COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1120-CR **Cir. Ct. No. 2015CF2107**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMONTE W. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and JEFFREY A. WAGNER, Judges. *Affirmed*.

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

¶1 PER CURIAM. A jury convicted Lamonte W. Moore of felony murder. *See* WIS. STAT. § 940.03 (2013-14).[1] Moore appeals from the judgment of conviction and from the order denying his postconviction motion.[2] Moore maintains that he is entitled to a new trial based on the trial court's failure to provide the jury with an instruction on accomplice testimony and trial counsel's ineffective assistance for failing to request the instruction. *See* WIS JI—CRIMINAL 245. We disagree and affirm.

I. BACKGROUND

¶2 According to the criminal complaint, Moore, who was with Kelsea Smith, Calvin Clayton, and Zahid Zavala, broke into a number of vehicles on the south side of Milwaukee before deciding to rob the victim in this matter at gunpoint on his front porch. Moore and Smith approached the victim, and Clayton and Zavala stayed on the sidewalk. Moore grabbed the victim by the front of his shirt while Smith pulled out a gun and shot the victim, who later died from his injuries. After the gunshots, the four men took off running.

¶3 Moore and Zavala were both charged with felony murder while attempting to commit armed robbery as a party to a crime. They had a joint jury trial at which both Clayton and Zavala testified. The issue on appeal stems from that trial testimony.

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

[2] The Honorable Ellen R. Brostrom presided over Moore's trial and imposed sentence; the Honorable Jeffrey A. Wagner denied the postconviction motion.

¶4 Clayton testified that he received a plea bargain agreement in his own criminal case in exchange for his testimony against Moore and Zavala at their trial. He also told the jury that he was previously convicted of a crime eight times.

¶5 Clayton testified that on the night of the murder, he, Smith, Moore, and Zavala went to the south side of Milwaukee to look for valuables in unlocked cars. When they did not find anything, Clayton said that Smith and Moore came up with the idea to rob someone. Clayton testified that he and Zavala did not want to participate; yet, they continued walking with Smith and Moore, who were looking for someone to rob.

¶6 The men eventually crossed a street to go toward the victim's house, at which point, Clayton testified, the robbery was "a go." The victim was standing in the doorway of his house. Clayton said Moore grabbed the victim and told him that they just wanted money while Smith pointed his gun at the victim. Clayton said he and Zavala kept walking past the porch as Moore and Smith attempted to rob the victim. Clayton heard four gunshots and the men ran off.

¶7 Clayton testified about videos from a nearby pole camera and from the Orchard Food Store. On the videos, he identified himself, Zavala, Moore, and Smith in the street and then walking together toward where the "robbery is about to be committed in the corner house." Clayton described for the jury that one of the videos showed Smith's arm reaching out when "he upped the gun" while Moore grabbed the victim by his shirt. Meanwhile, Clayton said that he and Zavala were away from the doorway.

¶8 Zavala's testimony was largely consistent with Clayton's. Zavala admitted that he was at the scene of the attempted armed robbery and shooting with Smith, Moore, and Clayton. Zavala also testified that Moore and Smith

approached the victim while he and Clayton kept walking. Zavala, however, denied knowing that the victim was going to be robbed or that Smith had a gun.

¶9 On cross-examination, Zavala admitted that the videos accurately showed that he was present at the time of the murder. He also admitted that when he was arrested, he lied to police and that he was previously convicted of two crimes.

¶10 During the trial, the State called a DNA analyst with the Wisconsin State Crime Laboratory to testify about DNA evidence obtained from the victim's shirt. The analyst described "touch" DNA for the jury and explained that swabs from the shirt revealed a DNA profile that included Moore as a possible contributor to the major mixture in an amount that was consistent with touch DNA resulting from "significant force and pressure used during whatever touch may have occurred." The analyst did not find DNA matches for Zavala, Clayton, or Smith on the victim's shirt. The analyst testified that the probability of finding another random person who could be a possible contributor of DNA to the mixture was 1 in 478.

¶11 The defense called Alan Friedman as an expert to testify about the DNA evidence. Based on his review of the information available, Friedman agreed that Moore could not be excluded as a contributor to the DNA profile mixture obtained from the swab of the victim's shirt.

¶12 After the close of evidence, the trial court instructed the jury on the elements of felony murder and of the lesser-included offense of attempted armed robbery. With respect to witness testimony, the trial court instructed the jury that it must "weigh the testimony of witnesses" and "determine the [effect] of the evidence as a whole," including the witnesses' credibility. Specifically, the trial

court instructed the jury to consider: if "the witness has an interest or lack of interest in the result of the trial"; the witness's "[c]onduct, appearance, and demeanor"; the witness's "clearness or lack of clearness" of recollection; the witness's opportunity to observe and know about "the matters the witness testified about"; "[t]he reasonableness of the witness's testimony"; the witness's "intelligence," "[b]ias or prejudice," "motives for falsifying[,]" and any "other facts and circumstance during the trial which tend either to support or to discredit the testimony."

¶13 In his closing argument, trial counsel drew the jury's attention to Clayton's credibility, arguing that his testimony should make the jury "pause or hesitate" because he had been convicted of a crime eight times. Trial counsel also emphasized that Clayton had changed his story, lied to police repeatedly, denied knowing Smith, and denied participating in the events that led to the charges against him.

¶14 The jury convicted Moore of felony murder. The trial court followed the defense's sentencing recommendation and sentenced Moore to ten years of initial confinement and ten years of extended supervision.

¶15 Postconviction, Moore alleged that he was entitled to a new trial because the trial court failed to instruct the jurors that both Clayton and Zavala were accomplices and that their testimony should be evaluated with great care and caution.[3] He claimed their testimony was not sufficiently corroborated to negate

[3] The pattern instruction regarding the testimony of accomplices is WIS JI—CRIMINAL 245, which reads as follows:

(continued)

the need for the instruction. Moore also argued that trial counsel gave him ineffective assistance by failing to request the accomplice instruction and by not otherwise objecting to the instructions that were given. Following briefing, the postconviction court denied Moore's claim without holding an evidentiary hearing.

II. DISCUSSION

¶16 The sole issue on appeal is whether Moore's trial counsel gave him ineffective assistance by not requesting that the jury be instructed on accomplice testimony or otherwise objecting to the jury instructions that were given.[4]

¶17 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668,

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> You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

(Underlining omitted.)

[4] The State submits, and Moore does not refute, that because trial counsel did not object to the instructions that were provided, he forfeited direct review of the trial court's instructions. *See* WIS. STAT. § 805.13(3) ("Counsel may object to the proposed [jury] instructions … stating the grounds for objection with particularity on the record. Failure to object … constitutes a waiver of any error in the proposed instructions[.]"); *see also* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (holding that failure to refute an argument constitutes a concession). Therefore, we examine Moore's appeal under the ineffective-assistance-of-counsel standard. *See* ***State v. Becker***, 2009 WI App 59, ¶¶17-18, 318 Wis. 2d 97, 767 N.W.2d 585 (explaining that in the absence of a timely objection, we address forfeited issues under the ineffective-assistance-of-counsel rubric).

687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. A defendant must show specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove constitutional prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Id.*** at 694; ***Love***, 284 Wis. 2d 111, ¶30.

¶18 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland***, 466 U.S at 698. The trial court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination that this court decides *de novo*. *See* ***id.*** We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

¶19 In his brief, Moore acknowledges that the accomplice instruction is not required if the testimony of the accomplice is corroborated. *See* ***State v. Smith***, 170 Wis. 2d 701, 715, 490 N.W.2d 40 (Ct. App. 1992). Here, however, he submits that there was insufficient corroboration. In his postconviction motion, Moore argued that beyond the accomplice testimony, there were only two other sources of evidence to establish what occurred: the video from the Orchard Food Store and the DNA evidence. As to the video, Moore argued that it provided insufficient corroboration because the identities of the four men who walked past the victim's porch and who rushed at the victim were unclear. As to the DNA evidence, Moore argued that it was called into question by his expert witness, who

said that while Moore could not be excluded as a contributor, if he was a contributor, he was only a minor one.

¶20 Moore discounts the fact that the video corroborated Clayton and Zavala's testimony that Smith and Moore approached the victim and that Smith shot him, even if the identities were unclear. Additionally, the DNA evidence that could not exclude Moore's DNA from being present on the victim's shirt corroborated the testimony of Clayton and Zavala that Moore grabbed the victim.

¶21 The accomplice jury instruction is meant for cases where the State attempts to prove the defendant is guilty using *only* the testimony of an accomplice. *See* ***Smith***, 170 Wis. 2d at 715. This is not such a case. Because the accomplice instruction was not required, trial counsel did not perform deficiently by not requesting it or by failing to object to the instructions that were given. *See* ***Strickland***, 466 U.S. at 697 (holding that we need not address both prongs of ineffective assistance if the defendant fails on one).[5]

By the Court.—Judgment and order affirmed.

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

[5] Moore takes issue with the postconviction court's determination that Zavala was not an accomplice. Even accepting for purposes of this appeal that Zavala was an accomplice, the analysis remains the same: the accomplice instruction is not required when there is corroborating evidence and the level of corroboration needed is "minimal." *See* ***State v. Smith***, 170 Wis. 2d 701, 715, 490 N.W.2d 40 (Ct. App. 1992). As explained, there was sufficient corroborating evidence in this case such that the instruction was not required.