COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP121-CR **Cir. Ct. No 2002CF2058**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS L. LEVY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 KESSLER, J. Curtis L. Levy, Jr., appeals from a judgment of conviction for burglary, contrary to WIS. STAT. § 943.10(1)(a) (2001-02),[1] and from orders denying his motions for postconviction relief based on ineffective assistance of counsel. Levy has not alleged facts which, if true, establish that his trial counsel's performance was deficient, and that counsel's performance prejudiced him, as required by ***Strickland v. Washington***, 466 U.S. 668 (1984). Not having presented facts to the trial court sufficient to establish a *prima facie* case, Levy was not entitled to a ***Machner***[2] hearing on the postconviction motions. *See* ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).[3] Consequently, we affirm the judgment and orders.

BACKGROUND

¶2 Levy was charged with burglary and robbery with threat of force in connection with an incident at a group home. The manager of the group home testified that he discovered Levy, who the manager did not know, coming up from the basement area carrying a blue bin that the manager often used to carry groceries. According to the manager's testimony, he asked the man who he was and why he was there. The man responded that his name was Curtis and he was there to see a friend, Michael. When the manager went to talk to Michael, Curtis attempted to leave the building with the blue bin.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[3] Levy focuses his argument on the ultimate issue: whether he is entitled to a new trial, rather than on whether he was entitled to a ***Machner*** hearing. Therefore, we will not consider further the trial court's decision to deny the postconviction motions without a hearing.

¶3 According to the manager, when he tried to stop Curtis, Curtis said he had a gun and stuck his hand in his coat. The manager let Curtis leave and then pursued him in his truck, calling 911 from his cell phone. He then saw Curtis, no longer carrying the blue bin, go into an apartment complex. The manager found the bin behind some garbage cans, filled with food that had been stored in the group home basement. At trial, the manager identified the man who had called himself "Curtis" as defendant Curtis Levy.

¶4 Levy testified on his own behalf that he went to the group home to visit his friend, Michael, who is a group home resident. Levy stated that after he spoke briefly with his friend, he ran into the manager who asked him who he was. The manager then told Levy to leave and he did. Levy denied having gone into the basement of the building or having seen a blue bin.

¶5 A police officer testified that eleven days after the group home incident she observed Levy "dumpster diving." When confronted by the officer and asked to identify himself, Levy did, but when the officer attempted to verify the information, Levy took off running. He was pursued and eventually arrested. Levy's explanation for his flight was that he did not want to be arrested for dumpster diving and he thought the police were harassing him. Levy's trial counsel did not object to the testimony about the dumpster diving or about Levy fleeing, but did object to the court giving a flight instruction to the jury. The court gave the flight instruction over trial counsel's objection.

¶6 A jury convicted Levy of the burglary charge, and acquitted him of the robbery. He was sentenced to twelve years of imprisonment, consisting of six years of initial confinement, followed by six years of extended supervision. He filed a postconviction motion, alleging ineffective assistance of counsel based on

trial counsel's failure to object to the testimony involving the dumpster diving and flight. The motion was denied.

¶7 Postconviction counsel then sought, and obtained, from this court, permission to file a supplemental postconviction motion. That motion asserted that trial counsel was ineffective for failing to object to the State's cross-examination of Levy in which he was repeatedly asked whether the other witnesses were lying and for failing to object to the State's closing argument that relied heavily on the alleged improper cross-examination. The trial court denied the motion. This appeal followed.

DISCUSSION

¶8 When Levy failed to object to the alleged trial court errors he now challenges on appeal, he waived his right to directly challenge these acts on appeal. *See* ***State v. Hartman***, 145 Wis. 2d 1, 9-10, 426 N.W.2d 320 (1988) (failing to object at trial waives right to claim error on appeal). For this reason, this case comes to us in the form of an ineffective assistance of trial counsel claim. This court follows a two-part test for ineffective assistance of counsel claims: the defendant must prove both that the attorney's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. The defendant must also prove counsel's allegedly improper acts prejudiced the defense by demonstrating a reasonable probability that the verdict would have been different, but for counsel's errors. ***State v. Koller***, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838.

The defendant must prevail on both parts of the test to be afforded relief. ***Johnson***, 153 Wis. 2d at 127-28.

¶9 Whether trial counsel's actions constitute ineffective assistance presents a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's factual findings regarding counsel's actions unless those findings are clearly erroneous. ***Id.*** at 634. Whether trial counsel's performance was deficient, and whether that behavior prejudiced the defense, are questions of law we review *de novo*. ***Id.***

¶10 Levy argues his trial counsel was ineffective because he failed to object to: (1) cross-examination designed to elicit the defendant's belief that other witnesses were lying; (2) the State's reliance on improper testimony and the State's bolstering of its witnesses in closing argument; and (3) evidence of flight and dumpster diving, which Levy argues was inadmissible under ***State v. Miller***, 231 Wis. 2d 447, 605 N.W.2d 567 (Ct. App. 1999) or, alternatively, as "other bad acts" evidence, pursuant to WIS. STAT. § 904.04(2).

I. Improper cross-examination

¶11 While this appeal was pending, the Wisconsin Supreme Court decided ***State v. Johnson***, 2004 WI 94, 273 Wis. 2d 626, 681 N.W.2d 901. The decision in ***Johnson*** resolves against Levy the issue related to the State's cross-examination of Levy. Levy withdrew that argument in his reply brief and it will not be addressed further.

II. Improper closing argument

¶12 Levy advances two theories that trial counsel's failure to object to statements made during the State's closing argument denied him the effective

assistance of counsel. First, Levy claims that trial counsel should have objected to the State's reliance on the cross-examination of Levy during closing argument. Because the cross-examination was not improper, this theory fails. *See* ***id.***

¶13 Second, Levy asserts that his trial counsel was ineffective for failing to object when the State improperly bolstered the credibility of the State's main witness. "Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial." ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The demarcation line between permissible and impermissible closing argument "is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***State v. Nielsen***, 2001 WI App 192, ¶46, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted).

¶14 Levy complains that the State characterized the manager's work of running a group home as "almost a vocation" and implied that because the manager had gone through a lot of effort to appear in court, he must be telling the truth. In doing so, Levy argues, the State improperly vouched for the credibility of the witness. We disagree. Based on the manager's testimony of his work, this was a fair characterization of and inference from the evidence. The closing argument was not improper. Therefore, trial counsel did not provide deficient performance when he failed to object.

III. Admission of flight and dumpster-diving evidence

¶15 Levy alleges that he was denied effective assistance of trial counsel when counsel failed to object to the admission of evidence that he fled from police and that he was "dumpster diving." Levy argues that evidence of flight was

inadmissible under ***Miller*** or as "other bad acts" evidence, pursuant to WIS. STAT. § 904.04(2). Under certain circumstances, evidence of a defendant's flight is admissible to establish consciousness of guilt, ***State v. Knighten***, 212 Wis. 2d 833, 839, 569 N.W.2d 770 (Ct. App. 1997), and the flight need not occur immediately after the crime, *see* ***Gauthier v. State***, 28 Wis. 2d 412, 420, 137 N.W.2d 101 (1965) (court properly admitted evidence that defendant escaped from custody while awaiting trial). "Analytically, flight is an admission by conduct. The fact of an accused's flight or related conduct is generally admissible against the accused as circumstantial evidence of consciousness of guilt and thus of guilt itself." ***State v. Winston***, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984) (citation omitted). However, "[e]vidence of flight is inadmissible where there is 'an independent reason for flight known by the court which cannot be explained to the jury because of its prejudicial effect upon the defendant.'" ***Miller***, 231 Wis. 2d at 460 (citation omitted).

¶16 Unless there is an independent reason for Levy's flight that cannot be explained to the jury because of its prejudicial effect, the evidence of his flight was admissible. *See* ***id.*** Levy fled when police approached him while he was dumpster diving. At the time, Levy's explanation for fleeing the police was that he did not want to get a ticket for dumpster diving and the police were harassing him. These reasons for flight are not sufficiently prejudicial that they could not have been admitted at trial as an independent reason for his flight.

¶17 Levy, in his postconviction motion, asserted that trial counsel should have objected to the flight evidence on the ground that Levy fled from the police because he was on parole and in absconder status. These reasons, Levy argues, could not be offered to the jury as independent reason for his flight because "his status as a parolee in absconder status would have been too prejudicial for the jury

to hear." We reject Levy's argument because it is inconsistent with the testimony he gave at trial.

¶18 At trial, Levy testified under oath that he ran from the police because he had not done anything to justify the police stopping him, he felt like he was being harassed, and he did not want to get a citation for dumpster diving (even though he denied he was doing so). He did not indicate in his testimony at trial, or in an affidavit in his postconviction motion, that the reason he ran from police was that he knew he was on parole and in absconder status.

¶19 Moreover, flight because of knowledge of probable arrest for another matter has been held not to be so prejudicial that the jury could not hear it. In ***Miller***, we affirmed the trial court's decision to allow evidence of flight where the defendant would have an opportunity to explain that he fled because he knew there was an outstanding warrant for his arrest for an unrelated crime. 231 Wis. 2d at 461. We conclude that trial counsel did not perform deficiently by failing to raise a meritless objection to the evidence of flight. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

¶20 Levy also contends that trial counsel performed deficiently by failing to object to the evidence that he was dumpster diving because that conduct was other bad acts evidence, inadmissible under WIS. STAT. § 904.04. Levy does not claim that the flight evidence itself was inadmissible under § 904.04. We agree with the State that Levy's implicit concession is accurate. Wisconsin case law firmly holds that evidence of a defendant's conduct to show consciousness of guilt is not other acts evidence under § 904.04. ***State v. Bauer***, 2000 WI App 206, ¶¶7-8, 238 Wis. 2d 687, 617 N.W.2d 902; ***State v. Neuser***, 191 Wis. 2d 131, 144, 528

N.W.2d 49 (Ct. App. 1995). Rather, Levy argues that evidence of the dumpster diving itself was inadmissible other bad acts evidence.

¶21 In response, the State asserts that the evidence of dumpster diving cannot be adequately separated from the flight evidence, and that the reason Levy was stopped by police was relevant to prove his flight from the police indicated a consciousness of guilt of the charged robbery and burglary.

¶22 We agree that evidence of the dumpster diving would be difficult to separate from the evidence of flight, as it provides a context for the reason the police were pursuing Levy. Moreover, Levy has not convinced this court that the State sought to introduce evidence of dumpster diving to suggest that such an act made it more likely that Levy also committed burglary, which would have been an improper basis for the admission of the evidence. *See* WIS. STAT. § 904.04. We conclude that in connection with the admissible flight evidence, the dumpster-diving evidence was admissible. Consequently, trial counsel was not ineffective for failing to object to the dumpster-diving evidence at trial.

By the Court.—Judgment and orders affirmed.

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