COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP68 **Cir. Ct. No. 2014CF3615**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL JUSTIN TAYLOR, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Nathaniel Justin Taylor, Jr., appeals a judgment convicting him of one count of felon in possession of a firearm and one count of

possession of a firearm while subject to a domestic abuse injunction. *See* WIS. STAT. § 941.29(2)(a) & (e) (2013-14).[1] He also appeals the order denying his postconviction motion without a hearing. Taylor argues that he is entitled to a new trial because he received ineffective assistance from his trial counsel, or, alternatively, in the interest of justice. We reject these claims and affirm.

I. BACKGROUND

¶2 Taylor was charged in a four count complaint with the following: possession of a firearm by a felon; possession of a firearm while subject to a domestic abuse injunction; disorderly conduct, use of a dangerous weapon, as an act of domestic abuse; and endangering safety by use of a dangerous weapon. The charges stemmed from an incident alleged to have occurred on August 13, 2014.

¶3 The complaint relayed that following a 911 call, police responded to the address of the victim, who informed police that the father of two of her children, Taylor, had argued with her, pushed her, pulled a semiautomatic pistol from beneath the bed, and threatened to kill himself. Officers located Taylor in a bedroom of the residence asleep with a loaded semiautomatic pistol tucked into his waistband.

¶4 Prior to the start of the jury trial, the charge of endangering safety by use of a dangerous weapon was dismissed. During the trial, the State entered into evidence a packing slip addressed to Taylor for a magazine clip. Police Officer Robert Gregory testified that the victim brought the packing slip to a charging

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

conference. He identified the slip as an order form for a magazine for a Ruger P90, which was the same type of firearm recovered from Taylor. He testified that the date on the order form was August 11, 2014, two days prior to the incident, and it was addressed to Nathaniel Taylor at 4535 North 20th Street, Milwaukee, Wisconsin 53209. The State then offered the packing slip into evidence without an objection from defense counsel. The magazine itself was not offered as evidence.

¶5 The victim's daughter also testified about the packing slip. She testified that a couple of days after Taylor's arrest, a "gun clip" arrived in the mail at their residence. She identified the packing slip addressed to Taylor as the one that came in the mail with the gun clip. The packing slip was published to the jury.

¶6 In its rebuttal closing argument, the State also addressed the packing slip and argued to the jury: "And I submit to you, jurors, that is probably the most compelling piece of evidence that this defendant knowingly possessed this weapon is that days after [Taylor's arrest,] a new clip to replace this old one came in the mail addressed to Nathaniel Taylor at this address."

¶7 The jury found Taylor guilty of possession of a firearm by a felon and possession of a firearm while subject to a domestic abuse injunction. The jury acquitted Taylor of disorderly conduct.

¶8 The trial court sentenced Taylor to three years of initial confinement and four years of extended supervision on each count to run consecutively.

¶9 Taylor filed a postconviction motion arguing that he was denied a fair trial when the packing slip was admitted into evidence. Because there had

been no objection to the admission of the packing slip, Taylor alleged ineffective assistance of counsel. The trial court denied Taylor's motion without holding a hearing.

II. DISCUSSION

¶10 Taylor acknowledges in his opening brief: "The evidence at trial was pretty clear that [he] was in possession of a firearm when officers arrived at the residence on August 13, 2014." His defense was that, in an attempt to frame him, the gun was planted on him while he was asleep, before the police arrived. Taylor submits that the admission of the packing slip purporting to show that he ordered a new clip for the gun was highly prejudicial and inadmissible. He argues that relief is warranted based on the ineffective assistance of his trial counsel, who did not object to the admission of the packing slip, or, alternatively, in the interest of justice.

¶11 To succeed on a claim of ineffective assistance of counsel, Taylor must show both that his attorney performed deficiently and that said deficiency was prejudicial. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. Proving deficient performance requires showing facts from which we can conclude that the attorney's representation fell below objective standards of reasonableness. *See* ***id.*** Proving prejudice requires showing "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *See* ***id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). We need not consider both prongs if the defendant fails to make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

¶12 A hearing on a postconviction motion is only required if "the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If the motion alleges sufficient facts, the trial court is required to hold a hearing, but if the motion is insufficient or conclusory, or is unsupported by the record, the decision whether to grant a hearing is left to the trial court's discretion. *See* ***id.***

¶13 In his postconviction motion, the extent of Taylor's argument related to deficient performance was his assertion that his trial counsel should have been aware the packing slip was hearsay and should have objected to its use at trial. Even if the packing slip constituted inadmissible hearsay, we nevertheless conclude that Taylor's trial counsel's decision not to object was strategic and, therefore, not deficient performance.[2] S*ee* ***State v. Libecki***, 2013 WI App 49, ¶25, 347 Wis. 2d 511, 830 N.W.2d 271 (a valid strategy is not deficient performance).

¶14 Taylor's trial counsel cross-examined Officer Gregory about the packing slip, highlighting that it did not contain any signatures and that the officers did not look into what credit card was used for the order or how payment was made. Taylor's trial counsel asked Officer Gregory: "[I]t's probably not the best idea if you are a felon to order a magazine and send it in your own name; isn't that correct?" Officer Gregory answered affirmatively.

[2] The trial court concluded that it did not need to decide whether the packing slip constituted hearsay because it was satisfied that there was no prejudice. However, we can affirm on alternate grounds. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

¶15 Taylor's trial counsel additionally cross-examined the victim's daughter about the fact that the new magazine, which came with the packing slip, arrived after the incident. Immediately prior to that questioning, Taylor's trial counsel alluded to tension between Taylor and the victim based on Taylor's interactions with other women. Although she had never witnessed it firsthand, the victim's daughter acknowledged that she was aware of Taylor talking to other women.

¶16 During his closing argument, Taylor's trial counsel referenced the packing slip and Officer Gregory's testimony that ordering parts for a firearm over the internet was probably not a good idea and would be "[e]asy to trace." Taylor's trial counsel then came back to a theme he had touched on in his opening statement: "Lovers scorned can often be hard to handle." He referenced the victim's daughter's testimony that there was trouble in the relationship between the victim and Taylor. Trial counsel further noted: Immediately prior to his arrest, "[Taylor] was sleeping after fighting with the woman he obviously has had a long relationship of trouble with." He went on to ask the jury to consider: "Was that gun intentionally on my client?"

¶17 Police found Taylor with a loaded gun. His defense was that he was framed. No witnesses were called on his behalf. We agree with the State's assessment: "Even assuming that counsel could have successfully kept the slip out of evidence, he used it to support the defense that [the victim] had set Taylor up by suggesting that not only did she plant the gun on him, but also that she ordered a new magazine in his name to further connect the gun to him."

¶18 We cannot conclude that Taylor's trial counsel's efforts to use the packing slip to bolster the overall defense strategy that the victim planted the gun

on Taylor fell below an objective standard of reasonableness. *See* ***McDougle***, 347 Wis. 2d 302, ¶13. Taylor did not allege sufficient facts that, if true, would establish that counsel provided deficient performance. *See* ***Allen***, 274 Wis. 2d 568, ¶14. Consequently, there is no need to analyze prejudice because Taylor's claim cannot satisfy both prongs. *See* ***Strickland***, 466 U.S. at 697.

¶19 Taylor alternatively asks that this court exercise its authority of discretionary reversal under WIS. STAT. § 752.35 and order a new trial in the interest of justice. He submits that the real controversy was not fully tried because the erroneous admission of the packing slip deprived him of a fair trial.

¶20 "In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried ... the court may reverse the judgment or order appealed from." WIS. STAT. § 752.35.

> [S]ituations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). The crucial issue at trial was whether Taylor knowingly possessed the gun he was found with at the time of his arrest. We are not convinced that the admission of the packing slip so clouded that issue as to require a new trial in the interest of justice. Such power is reserved for exceptional cases, and this is not one of them. *See* ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).