COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1033-CR
2016AP1034-CR

Cir. Ct. Nos. 2011CF894
2011CF1108

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL A. JONES,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER and RALPH M. RAMIREZ, Judges. *Affirmed*.

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

¶1 PER CURIAM. In these consolidated cases, Samuel A. Jones appeals from judgments of conviction and an order denying his motion for postconviction relief.[1] He contends that (1) the circuit court improperly admitted other acts evidence, (2) the circuit court erred in allowing a witness to testify about a matter on which she had no independent recollection, (3) his trial counsel was ineffective, and (4) he presented newly discovered evidence warranting a new trial. We reject Jones' claims and affirm the judgments and order.

¶2 Jones was convicted following a jury trial of four counts of identity theft, all as a party to a crime. The charges stemmed from his participation in a scheme to cash stolen checks using stolen identities. For his crimes, the circuit court imposed an aggregate sentence of twelve years of initial confinement and twelve years of extended supervision.

¶3 Jones subsequently filed a motion for postconviction relief. In it, he sought a new trial due to alleged circuit court errors, ineffective assistance of trial counsel, and newly discovered evidence. Following a hearing on the matter, the circuit court denied the motion. This appeal follows. Additional facts are set forth below.

¶4 On appeal, Jones first contends that the circuit court improperly admitted other acts evidence. He complains that the admission of such evidence violated the court's pretrial ruling on the matter.

[1] The Honorable Kathryn W. Foster presided over trial and entered the judgments of conviction. The Honorable Ralph M. Ramirez entered the order denying Jones' postconviction motion.

¶5 Prior to trial, Jones brought a motion to prohibit the State from introducing other acts evidence. The State responded with a motion to admit such evidence. Specifically, the State sought permission to introduce evidence of other acts of identity theft occurring around the same time as the charged offenses to show that the charged offenses were part of a larger scheme to commit identity thefts in Wisconsin.

¶6 Jones submits that the circuit court decided the motions by saying, "But that doesn't mean that something also being passed in another state is in this trial. You said you were going to leave out the other actions in this state." However, the record reveals that these statements were not a final or complete decision on the matter. Rather, they were simply part of the court's colloquy with counsel while hearing the motions.

¶7 The rest of the circuit court's remarks show that the State could introduce evidence of what might be considered other acts to demonstrate Jones' involvement in the scheme to cash stolen checks using stolen identities.[2] This was a permissible purpose for such evidence. *See* ***State v. Davidson***, 2000 WI 91, ¶60, 236 Wis. 2d 537, 613 N.W.2d 606 (other acts may be admitted for the purpose of establishing a scheme). However, the State was not allowed to introduce evidence of any specific instances where stolen checks were cashed using stolen identities except the charged offenses.

[2] The circuit court declined to "rule on every idiosyncrasy of collateral events." However, it indicated that it would afford the State some "latitude" in introducing evidence of the scheme from around the time of the charged offenses.

¶8 The testimony that Jones' objects to—that of his co-actor Elizabeth Sturm—stayed within these boundaries. Sturm was able to demonstrate Jones' involvement in the scheme by acknowledging that (1) she was convicted of eight counts for her involvement with Jones; (2) Jones gave her checks to cash in Wisconsin more than forty times around the time of the charged offenses; (3) Jones instructed her on which identity to use when cashing a check; and (4) she was planning to go home after the thefts in Wisconsin, but Jones found more work for her in Atlanta. Sturm did not impermissibly testify about any specific instances where stolen checks were cashed using stolen identities outside of the charged offenses. Because we see no violation of the circuit court's pretrial ruling, we conclude that the admission of Sturm's testimony was proper.

¶9 Jones next contends that the circuit court erred in allowing a witness to testify about a matter on which she had no independent recollection. Again, this argument involves the testimony of Sturm.

¶10 At trial, Sturm expressed difficulty recalling the events of June 20, 2011—one of the dates of the charged offenses. The prosecutor asked Sturm if it would assist her recollection to review a transcript of her testimony at the preliminary hearing. Sturm agreed that it would. The prosecutor then gave Sturm the transcript, asked her to review one page of it, and said, "[J]ust let us know if that helps with your recollection." Sturm replied, "Yes, ma'am." Afterwards, Sturm testified that she cashed a check on June 20, 2011, that was made payable to a victim named N.S. She further testified that N.S. did not give her permission to use her name and that she had gotten the check from Jones.

¶11 Jones objects to the above testimony on grounds that Sturm did not expressly state that, after looking at the transcript, she had an independent

recollection of the June 20, 2011 events. However, Jones forfeited this issue by failing to promptly raise it in the circuit court. *See* ***State v. Carprue***, 2004 WI 111, ¶46, 274 Wis. 2d 656, 683 N.W.2d 31. Even if we were to consider the issue through the prism of ineffective assistance of counsel, Jones would still not be entitled to relief. In its decision denying Jones' postconviction motion, the circuit court found that, despite the absence of magic words, Sturm's recollection was refreshed. Because Jones has not shown that this finding is clearly erroneous, he cannot demonstrate the requisite prejudice to support a claim of ineffective assistance of counsel. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (a claim of ineffective assistance of counsel requires a showing of both deficient performance and prejudice).[3]

¶12 Jones next contends that his trial counsel was ineffective. He blames counsel for failing to strike a prospective juror who was allegedly antagonistic to the presumption of innocence. He also blames counsel for failing to call a witness. We consider each claim in turn.

¶13 During voir dire, Jones' trial counsel asked whether anyone thought that the State's case would be more believable simply because it planned on calling a significantly greater number of witnesses than the defense. Counsel subsequently engaged a juror named D.G. in the following colloquy:

> [D.G.]: Well I don't know. If you have 20 people that said he did it, you know, I don't know what your witnesses are going to say or what their witnesses are going to say, but it seems as though the more the merrier.

[3] As noted by the State, there is reason to believe that Sturm's independent recollection was actually refreshed in this case. That is because Sturm testified to information (i.e., who the cashed check was payable to) that was not contained in the one page of transcript that she reviewed.

> [DEFENSE COUNSEL]: So kind of where there is smoke, there is fire?
>
> [D.G.]: Kind of.
>
> [DEFENSE COUNSEL]: So if all the witnesses were going to say the same thing.
>
> [D.G.]: Yeah, if all the witnesses pretty much said the same thing, yes.

¶14 Trial counsel then discussed the presumption of innocence and asked whether anyone thought that Jones must have done something wrong because he was in court. Again, counsel engaged D.G. in the following colloquy:

> [D.G.]: I wouldn't necessarily say he is guilty, but he is here for a reason. I mean, at least he got caught in the wrong place, wrong time. He did something that he wasn't supposed to do, whether he was just in the wrong place at the wrong time and just guilty by association, you know, that type of thing, or if he actually committed the crime.
>
> [DEFENSE COUNSEL]: So you think—
>
> [D.G.]: I believe there is a reason why people get called in here and, you know, if they are found innocent they are found innocent, but there is a reason that you are here.
>
> [DEFENSE COUNSEL]: Let me follow up with that with you. Have you ever been accused of something you didn't do, not by law enforcement, by a parent, by a spouse, an ex-spouse, an ex-girlfriend? Anyone?
>
> [D.G.]: Yes, and it does make a guy mad.
>
> [DEFENSE COUNSEL]: So that does happen.
>
> [D.G.]: Yes.
>
> [DEFENSE COUNSEL]: Okay. So in that experience you had [to] realize that sometimes people are accused of things that they really didn't do.
>
> [D.G.]: Yeah.
>
> [DEFENSE COUNSEL]: Okay. And just because Mr. Jones is seated here, you think you can be fair to him and listen to the evidence and then determine whether—

> [D.G.]: If the evidence proves he is innocent, he is innocent. I am not going to hold that against him.
>
> [DEFENSE COUNSEL]: Okay. And just one more follow-up on you. I am not picking on you, but we are having a little dialogue. We talked about the burden of proof and beyond a reasonable doubt. Okay. So sometimes in a criminal case not guilty means not proven. Do you have a problem with that idea?
>
> [D.G.]: No.

¶15 Reviewing these exchanges, we are not persuaded that D.G. evinced an antagonism to the presumption of innocence. There was nothing wrong with his commonsense observation that the more witnesses there were who testified to the same thing, the more likely their testimony would be true. As for the statement regarding Jones' presence in court, D.G. noted that Jones could still be found innocent. Again, he stated, "If the evidence proves [Jones] is innocent, he is innocent. I'm not going to hold that against him." Although there is no requirement that a defendant prove his or her innocence, it is not uncommon for a juror to express some initial confusion about the law. D.G. subsequently expressed no problem with the idea that "not guilty means not proven." There is no reason to believe that he could not abide by the circuit court's instructions regarding the presumption of innocence and burden of proof.

¶16 Because Jones has not shown that D.G. was unfit to serve on the jury, trial counsel cannot be faulted for failing to strike him. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (failure to pursue a meritless legal issue is not deficient performance). Accordingly, we reject Jones' first claim of ineffective assistance.

¶17 Turning to the second claim of ineffective assistance, Jones blames trial counsel for failing to call an inmate named Deangelo Lobley as a witness.

Jones submits that Lobley would have impeached the testimony of Darnell King, who was a witness for the prosecution.

¶18 At trial, King testified that Jones confessed to being involved in the scheme to cash stolen checks using stolen identities. He said that Jones made the confession while in jail with him and that several other inmates, including Lobley, could corroborate that.[4] According to Jones, had trial counsel sought out Lobley, he would have learned that King told Lobley to watch out for Jones while he was in the shower so that King could read Jones' police reports. Jones asserts that King's testimony was based upon Jones' police reports, not a confession.

¶19 Again, we are not persuaded that Jones has demonstrated ineffective assistance of counsel. An attorney's performance must be judged on the facts available to him or her at the time. ***State v. Goetsch***, 186 Wis. 2d 1, 17, 519 N.W.2d 634 (Ct. App. 1994). Here, the only facts that counsel had available to him at the time of trial indicated that Lobley would provide evidence unfavorable to Jones, i.e., that he heard Jones confess his guilt. As a result, counsel did not perform deficiently by failing to call Lobley as a witness.

¶20 Finally, Jones contends that he presented newly discovered evidence warranting a new trial. This evidence consisted of an affidavit from a co-defendant named Carlton Williams who stated that Jones was at a hotel when he and Sturm went out and cashed a forged check on June 20, 2011. Williams

[4] Two other inmates did, in fact, provide statements to police regarding Jones.

made this affidavit after he had accepted a plea deal, which prevented him from being prosecuted for the identity theft committed on June 20, 2011.[5]

¶21 A defendant seeking a new trial on the basis of newly discovered evidence must establish, among other things, that the evidence was discovered after conviction. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. Here, Williams' affidavit fails to meet this basic requirement. That is because if Jones was not with Williams and Sturm when they went out and cashed a forged check on June 20, 2011, then he already knew that information before his trial. Thus, Jones was not entitled to relief on that basis.

¶22 For these reasons, we affirm the judgments and order.

By the Court.—Judgments and order affirmed.

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

[5] In his plea colloquy, Williams implicated Jones in the scheme to cash stolen checks using stolen identities.