COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2549-CR **Cir. Ct. No. 2009CF4648**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN DEONTE ELIM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and CHARLES F. KAHN, JR., Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Melvin Deonte Elim appeals from a judgment of conviction entered after a jury found him guilty of possessing a firearm as a person previously adjudicated delinquent for an act that would be a felony if committed

by an adult. He also appeals from an order denying his motion for postconviction relief.[1] On appeal, Elim claims the guilty verdict is inconsistent with a not guilty verdict that the jury returned on a companion charge, he was denied the right to confront a witness against him, and his trial counsel was ineffective. We reject his contentions and affirm.

BACKGROUND

¶2 On October 7, 2009, Elim shot Brandon Hampton. With the consent of Elim's wife, police searched Elim's home the next day and found a pistol. The State charged Elim with two crimes: (1) first-degree recklessly endangering safety of another person by use of a dangerous weapon; and (2) possessing a firearm as a person previously adjudicated delinquent for an act that would be a felony if committed by an adult. At the initial appearance on October 13, 2009, Elim advised the magistrate and the State that the case involved "self-defense issues." He reiterated that position in two subsequent bail hearings. He demanded a jury trial.

¶3 The State collected DNA samples from Elim and from the pistol found in his home. The record reflects that, in January 2010, Elim received a copy of the Wisconsin Crime Laboratory report of the DNA test results. In June 2010, approximately one month before trial began, the State filed notice that it intended to present testimony about the DNA test results from Wisconsin Crime Laboratory analyst Gretchen DeGroot. The notice and the accompanying report, prepared by

[1] The Honorable Daniel L. Konkol presided over the trial and entered the judgment of conviction. The Honorable Charles F. Kahn, Jr., presided over the postconviction proceedings and entered the order denying postconviction relief.

crime laboratory analyst Nicholas A. Homa, reflect that Elim was a potential contributor of DNA collected from the pistol.

¶4 At the outset of the trial, Elim gave an opening statement disclosing his theory of self-defense as to both charges. He explained: "we're not going to say [] Elim wasn't briefly in possession of a gun, nor are we going to say he didn't shoot" Hampton. Elim went on to tell the jury it would conclude that "there was no alternative here to what [he] did."

¶5 The State presented evidence that Elim shot Hampton, and a police officer described finding a handgun in Elim's home. DeGroot then testified for the State as an expert witness. She told the jury that she is employed by the Wisconsin Crime Laboratory in the DNA analysis unit as an advanced forensic scientist. She described the laboratory tests that her fellow analyst, Homa, conducted on DNA samples collected from Elim and from the pistol found in his home. DeGroot next testified that she performed a peer review of Homa's work. She explained that her review involved examining all of the case notes and data collected and then drawing a conclusion about the donor of the DNA found on the pistol. She testified that, in her opinion, Elim could not be excluded as a potential donor of the genetic material found on the pistol.

¶6 Elim testified on his own behalf. He admitted shooting Hampton. Elim said that on the afternoon of the shooting, he was visiting relatives at his mother's home. During the visit, Elim and members of his family went outside to confront Tremese Hampton, who had fought with one of Elim's cousins earlier

that day.[2] Elim told the jury that, shortly after stepping outside the house, he accepted a gun from one of his companions because he "ain't taking no chances." Soon thereafter, he saw Hampton, Tremese Hampton's brother, run out of the bushes waving a gun. Elim described struggling with Hampton and reaching for Hampton's gun, which went off. Elim testified: "that's when I fired."

¶7 Elim admitted that police found the gun he had fired hidden in his home. He also stipulated to his status on October 7, 2009, as a person previously adjudicated delinquent for an act that would be a felony if committed by an adult.

¶8 The circuit court instructed the jury about, *inter alia*, self-defense. The jury found Elim not guilty of first-degree recklessly endangering safety of another and guilty of unlawfully possessing a firearm.

¶9 Elim moved for postconviction relief, claiming, as relevant here, that: (1) the guilty verdict on the charge of unlawfully possessing a firearm must be set aside as inconsistent with the not guilty verdict on the charge of recklessly endangering safety; (2) the State violated his right under the federal constitution to confront an adverse witness when the State presented testimony from DeGroot rather than from Homa; and (3) trial counsel was ineffective by failing to raise an objection to DeGroot's testimony. The circuit court denied relief without a hearing, and this appeal followed.

[2] Elim testified at trial that he confronted "TJ." Another witness clarified that "TJ" is a nickname for Tremese Hampton.

DISCUSSION

¶10 Elim asserts that the verdicts in this case are fatally inconsistent. In his view, the jury necessarily determined that he acted in self-defense when he endangered safety by shooting another person, and therefore he necessarily acted in self-defense when he possessed a firearm. He argues that he is thus entitled to a judgment of acquittal for the latter crime. We disagree.

> It has been universally held that logical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted.

State v. Thomas, 2004 WI App 115, ¶41, 274 Wis. 2d 513, 683 N.W.2d 497 (citation and emphasis omitted). The rule is based on the reviewing court's inability to determine whether a jury's inconsistencies are the result of leniency, mistake, or compromise. *See* ***id.***, ¶42. Thus, inconsistency between a verdict of guilty and a verdict of not guilty neither requires nor permits reversal of the guilty verdict. ***State v. Thomas***, 161 Wis. 2d 616, 631, 468 N.W.2d 729 (Ct. App. 1991).

¶11 Elim asserts that he is nonetheless entitled to relief from his conviction because "the verdicts at issue here are not merely logically inconsistent. They are, in fact, mutually exclusive." Elim fails to offer any citation supporting the proposition that his distinction makes a difference in the analysis. We do not consider arguments unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶12 Elim next complains that he suffered a violation of the right afforded to him under the federal constitution to confront his accusers.[3] *See* U.S. CONST. amend. VI. Elim contends that DeGroot testified about the results of DNA tests that she did not personally conduct, and the State thus deprived him of the right to "confront the witness against him: the analyst who actually conducted the tests." Elim, however, did not object to DeGroot's testimony at trial and thus did not preserve the objection for appellate review. *See* ***State v. Ellington***, 2005 WI App 243, ¶14, 288 Wis. 2d 264, 707 N.W.2d 907. Accordingly, any challenge must be considered within the rubric of ineffective assistance of counsel. *See* ***id.***

¶13 We turn, then, to Elim's final claim, namely, that his trial counsel was constitutionally ineffective by failing to object to DeGroot's testimony. To prevail on a claim that trial counsel was ineffective, a defendant must satisfy a two-prong test requiring proof both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must identify specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate 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." ***Id.*** at 694. We may start our analysis by considering either prong of

[3] Elim does not suggest that he suffered any violation of the right to confrontation conferred by WIS. CONST. art. I, § 7. He therefore forfeited the issue, and we do not discuss it. *See* ***State v. Deadwiller***, 2012 WI App 89, ¶7 n.1, ___ Wis. 2d ___, ___ N.W.2d ___.

the ***Strickland*** test, and we need not consider both prongs if a defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

¶14 Here, Elim fails to show that his trial counsel performed deficiently by not objecting to DeGroot's testimony. The right to confrontation applies only to statements that are testimonial. ***State v. Deadwiller***, 2012 WI App 89, ¶7, ___ Wis. 2d ___, ___ N.W.2d ___. Crime laboratory reports of DNA analysis such as the report at issue here are not testimonial. *See* ***id.***, ¶1. Therefore, no constitutional impediment prevents an expert witness from testifying for the State about the results of DNA analysis performed by another technician. *See* ***id.***

¶15 Moreover, were we to conclude that the Wisconsin Crime Laboratory report was in some respect testimonial, we would nonetheless conclude that Elim suffered no violation of his right to confront witnesses when DeGroot testified about the DNA analysis. "A defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another." ***State v. Barton***, 2006 WI App 18, ¶20, 289 Wis. 2d 206, 709 N.W.2d 93. Here, DeGroot, a forensic scientist, testified that she examined the data and reached her own conclusion, to a reasonable degree of professional certainty, that Elim could not be excluded as a possible contributor of the DNA found on the pistol.

¶16 ***Deadwiller*** and ***Barton*** demonstrate that Elim suffered no constitutional deprivation when DeGroot testified about the results of the DNA analysis. Trial counsel thus did not perform deficiently by foregoing an objection to DeGroot's testimony on confrontation clause grounds. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (failure to advance a meritless argument does not constitute deficient performance).

¶17 For the sake of completeness, we have also examined the prejudice component of the ***Strickland*** test. Elim shows no prejudice flowing from DeGroot's testimony, because he admitted shooting Hampton. Evidence that Elim's DNA was on the gun used in the shooting was thus entirely consistent with Elim's theory that he fired the gun in self-defense. The evidence therefore does not undermine our confidence in the outcome of the trial. *See* ***Strickland***, 466 U.S. at 694.

¶18 Elim suggests that his defense was necessitated by the violation of his constitutional rights. He implies that he might have selected a different theory of defense if his trial counsel had objected to DeGroot's testimony. A motion for postconviction relief, however, requires more than such a conclusory allegation. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant seeking postconviction relief must offer specific material facts to support a claim. ***Id.***, ¶¶9, 36.

¶19 The suggestion that Elim selected his theory of defense in response to DeGroot's testimony lacks any factual support in his motion or the record. Elim explained at his initial appearance in October 2009 that the case involved self-defense. He reiterated his theory of self-defense in two subsequent bail motions, one in October 2009 and another in November 2009. These disclosures were far removed from DeGroot's testimony at trial in July 2010. Indeed, Elim selected and disclosed his self-defense theory before he received the DNA test results in January 2010. Thus, the record does not support the proposition that Elim selected a self-defense theory based on the manner in which the State presented crime laboratory results to the jury. He shows no prejudice arising from DeGroot's testimony.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).