COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1082-CR **Cir. Ct. No. 99 CF 4823**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVINNE G. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and JOHN J. DiMOTTO, Judges. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 FINE, J. Davinne G. Taylor appeals from a judgment entered on a jury verdict convicting him of robbery with use of force, as party to a crime, *see* WIS. STAT. §§ 943.32(1)(a) and 939.05, and from the trial court's order denying, without an evidentiary hearing, his motion for postconviction relief. The

Honorable Elsa C. Lamelas presided over Taylor's trial. The Honorable John J. DiMotto decided Taylor's motion for postconviction relief. Taylor contends that his trial lawyer gave him ineffective representation at trial in a number of respects. We affirm.

¶2 This case stems from an invasion of the home of Rena Lee and her son Steven Lee by a group of young men who, according to the Lees, included Taylor. Taylor denied being involved. He claims that his lawyer: 1) should have objected when the State asked Taylor on cross-examination why he did not tell the police during questioning, after they gave him the warnings required by ***Miranda v. Arizona***, 384 U.S. 436 (1966), about an alibi he presented at trial; 2) should not have told the jury during pre-trial *voir dire* that Taylor had a criminal record, and should have advised Taylor against revealing during his testimony his stays in the Milwaukee County Jail and the Milwaukee House of Correction; 3) should have impeached with greater effectiveness alleged inconsistencies in the Lees' testimony; and 4) should have objected to the testimony of a police detective that Steven Lee's pre-trial statements were "substantially the same as what he told the jury today." Taylor also submits in a final catch-all argument that each of the alleged miscues by Taylor's lawyer when added together prejudiced his right to a fair trial.

¶3 Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel, ***Strickland v. Washington***, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, ***State v. Sanchez***, 201 Wis. 2d 219, 226–236, 548 N.W.2d 69, 72–76 (1996). In order to establish a violation of this right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that

"the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76.

¶4 A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. The defendant must also prove prejudice; that is, he or she must demonstrate that the trial lawyer's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Ibid***. Put another way: "In order to show prejudice, '[t]he defendant must show that there is 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.'" ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76 (bracketing in ***Sanchez***) (quoting ***Strickland***, 466 U.S. at 694).

¶5 In assessing a defendant's claim that his or her counsel was ineffective, a court need not address both the deficient—performance and prejudice components if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697; ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76. Whether counsel's performance was deficient, and, if so, whether it was prejudicial, are legal issues we review *de novo*. ***Sanchez***, 201 Wis. 2d at 236–237, 548 N.W.2d at 76. An evidentiary hearing is not required unless there are material facts in dispute. *See* ***State v. Jackson***, 229 Wis. 2d 328, 343, 600 N.W.2d 39, 46 (Ct. App. 1999).

¶6 Where, as here, a defendant claims that his constitutional rights were violated but that direct appellate review is foreclosed because the trial lawyer did not preserve timely an objection to the alleged violation, the defendant's claims

are viewed in the context of an ineffective-assistance-of-counsel context. ***Kimmelman v. Morrison***, 477 U.S. 365, 374–375 (1986); ***State v. Damaske***, 212 Wis. 2d 169, 200, 567 N.W.2d 905, 919 (Ct. App. 1997); *see also* ***Ford v. Israel***, 701 F.2d 689, 691 (7th Cir. 1983), *cert. denied,* 464 U.S. 832 (1983) (failure to object to prosecutor's question asking defendant about his post-***Miranda***-warnings silence and prosecutor's argument to the jury based on that silence means that prosecutor's actions are reviewed to determine whether the defense lawyer's "failure to object was prejudicial"). We analyze Taylor's contentions in turn against this legal framework.

1. *Failure to mention alibi during questioning by police.*

¶7 At trial, Taylor testified that on the night and during the time of the invasion of the Lees' home, August 6, 1999, he was with his girlfriend, Sharlisha Thomas, and his baby son. On cross-examination during its surrebuttal, the State asked him about a conversation he had with an officer while he was in the Milwaukee County House of Correction on September 16, 1999:

> Q And did you tell him that you were with Sharlisha, or did you just tell him you didn't have anything to do with the robbery?
>
> A I told him I didn't have anything to do with the robbery because I didn't feel --
>
> Q Isn't it true that you didn't tell him anything about you were with Sharlisha on August 6, 1999?
>
> A No, I didn't. I didn't feel I had to because he asked me about the robbery. He didn't ask me where I was. He just asked me did I have anything to do with it.
>
> Q Okay. And you didn't feel it necessary to tell him where you were at the time the robbery happened; is that correct?

> A No, because he didn't ask me that. He just asked me did I have anything to do with the robbery. That was his question. I said, No. He said, Okay.

Taylor's trial lawyer did not object to this exchange, and Taylor argues on appeal that it violates his right under ***Doyle v. Ohio***, 426 U.S. 610 (1976), to be free from prosecutorial comment about post-***Miranda*** silence. Although the State contends that the exchange does not fall within ***Doyle***'s proscription, we need not decide whether it does or does not because Taylor has not demonstrated that he was prejudiced under the ***Strickland*** analysis.

¶8 The inference that the State sought to have the jury draw from this exchange was that because Taylor did not mention his alleged August 6 visit to his girlfriend and son when, some five weeks later, he was asked about his role, if any, in the robbery, he was fabricating the visit as a belated attempt to establish an alibi. But, earlier in the trial, a Milwaukee police detective testified that she spoke with Sharlisha Thomas on January 8, 2000, who told the detective, as testified to by the detective, that Taylor had called Thomas when Taylor "was in the County Jail, and he had told her that the police would be contacting him -- I am sorry -- contacting her. And he wanted her to say that on the night this incident had happened that she was with him.... She said she could not remember if that [August 6, 1999] was the date he had been over to the house."[1] Moreover, Thomas testified that although she did not "recall" getting the call from Taylor described by the detective, Taylor had been to her house to visit her and the baby, but she did not remember when it was, other than it was "early August" of 1999. In light of all of this, the marginal benefit to the State by getting Taylor to admit

[1] Nothing in the appellate record explains the apparent discrepancy between the references to the Milwaukee County Jail and the Milwaukee County House of Correction.

that when a police officer spoke to him in the Milwaukee House of Correction some five weeks after the home invasion that he did not *volunteer* that he was with his girlfriend and young son that night was minimal; he not only explained why he did not mention it but, also, the alibi presented by Thomas was less than staunch. We cannot conclude that he has demonstrated a "reasonable probability" that but for his trial lawyer's failure to object to the State's questions on cross-examination "the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

2. *Reference by Taylor's trial lawyer to Taylor's criminal record.*

¶9 During *voir dire*, Taylor's trial lawyer said to the jury:

> I think we'll get into this, it'll probably be brought out during the trial that Mr. Taylor has a prior -- or prior convictions. Now, will you be able to follow the judge's instructions that she gives at the end of the trial?

The trial court called the lawyers to the bench for an unreported sidebar conference. After the conference, Taylor's lawyer told the jury:

> Let me ask this in a hypothetical way.
>
> If a person, during the course of the trial it's brought out that he has a prior conviction, would you just consider that as to the credibility of his testimony or would you use that to convict?

At that point, the trial court instructed the jury that prior convictions could be used by them to assess the credibility of a witness's testimony. Later, at the close of the case, the trial court instructed the jury that evidence of a witness's prior conviction was to be used solely as an aid in assessing that witness's credibility. Moreover, the trial court specifically told the jury that evidence of a prior conviction "must not be used for any other purpose and, particularly, you should bear in mind that

conviction of the defendant of a crime at some previous time or an adjudication of delinquency at some previous time is not proof of guilt of the offense now charged."

¶10 The *voir dire* was not the only time that the jury was told something that would have led them to conclude that Taylor had either been arrested for or convicted of a crime. During Taylor's testimony, his lawyer asked him how he could be so sure that he visited Thomas and his baby son on August 6, 1999, and not on some other date. Taylor responded: "Because I was presently in jail and got out of jail like two days before." Additionally, Taylor testified, in response to his lawyer's question, that he was in the Milwaukee House of Correction when the officers spoke to him about his possible involvement in the home invasion:

> Q When did you first learn that you were a suspect in this case?
>
> [Objection and trial court's overruling the objection omitted.]
>
> [A] It was September 16th. The reason I remember because it was two days after my birthday.
>
> Q And how did you learn it?
>
> A I was in the House of Correction at the time.

Later, on cross-examination, Taylor repeated that he spoke with police officers about the home invasion while he was "at the House of Correction."

¶11 As noted, Taylor cannot succeed on his claim of ineffective assistance of counsel unless he demonstrates that his lawyer's alleged deficient performance likely affected the trial's result. Both Lees identified Taylor as one of the robbers. Indeed, Steven Lee testified that he had known Taylor for three years before the robbery—seeing him "almost like every week," and that after the

robbery Taylor called him to apologize and say that he would return what they stole. In fact, Taylor admitted that Steven Lee had seen him before, and, in response to the prosecutor's question, "So he knows what you look like; correct?" Taylor responded: "Apparently, he does." The appellate record is devoid of any evidence that either Lee had a motive to lie about Taylor's involvement.

¶12 Given the Lees' testimony and Thomas's ambiguous alibi, Taylor's only chance for acquittal was to testify and deny his involvement, although he now claims that he might not have testified if the jury had not learned of his criminal record. If he did not testify, the Lees' testimony that he was one of the robbers would have gone essentially unrebutted. If he did testify, it is likely that at least some of his prior convictions would have been admissible under WIS. STAT. RULE 906.09 (Taylor does not argue that they would not have been admissible). Additionally, his testimony that he remembered specifically the date of his alleged visit to Thomas and their baby because it was two days after his release from jail tended to bolster the credibility of his recollection, which, it seems to us, was more significant to his defense than preventing the jury from knowing that he was in a local lockup. Moreover, we presume that the jury followed the trial court's instructions not to consider Taylor's prior record as affecting their assessment of his guilt or innocence. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). Taylor has not shown that the result of the trial would have been different had his trial lawyer done what Taylor contends he should have done.

3. *Alleged failure to adequately impeach.*

¶13 Taylor claims that his trial lawyer was ineffective because the lawyer "overlooked" what his brief on appeal characterizes as "important

inconsistencies" in the testimony of Rena and Stephen Lee. We analyze each instance in turn.

a. Taylor points out that at the trial both of the Lees testified that one of the robbers, Andre Hull, forced Stephen Lee to lie on the floor and put a gun to his neck. Both the Lees claimed that Taylor then said "'shoot him, they already saw my face.'" Taylor contends that his trial lawyer should have impeached the Lees with the fact that neither told the police that, and that Stephen Lee told the police that Hull was the only robber "doing the talking."

b. Stephen Lee testified that Taylor took him outside the house and forced him to lie down on his back. The following is an excerpt from Stephen Lee's testimony on cross-examination:

> Q It's your testimony he [Taylor] took you outside and you laid on the ground?
>
> A Yes.
>
> Q Face down?
>
> A No. He had turned me over on my back.
>
> Q Face up. Then he shot the gun into the ground?
>
> A Yes.

Taylor contends that his trial lawyer should have, as expressed in his appellate brief, impeached Stephen Lee with his statement to the police that Taylor, as characterized by the police report, put the "gun to his back." Taylor argues on appeal that his trial lawyer should have pointed out that "[i]f Lee were lying on his back, as he testified at trial, it would not have been possible to put a gun to it." He faults his trial lawyer for "fail[ing] to expose this inconsistency."

¶14 In light of the evidence we recounted in section 2, Taylor's claim of ineffective representation in connection with his trial lawyer's failure to impeach is without merit. Simply put, his contentions in the context of this case are *de minimis* retrospective minutiae that are present in any trial. Moreover, as Judge DiMotto, an experienced lawyer and judge, cogently pointed out in his written decision denying Taylor's motion for postconviction relief, it is not "unusual that everything that was said during the commission of a robbery occurring over a period of one to two hours or more was not reported to police." Further, the phrase used by Stephen Lee in his testimony was that Taylor "had turned me over on my back," implying that he was originally placed on the ground face down. Taylor has not shown that the result of the trial would have been different had his trial lawyer done what Taylor contends he should have done.

4. *Alleged "vouching" testimony by police detective.*

¶15 Taylor claims that his lawyer was ineffective because the lawyer did not object to the prosecutor's attempt to bolster the in-court testimony of Steven Lee by asking the following of the detective who had investigated the home invasion:

> Q And you heard Mr. Lee testify earlier today, correct?
>
> A Yes, I did.
>
> Q And on August 6th when you talked to him he gave you a statement that night?
>
> A That is correct.
>
> Q And the statement he gave you that night, was it substantially the same as what he told the jury today?
>
> A Yes, it was.

Q Were there any significant inconsistencies in it?

A None that I recall.

Taylor claims that this violates the rule in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984), that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *See also* ***State v. Romero***, 147 Wis. 2d 264, 277, 432 N.W.2d 899, 904 (1988) (improper for one witness to opine that another witness was being "totally truthful"). The rule, however, does not bar testimony from which the jury can *infer* that a witness is being truthful (as opposed to being told that the witness *was* truthful). *See* ***State v. Huntington***, 216 Wis. 2d 671, 696–698, 575 N.W.2d 268, 279 (1998) (actions of alleged sexual assault victim "consistent with behavior of other sexual abuse victims"); ***State v. Elm***, 201 Wis. 2d 452, 457, 549 N.W.2d 471, 473 (Ct. App. 1996) (opinion by physician that child complaining of sexual abuse "'was molested'"). Here, the detective told the jury that Lee's testimony was consistent with what he had told her shortly after the robbery. Consistency, by itself, proves nothing but loquacity—liars can be consistent in their lies just as truth-tellers can be consistent in their truths. Additionally, the trial court told the jurors that they were "the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony." As noted, we presume that the jury follows a trial court's legal instructions, and this presumption applies to this instruction as well. ***State v. Pharm***, 2000 WI App 167, ¶31, 238 Wis. 2d 97, 121–122, 617 N.W.2d 163, 174. Taylor has not shown that his trial lawyer's failure to object to the detective's testimony deprived him of a fair trial.

5. *Cumulative effect of trial counsel's alleged errors.*

¶16 In a final catch-all argument, Taylor contends in a mere three sentences without any further analysis that the "cumulative effect" of his lawyer's alleged shortcomings during the trial "leads to the conclusion that those errors 'undermine confidence in the outcome'" of the trial. (Quoting ***Strickland***, 466 U.S. at 694.) Insofar as this contention is based on the arguments developed by Taylor, and addressed in this opinion, we disagree; his trial counsel's alleged deficiencies were *de minimis*—whether viewed separately or in combination. Insofar as Taylor may be referring to matters that happened during the course of the trial that have not been specifically argued by him on this appeal, mere allusion of error does not suffice. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

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¶17 SCHUDSON, J. (*dissenting*). Under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), Taylor has established the basis for an evidentiary hearing on his claim of ineffective assistance of counsel. No hearing is needed, however, because Taylor also has established that the State, in cross-examining him, committed constitutional error requiring reversal for a new trial.

¶18 Denying Taylor's postconviction motion, the circuit court concluded:

> Whether the defendant felt he was forced to testify because of the information provided to the jury during voir dire or whether he fully intended to testify from the beginning, as trial counsel advised the court during the voir dire sidebar, is not crucial in deciding this issue. The fact of the matter is that had he not testified, he would have been convicted beyond a reasonable doubt because he essentially had no defense.

The court was wrong in two respects.

¶19 First, resolving the factual dispute between Taylor and his attorney regarding whether Taylor had decided to testify *is* "crucial to deciding this issue." During voir dire, defense counsel told the jury panel that "it'll probably be brought out during the trial that Mr. Taylor has a prior—or prior convictions." According to his postconviction motion, however, Taylor maintained "that a final decision regarding whether or not he would testify had not yet been made" when counsel, during voir dire, revealed the fact of his criminal record. Indeed, just before Taylor testified, counsel commented, "Mr. Taylor has just indicated that he would like to testify." Thus, there is a factual dispute between Taylor and his attorney

regarding when Taylor decided to testify, and whether his decision was controlled by his attorney's voir-dire disclosure of his criminal record.

¶20 Second, the postconviction court's opinion that, regardless of his attorney's disclosure of the criminal record, Taylor would have had to testify because he "essentially had no defense" is unsupported by the record. Taylor, of course, was not required to present *any* defense; the State had the burden of proof. And the State's evidence was anything but overwhelming. As Taylor summarizes in his brief to this court:

> The Lees' allegations were implausible on their face, and were not supported by any of the ten other witnesses allegedly present. The Lees claimed that a gang of up to five intruders ransacked their house for over two hours, and yet took very little. The VCR allegedly stolen was inexplicably found stashed in the bushes behind their apartment. Although the Lees lived across from a Walgreen's on a busy street, and they claimed the intruders fired a gun outside, and although police canvassed the neighborhood and spoke with neighbors, no one claimed to have heard or seen anything. The five other purported victims—some of whom, like James Addison[, who was Rena's boyfriend], were allegedly forced to lie on the floor and were tied up—were not even present in the apartment moments after the robbery when police arrived. Although the intruders wore no gloves and pulled out drawers throughout the apartment, there were no fingerprints. Of the five alleged intruders, only two were ever prosecuted.
>
> And Steven embellished his story at trial in implausible ways. He testified that Mr. Taylor, who had just finished ransacking his home, who had threatened to come back if they caught him with any more money, and who had ordered him around at gunpoint and shot a gun into the ground near him, meekly called back that very night, just after the police left, to identify himself by name, apologize, say he didn't mean to do it, and promise to bring back the stolen property.
>
> The only evidence against Mr. Taylor was the word of Rena and Steven Lee. Beyond being facially implausible, the stories told by Steven and Rena Lee were inconsistent with one another. Rena claimed she first

> became award of the robbery when she walked out of her bedroom into the front room. Steven claimed the incident began when he and Rena were sitting together watching TV and he heard a banging downstairs. The two disagreed about how long the incident lasted, and how many people were involved. Rena said Mr. Taylor didn't have a gun; Steven said he did. Rena said one of the men struck Steven in the bedroom. Steven said no, he was struck in the bathroom.
>
> Their testimony also was not even consistent with their prior statements. Detective Webb said Rena picked Mr. Taylor out of a photo spread, but Rena adamantly insisted she did not. Steven and Rena told police that one of the men fired a gun into the air, but at trial Steven said he fired the gun into the ground.

(Record references omitted.) Notably, the State does not counter *any* of these assertions. Instead, in arguing only that "there was overwhelming evidence of Taylor's guilt," the State simply recounts the Lees' testimony.

¶21 The majority repeats the postconviction court's mistake, writing, "Given the Lees' testimony and Thomas's ambiguous alibi, Taylor's only chance for acquittal was to testify and deny his involvement, although he now claims that he might not have testified if the jury had not learned of his criminal record." Majority at ¶12. Even a cursory reading of the trial record, however, casts considerable doubt over much of the State's evidence and counters the majority's characterization of Taylor's claims of testimonial inconsistencies as "*de minimis* retrospective minutiae that are present in any trial." Majority at ¶14.

¶22 In any event, Taylor did testify and was cross-examined regarding his failure to tell police his alibi. *See* Majority at ¶7. The postconviction court, however, concluded that the State had not improperly commented on Taylor's post-***Miranda*** silence. Once again, the postconviction court erred.

¶23 On this issue, Taylor's circumstances are comparable to those considered in: ***Doyle v. Ohio***, 426 U.S. 610 (1976); ***State v. Brecht***, 143 Wis. 2d 297, 421 N.W.2d 96 (1988); ***McLemore v. State***, 87 Wis. 2d 739, 275 N.W.2d 692 (1979); ***State v. Feela***, 101 Wis. 2d 249, 304 N.W.2d 152 (Ct. App. 1981), *overruled in part on other grounds by* ***State v. Pharr***, 115 Wis. 2d 334, 340 N.W.2d 498 (1983); and ***Neely v. State***, 86 Wis. 2d 304, 272 N.W.2d 381 (Ct. App. 1978), *aff'd*, 97 Wis. 2d 38, 292 N.W.2d 859 (1980). These cases control and, unquestionably, establish that counsel would have had a sustainable basis for objection.

¶24 Thus, the record establishes the possibility of one constitutional error (that could only be determined following a ***Machner*** hearing), committed during voir dire, and the certainty of another, committed during the cross-examination of Taylor. The errors are linked insofar as the first may have determined whether Taylor testified and the second consisted of the State's improper cross-examination when he did. Both the possible error and the certain error are subject to harmless-error analysis. *See* ***McLemore***, 87 Wis. 2d at 757. But here, as in ***McLemore***:

> In assessing the impact of the error, the court must consider the impact of its repetition, the nature of the state's evidence, and the nature of the defense.… [T]his was not a case where the prosecution casually asked an isolated question about the defendant's silence. Rather, the prosecution emphasized the matter in a lengthy series of questions.
>
> The defendant's defense was his alibi. The district attorney's improper questioning of the defendant on his failure to reveal his alibi to the authorities created the impression that the defendant had merely fabricated the story. Thus, the questioning by the prosecutor was highly prejudicial, and reversal is required on this ground also.

Id. (citations omitted).

¶25 The record reveals that the State's evidence was thin and, in some important ways, implausible or inconsistent. The record reveals that the case was remarkably under-tried; defense counsel failed to expose or challenge many of the defects in the State's evidence. And the record establishes a consequential, constitutional error. Therefore, while Taylor has established the basis for an evidentiary hearing on his postconviction claim of ineffective assistance of counsel, no hearing is needed because, unquestionably, the constitutional error in his cross-examination requires a new trial. Accordingly, I respectfully dissent.