COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP159 **Cir. Ct. No. 2012CF8**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES LAMAR HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. James Lamar Henderson appeals pro se from an order denying his motion for postconviction relief. He contends that the circuit court erroneously admitted hearsay testimony in violation of his constitutional right to confrontation. He further contends that his trial counsel was ineffective.

Finally, he contends that he is entitled to a new trial in the interest of justice. We reject Henderson's arguments and affirm.

¶2 In January 2012, the State filed a criminal complaint charging Henderson with two counts of attempted first-degree intentional homicide with use of a dangerous weapon, one count of first-degree reckless injury with use of a dangerous weapon, one count of first-degree reckless endangerment with use of a dangerous weapon, and four related counts of misdemeanor bail jumping. The charges stemmed from an incident at a New Year's Eve party in which Henderson shot a firearm at two individuals, striking one with several bullets.

¶3 The matter proceeded to trial. There, the jury heard from Sergeant Terrance Jones of the Racine Police Department. Sergeant Jones testified that on December 31, 2011, he was off-duty, working security at the American Legion in Racine. Shortly after midnight, his partner, Officer Robert Thillemann, entered the building and said that there was a report of a shooting outside. Sergeant Jones and Officer Thillemann headed outside to investigate.

¶4 Sergeant Jones testified that as he was heading outside, he talked to a woman who refused to give her name. When the prosecutor asked Sergeant Jones what the unidentified woman said to him, defense counsel objected on grounds of hearsay and the right to confrontation. After a brief voir dire of Sergeant Jones outside the presence of the jury, the circuit court overruled the objection. The court determined that the woman's statements were admissible as present sense impressions and did not raise a confrontation issue.

¶5 Sergeant Jones went on to describe two conversations that he had with the unidentified woman. In the first conversation, he asked whether she saw anyone shooting a gun. The woman said that she saw a man firing one in the back

of the parking lot. This caused Sergeant Jones to investigate the back of the parking lot where he discovered the shooting victims.

¶6 After talking to the shooting victims, Sergeant Jones spoke again with the unidentified woman. In this second conversation, the woman described the gunman. At that point in time, Sergeant Jones did not know whether the gunman was still in the area.

¶7 On the basis of this and other evidence, the jury convicted Henderson of one count of attempted first-degree intentional homicide with use of a dangerous weapon, one count of first-degree recklessly endangering safety with use of a dangerous weapon (this charge had been amended from attempted first-degree intentional homicide with use of a dangerous weapon), one count of first-degree reckless injury with use of a dangerous weapon, and three counts of misdemeanor bail jumping.

¶8 Henderson filed a postconviction motion accusing his trial counsel of ineffective assistance for not moving to sever the bail jumping counts from the felony charges and for not advising him to testify. The circuit court denied the motion following a ***Machner***[1] hearing. Henderson appealed, and this court affirmed the judgment of conviction and circuit court order denying the postconviction motion. ***State v. Henderson***, No. 2014AP1175-CR, unpublished slip op. (WI App June 3, 2015).

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

¶9 In December 2015, Henderson filed another motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2015-16).[2] The circuit court denied the motion without a hearing. This appeal follows.

¶10 On appeal, Henderson first contends that the circuit court erroneously admitted hearsay testimony in violation of his constitutional right to confrontation. His argument centers on the unidentified woman's statements as recounted in Sergeant Jones' testimony.[3]

¶11 Whether a statement is admissible under a hearsay exception is a question of law that we review de novo. ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290. Whether admission of a hearsay statement violates a defendant's constitutional right to confrontation is also a question of law that we review de novo. ***State v. Weed***, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485.

¶12 The rule against hearsay does not bar admission of "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." WIS. STAT. § 908.03(1). "[W]ide discretion is afforded a [circuit] court in deciding whether the time lapse was sufficiently short to qualify a statement as a present sense impression …." ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 63 n.13, 252 N.W.2d 81 (1977).

[2] All references to the Wisconsin Statutes are to the 2015-16 version.

[3] Although Henderson's claims are arguably barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we nevertheless choose to address them.

¶13 Here, Sergeant Jones' first conversation with the unidentified woman occurred within minutes of the shooting. Officer Thillemann testified that two people left the American Legion and "a few moments later" returned and told him that they heard gunshots outside. He informed Sergeant Jones of the shooting and exited the building one or two minutes after their report. Sergeant Jones, in turn, testified that he spoke to the unidentified woman "[p]robably not even a minute" after Officer Thillemann informed him of the shooting.

¶14 Sergeant Jones' second conversation with the unidentified woman also occurred within minutes of the shooting. Sergeant Jones testified that the difference in time between the first and second conversations was between five and ten minutes total.

¶15 Given the relatively short period of time between the shooting and the unidentified woman's statements describing it, we are satisfied that the circuit court could properly admit the statements as present sense impressions. *See* ***United States v. Blakey***, 607 F.2d 779, 785-86 (7th Cir. 1979) (holding that a statement made, at most, 23 minutes after an event occurred was admissible as a present sense impression), *overruled on other grounds by* ***Idaho v. Wright***, 497 U.S. 805 (1990)).

¶16 We are also satisfied that the admission of the statements did not violate Henderson's constitutional right to confrontation. Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." ***Davis v. Washington***, 547 U.S. 813, 821 (2006). Here, the statements at issue were nontestimonial because the primary purpose of Sergeant Jones' questioning was to meet an ongoing emergency. *See* ***id.*** at 822.

¶17 Henderson next contends that his trial counsel was ineffective. Specifically, he faults counsel for (1) failing to object to the hearsay testimony; (2) failing to try to impeach it; and (3) failing to argue that the unidentified woman's statements were not present sense impressions because she was not stressed or excited when she made them.

¶18 As a threshold matter, Henderson has forfeited the right to raise his claims of ineffective assistance of counsel. That is because he had a ***Machner*** hearing before his direct appeal and failed to raise them there. *See* ***State v. Thompson***, 222 Wis. 2d 179, 190 n.7, 585 N.W.2d 905 (Ct. App. 1998); ***State v. Elm***, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996).

¶19 Even if we were to look past this forfeiture, Henderson's claims are without merit. The record shows that trial counsel did object to the hearsay testimony and tried to impeach it via cross-examination of Sergeant Jones. Moreover, there is no requirement that a declarant be stressed or excited when making a present sense impression.[4] Counsel's failure to advance such an argument cannot constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶30, 256 Wis. 2d 270, 647 N.W.2d 441 (defense counsel not ineffective for failing to bring meritless motion).

¶20 Finally, Henderson contends that he is entitled to a new trial in the interest of justice. He asks for this relief pursuant to WIS. STAT. § 752.35.

[4] Henderson appears to be confusing the requirements of the excited utterance exception to hearsay with the requirements of the present sense impression exception. *See* WIS. STAT. § 908.03(1), (2).

¶21 We exercise our discretionary power to grant a new trial infrequently and judiciously. ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have already determined that no error occurred as to the issues that Henderson has raised on appeal. We therefore conclude that no basis exists to order a new trial under WIS. STAT. § 752.35.

By the Court.—Order affirmed.

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