Joseph was deficient performance. ***Id.***, ¶46. The Court noted that while the inconsistencies between Daniel's various statements may have diminished the weight and credibility of Daniel's confession, they did not provide an objectively reasonable basis "for foregoing their use altogether." ***Id.*** Furthermore, despite both the victim's identification of Joseph and Daniel's prior inconsistent statements as to his involvement in crimes, the ***Guerard*** court held the attorney's failure to introduce Daniel's statements prejudiced Joseph's defense under the ***Strickland*** standards, and it reversed his conviction for that reason. ***Id.***, ¶47.

¶32 The facts in ***Guerard*** are strikingly similar to those in this case and support Cleveland's prejudice claim.[4] In ***Guerard***, Daniel recanted his prior self-inculpatory statements, which exculpated Joseph, setting up the State's ability to impeach Daniel's credibility with his prior inconsistent statements that Joseph was innocent. Similarly here, Raimondi's subsequent statement recanted his prior self-inculpatory statements. As the State argued, that certainly raised the prospect of impeaching Raimondi's prior statements. However, credibility determinations are particularly within the province of the finder of fact, here the jury, not the circuit court at the postverdict hearing. *See* ***Guerard***, 273 Wis. 2d 250, ¶49 ("The jury would have had to determine the weight and credibility to assign to Daniel's confessions, and might have convicted Guerard anyway. But the failure to introduce Daniel's admissible confessions exculpating Guerard undermines our confidence in this verdict."); *see also* ***State v. David J.K.***, 190 Wis. 2d 726, 741, 528 N.W.2d 434 (Ct. App. 1994). Moreover, the circuit court's credibility determination at the postconviction motion hearing was inherently lacking given that Raimondi did not testify at trial or the motion hearing.

¶33 Next, we address the circumstantial evidence arguably connecting Cleveland to the crimes to determine if there is a reasonable probability that, but for the failure of Cleveland's counsel to call Raimondi as a witness, the result of the proceeding would have been different. We first note that only the evidence showing Cleveland with Kevin Powell near the Durango shortly before the burglaries would implicate Cleveland in the K.P. burglary, for which he was convicted. In addition, all of the circumstantial evidence—while potentially bases for a jury ultimately to find Cleveland guilty of the L.S. burglaries—could be

[4] The State's response brief does not address the Wisconsin Supreme Court's decision in ***State v. Guerard***, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12, in any manner, including its impact on this case, despite Cleveland's prominent invocation of ***Guerard*** in his initial brief and its manifest relevance to the issues in this case.

explained as consistent with Kevin and Raimondi having committed the crimes without Cleveland. Kevin's uncontested testimony was that he and Cleveland were together when photographed before the burglaries, but he dropped Cleveland off at Shopko before the burglaries occurred. Hoefs' testimony about the snowblower and television concerned events after the burglary, so that did not necessarily place Cleveland at the burglary site. In addition, Cleveland could have acquired the snowblower and television from Kevin and Raimondi after they committed the burglaries. There was no evidence presented on whether Raimondi walked with a limp, either generally or on the day of the burglaries, which is clearly weaker evidence than the photo and line-up identification of Joseph in the ***Guerard*** case. Furthermore, had Raimondi testified under oath that Cleveland was not involved, the jury could have been left, depending on its credibility assessments, with reasonable doubt concerning Cleveland's guilt. After all, evidence exculpatory to Cleveland coming from the unrelated Raimondi may have carried more weight with the jury than son Kevin's testimony that his father was innocent. Certainly, that scenario presents a stronger argument than in ***Guerard***, where the statements exculpating Joseph came from Joseph's brother.

¶34 In addition, the direct evidence against Joseph in ***Guerard*** was stronger than the circumstantial evidence against Cleveland, particularly the victim's photo and line-up identification of Joseph, which was lacking against Cleveland. While in ***Guerard***, Joseph testified in his own defense at trial, and here Cleveland did not, Kevin's testimony showed Cleveland's defense was that Raimondi, not Cleveland, committed the crimes along with Kevin.

¶35 Consistent with ***Guerard***, we hold that the introduction of Raimondi's testimony or prior written statements at trial would have provided Cleveland with a reasonable probability of a different trial result, and Cleveland's counsel's failure to attempt to present that testimony or statements at trial is sufficient to undermine our confidence in the outcome. Thus, we hold under the

Strickland and ***Carter*** standards that Cleveland has met his burden of proving prejudice so as to warrant a reversal of his conviction. Accordingly, we reverse the convictions and postconviction order, and remand to the circuit court for further proceedings.

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

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