COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP232-CR **Cir. Ct. No. 2014CF3400**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWAYNE T. FREEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Brennan P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Dwayne T. Freeman appeals from a judgment of conviction, following a jury trial, for armed robbery as party to the crime and as a repeater, burglary with use of a dangerous weapon as party to the crime, and possession of a firearm by a felon. *See* WIS. STAT. §§ 943.32(2), 943.10(1m)(a),

941.29(2)(a), 939.05, 939.62(1)(c) & 939.63(1)(b) (2013-14).[1] He also appeals from the order denying his postconviction motion. Because the trial court properly excluded the testimony of one of Freeman's witnesses and the postconviction court properly denied Freeman's ineffective assistance of counsel claims without holding a hearing, we affirm.[2]

I. BACKGROUND

¶2 The following facts are taken from witness testimony at trial. On July 30, 2014, B.J. picked up his wife, A.W., from her job. A.W. testified that when they arrived home, Freeman and two other men immediately approached them with guns.[3] Freeman grabbed A.W. from behind and indicated that he had a bullet in the chamber of his gun. Freeman held A.W. by the waist and walked with her toward the front door of her home. The other two men held B.J. and walked him to the door.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] In his table of contents, Freeman's counsel identifies the issues on appeal as whether the trial court erred in denying his motion for judgment notwithstanding the verdict or, in the alternative, whether we should order the trial court to amend the judgment of conviction to reflect a single DNA surcharge. Additionally, in the conclusion section of his brief, Freeman's counsel asks that we overturn Freeman's conviction because the "evidence presented at trial was insufficient to warrant a guilty verdict." Freeman did not, however, brief these issues on appeal.

In his statement of issues, Freeman identified the issues that are actually discussed in his appellate brief. Those are the issues we analyzed in this decision. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments that are undeveloped or unsupported by references to relevant legal authority). We caution counsel to use more care with his filings in the future.

[3] After reviewing a photo array and at trial, A.W. identified Freeman as the man who robbed her home while armed.

¶3 Once they were inside the house, two of the men stayed with B.J. in the kitchen and demanded money. Meanwhile, A.W. took Freeman to the basement to give him money that was hidden in the ceiling. She gave Freeman $8000 in cash.

¶4 Freeman then took A.W. to the bedrooms to search for more money. When they passed through the living room, A.W. noticed that her son, J.J. was awake.[4] Freeman proceeded to take five or six grams of marijuana belonging to A.W., some fashion belts, and car keys.

¶5 When one of the men noticed that the police had arrived, all three ran out of the back door of the home. A.W. proceeded to retrieve a loaded firearm from a shelf in her pantry. She ran to her backyard where B.J. was fighting with two of the men and fired a shot into the air. Afterward, the men, including B.J., scattered. More gunfire followed.

¶6 Officer Ashley Navone and Officer Joseph Saric arrived at A.W.'s home after receiving a call that someone had a gun. Officer Navone saw three men run from the house. Then, she heard gunfire and took cover.

¶7 When the gunfire ended, Officer Navone saw Freeman climbing a fence to get from one yard to another. She ordered Freeman to come out of the yard; instead, he tried to hide. Officer Erik Smith responded to Officer's Navone's call that a man was hiding in the yard, and he saw Freeman run. After running a few blocks, Freeman turned and faced Officer Smith and put his hands

[4] J.J., who was seventeen at the time of the crime, also identified Freeman as one of the robbers.

in the air. Officer Smith placed Freeman in handcuffs and waited for Officer Jeffrey Dumke to arrive with a car. Officer Dumke searched Freeman and found a blue rubber glove. Another glove was recovered from Freeman during the booking process.

¶8 The State initially charged Freeman with armed robbery as party to the crime, as a repeater. The State subsequently filed an amended information charging Freeman with armed robbery as party to the crime, as a repeater, burglary with use of a dangerous weapon as party to the crime, and possession of a firearm by a felon.

¶9 On January 16, 2015, Freeman filed a witness list naming Steve Harrington and Jamie Grey. The State moved to strike the witnesses concluding that they were alibi witnesses and that Freeman failed to provide timely notice.

¶10 On the first day of trial, the trial court addressed the State's motion to strike. Freeman's trial counsel explained to the trial court that he planned to call Harrington, whose testimony would not place Freeman anywhere geographically.[5] Rather, Harrington would testify that Freeman lived with him on the date of the crime and left their home that morning with a dog. Freeman's trial counsel argued that Harrington would not be an alibi witness but that this testimony was relevant because it took Freeman "out of his home" and would corroborate Freeman's explanation for what he was doing at the time the crime occurred.

[5] No mention was made of Jamie Gray during this discussion. And, in fact, when the State was explaining the basis for its motion to the trial court, it relayed that Freeman's trial counsel only intended to call Harrington. Freeman's trial counsel did not suggest otherwise.

¶11 The State objected and argued that Harrington's testimony was not relevant: "To have a witness say, I don't know where the defendant was, I'm not sure that's relevant." The trial court granted the State's motion concluding that Harrington's testimony had two problems: lack of relevance and lack of notice.

¶12 The jury convicted Freeman of each count. The trial court sentenced Freeman to eight years for the armed robbery, nine years for the burglary, and six years for possession of a firearm as a felon. The sentences on the first two counts were ordered to run consecutively, and the sentence on the last count was to run concurrently.

¶13 Freeman filed a postconviction motion for a new trial and for a ***Machner*** hearing.[6] He argued that the trial court erroneously struck two witnesses for failure to provide notice of an alibi to the State. Freeman did not submit affidavits from the witnesses in conjunction with his motion. He alternatively argued that his trial counsel provided ineffective assistance. The postconviction court denied the motion without a hearing. Freeman appeals.

II. DISCUSSION

A. *The trial court properly excluded the proffered testimony as irrelevant*.

¶14 We review a trial court's evidentiary ruling for an erroneous exercise of discretion. *See* ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will uphold a trial court's exercise of discretion if the court applied the

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

proper legal standard to the facts and reached a reasonable determination. *See* ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606.

¶15 Relevant evidence is evidence tending to make the existence of any consequential fact more or less probable than it would be without the evidence. WIS. STAT. § 904.01. Evidence that is not relevant is inadmissible. WIS. STAT. § 904.02.

¶16 Like the State, we find Freeman's representation as to the witnesses' anticipated testimony problematic. As noted, the record reveals that Freeman planned to call *only* Harrington as a witness at trial. *See supra*, ¶10 n.5. Yet, in Freeman's statement of facts, he submits that both Harrington and Gray "would testify that Freeman left their home with his dog and gloves to pick up after the dog, as is Freeman's daily routine." This statement does not contain a citation to the record, nor is it supported by the record.[7] *See* WIS. STAT. RULE 809.19(1)(d) (requiring "a statement of facts relevant to the issues presented for review, with appropriate references to the record").

¶17 There was no WIS. STAT. § 904.02 relevance to Freeman's proffered testimony from Harrington. As explained by Freeman's trial counsel, Harrington would not place Freeman "anywhere geographically." Freeman's trial counsel continued:

> He simply … knows [Freeman] left the building. He doesn't know if he went to a coffee shop or went on a trip, he just knows he left on a routine task to walk the dog, that he's familiar with, he regularly does, but he doesn't

[7] For a second time in this decision, we caution counsel to be more careful with his filings in the future.

> know if he went north, south, east, or west, does not place him at any specific location.

¶18 We adopt the postconviction court's summation of the shortcomings in this regard:

> What is the relevance of th[is] witness[]? The defendant was walking his dog at some time at some place unknown with blue latex gloves. Well, he was also arrested by police on 26th and Nash that morning who had seen him running from the back of [A.W.'s] house, and he was identified by the occupants of the home as one of the armed robbers who stole money and drugs from their home.

See WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) ("When the trial court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto."). While Freeman asserts that the testimony was relevant because "[i]t would have filled in the blank as to why Freeman was seen in the area of the crime," he did not offer any support for that assertion when he made his offer of proof.

¶19 The trial court properly exercised its discretion when it excluded the proffered testimony as irrelevant. Given that the testimony was properly excluded on this basis, we will not discuss the other basis on which the trial court excluded the testimony (i.e., whether Harrington was an alibi witness such that notice pursuant to WIS. STAT. § 971.23(8)(a) was required).[8] *See* ***Walworth State Bank v. Abbey Springs Condo. Ass'n, Inc.***, 2016 WI 30, ¶13 n.7, 368 Wis. 2d 72,

[8] The trial court ruled: "It does to some extent go to alibi, and the defense didn't provide appropriate notice on it. The question is, whether it's even relevant or not too, I think we've got those two issues. As a result, [t]he [c]ourt will not allow that testimony to occur."

878 N.W.2d 170 (“‘Typically, an appellate court should decide cases on the narrowest possible grounds.’”) (citation omitted).

B. *The postconviction court properly denied Freeman’s ineffective assistance of counsel claims without a hearing.*

¶20 Freeman alleges ineffective assistance of trial counsel. To prevail on such a claim, a defendant must prove both that trial counsel’s performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant fails to prove one component, a court need not consider the other. *See* ***id.*** at 697. To prove deficiency, Freeman must show that trial counsel’s actions or omissions were “professionally unreasonable.” *See* ***id.*** at 691. To prove prejudice, Freeman must show that trial counsel’s errors had an actual, adverse effect on the defense. *See* ***id.*** at 693. Whether counsel’s performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶21 A defendant claiming ineffective assistance of trial counsel must seek to preserve trial counsel’s testimony in a postconviction hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nonetheless, a defendant is not automatically entitled to a hearing on the claim. A postconviction court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 13, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion contains sufficient allegations of material fact to earn a hearing presents an additional question of law for our independent review. *See* ***id.***, ¶9. To be sufficient, the motion should “allege the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *See* ***id.***, ¶23. If the defendant does not allege sufficient material

facts that, if true, would entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the postconviction court has discretion to deny a motion without a hearing. *See* ***id.***, ¶9. We review the postconviction court's discretionary decisions with deference. ***Id.***

¶22 Freeman argues that his trial counsel was ineffective for failing to investigate his claim that he was walking a dog immediately prior to the time the crime was committed and to provide notice to the State regarding the potential alibi witnesses. Freeman admits he did not tell his trial counsel about Gray and Harrington until January 15, 2015.[9] Trial counsel's witness list identifying the two witnesses was filed the next day. We will not find an attorney "deficient for failing to discover information that was available to the defendant but that [the] defendant failed to share with counsel." *See* ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325. Moreover, as explained above, it does not appear the witnesses would have provided relevant testimony; as such, Freeman has not shown that any purported errors in this regard had an actual, adverse effect on the defense. *See* ***Strickland***, 466 U.S. at 693. As summed up by the postconviction court in its decision: "Where is the affidavit from either witness? The court has no idea what they would have actually said. The court does not set evidentiary hearings based on 'information and belief.'" *See* ***Allen***, 274 Wis. 2d

[9] In his opening brief, Freeman asserted that he informed trial counsel he was walking a dog at the time the crime occurred prior to January 15, 2015. As the State pointed out, Freeman did not include this assertion in his postconviction motion and nothing in the record supports the statement. Freeman seemingly concedes this point in his reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

568, ¶9 (postconviction court can deem conclusory allegations inadequate to warrant a hearing).

¶23 Freeman additionally argues trial counsel "failed in both advising him and [in] presenting evidence at trial." First, Freeman asserts that his trial counsel failed to present evidence to the jury that he was brought to the crime scene before he was taken to jail. As the State points out, there is nothing in the record to support Freeman's assertion that anyone brought him to A.W.'s home before taking him to jail. *See* ***id.*** Freeman does not refute this point in his reply brief. We therefore deem this issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶24 Second, he argues his trial counsel failed to properly attack the credibility of the victims by highlighting the inconsistencies in their testimony. Freeman directs our attention to A.W.'s testimony that B.J. was not involved in drug sales. In contrast, Freeman relays that J.J. "claim[ed] on the record that [B.J.] did sell drugs and had been for years."

¶25 The record citation that Freeman provides does not support this assertion. Instead, the record reveals that when Freeman's trial counsel asked J.J. whether B.J. dealt marijuana, the State twice objected to the relevancy of the line of questioning, and the trial court sustained both objections. Even if a plausible argument could be made that trial counsel performed deficiently, there is not a reasonable probability that the jury would have reached a different verdict based on whether B.J. sold drugs. *See* ***Strickland***, 466 U.S. at 693.

¶26 Third, Freeman claims his trial counsel failed to argue that the physical evidence did not place Freeman in the house. The record soundly refutes this contention. During his closing argument, Freeman's trial counsel repeatedly

argued that the jury should find reasonable doubt based on the lack of physical evidence connecting Freeman to the crime.

¶27 Freeman's specific complaint seems to be that his trial counsel did not emphasize that there was no drywall powder on his clothing when he was arrested—despite the fact that he was alleged to have pulled down a drywall ceiling to get to the money. In this regard, A.W. testified that she and Freeman "tore down just a little bit of the ceiling hanging" to get to the cash that was in the basement. It is speculative to assume that Freeman would have had drywall powder on his clothing, and, indeed, he offers no support in the record for this claim. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶28 To the extent Freeman fleetingly asserts that he is entitled to a new trial in the interests of justice, his assertion is not developed. We will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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