COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP42-CR **Cir. Ct. No. 2010CF1567**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ULYSSES A. TALLIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and JONATHAN D. WATTS, Judges. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Ulysses A. Tallie appeals the judgment convicting him of one count of burglary of a building in violation of WIS. STAT. § 943.10(1m)(a) (2009-10) and the order denying his motion for postconviction

relief.[1] Tallie argues his trial counsel provided ineffective assistance by failing to investigate and present a jail property inventory list. We reject Tallie's argument and affirm.

BACKGROUND

¶2 Tallie and Alvin Harris were each charged with two counts of burglary for stealing locked coin boxes from laundry machines in two apartment buildings located at 4356 and 4344 North 84th Street. Tallie went to trial on both counts.

¶3 At Tallie's trial, Gregory Adams, the caretaker for both apartment buildings, testified that he saw Tallie enter the 4356 building and go into the basement. Adams said he saw Tallie leave the building, remove something from the trunk of a blue Chevy, and re-enter the apartment building. Adams claimed he then saw Tallie carrying something back to the blue Chevy. Two people eventually got into the car and drove to the 4344 building.

¶4 After seeing this, Adams went into the basement of the 4356 building and saw that the top of a washing machine, with an attached coin box, was missing. He called the police. Adams then went to a vacant unit in another building to watch and wait. He saw Tallie and another man go into the 4344 building. When the police arrived, they observed two men on their way out of 4344 carrying something wrapped in a sheet or white blanket. Adams yelled out

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

The Honorable Daniel L. Konkol presided over Tallie's trial and entered the judgment of conviction. The Honorable J. D. Watts decided Tallie's postconviction motion.

the window, "there they are, in the doorway." Upon seeing the police, the two men immediately went back into the building. Police located the men in the doorway of the apartment building and took them into custody.

¶5 Both arresting officers identified Tallie at trial as one of the two men involved in the incident. The officers also testified that shortly after arresting Tallie and his co-actor, they checked the stairwell to the basement of the 4344 building and found a dryer top with a locked coin box along with two tire irons, a knife, and a flathead screwdriver. The dryer top was wrapped in a white sheet.

¶6 The basement doors of both buildings were locked and neither appeared to have been broken into. Adams, however, testified that a few months before this incident, one of the maintenance men lost his keys and the basement locks had not yet been changed.

¶7 Regarding the keys for the blue Chevy, an officer who searched Tallie and his co-actor testified:

> A: One of the gentlemen I know had had [sic] a set of car keys. I want to say I think one of the gentlemen had some other contraband, drug paraphernalia on them. I couldn't tell you exactly who had what.
>
> Q: So you don't recall which person had the keys on them?
>
> A: Correct.

The keys were then used to search the blue Chevy that Adams had seen Tallie and his co-actor using. In it, an officer found a washing machine top with a coin box wrapped in a sheet.

¶8 Tallie testified on his own behalf. He admitted that he was present at the scene with Harris on the night of the burglaries. According to Tallie, Harris

and a friend needed help moving some items. Tallie went to 4344 North 84th Street, the address Harris gave him, and was told by a third person named "TY" to wait a few minutes, and TY would be right back. Tallie went outside to smoke a cigarette, but went into the building when he saw the police arrive. Tallie denied being involved in the burglaries and testified that Harris owned the blue Chevy.

¶9 The jury acquitted Tallie of the burglary at 4356 North 84th Street, but found him guilty of the burglary at 4344 North 84th Street. The trial court sentenced Tallie to three years of initial confinement and three years of extended supervision.

¶10 Tallie's postconviction counsel subsequently obtained the property inventory list taken at the time Tallie was booked into the Milwaukee County Jail. A sealed bag was listed on the inventory but the bag's contents were not identified. After Tallie was convicted and moved to a different facility, the items referenced on the inventory list were destroyed. Tallie filed a postconviction motion alleging ineffective assistance of trial counsel based on counsel's failure to introduce the jail property inventory list, which Tallie claims would have impeached evidence of his guilt. The trial court denied Tallie's motion.

DISCUSSION

¶11 Tallie's sole argument on appeal is that trial counsel rendered ineffective assistance by failing to investigate and present the jail property inventory list. Tallie contends the inventory list was important for four reasons. First, it would have shown that the police misidentified him. The police indicated in their report that the burglar had a short afro but Tallie claims he was wearing a skull cap at the time of his arrest. Second, the inventory list would have demonstrated that Tallie did not have car keys in his possession at the time of his

arrest. He submits that if the car keys were not in his possession, "it is highly unlikely that it was Tallie whom Adams observed." Third, the inventory list would have shown that he did not have the master keys to the apartment building on his person, and this would rebut the inference that he was able to get into the basement of the buildings using the missing keys. Finally, the inventory list would have impeached testimony that he had drugs or drug paraphernalia in his possession when he was arrested. According to Tallie, by failing to obtain the inventory list, trial counsel missed the opportunity "to bring reasonable doubt into the identification determination," and consequently, prejudiced his case.

¶12 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance means that the identified acts or omissions of counsel "were outside the wide range of professionally competent assistance." ***Id.*** at 690. Prejudice occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** Because the defendant must show both deficient performance and prejudice, a reviewing court may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶13 Even if we were to conclude that Tallie's trial counsel performed deficiently, Tallie has not shown that he was prejudiced. In resolving this appeal, we adopt as our own the postconviction court's reasoning found in its decision denying Tallie's postconviction. *See* WIS. CT. APP. IOP VI.(5)(a) (May 22, 2012) ("When the trial court's decision was based upon a written opinion ... of its

grounds for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion."). On this issue, the trial court explained:

> The main eyewitness testimony came from Gregory Adams, caretaker for the buildings at both locations. He testified that he saw the defendant come out of the building at 4356 N. 84th Street carrying something. He stated that the defendant and another man then went to the next building at 4344 N. 84th Street and came up from the basement with something wrapped in sheets. Gregory Adams identified the defendant as the person carrying the items from the buildings in each instance.
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> Both Officers Vetter and Tharp identified the defendant at 4344 N. 84th Street as one of the people who exited the building. Officer Vetter testified the defendant was carrying a large object in a white blanket before the defendant and his assistant saw the police and "immediately retreated and went back into the apartment building." Based on the eyewitness testimony, the presence of a skull cap would not have made a difference because both officers identified the defendant after Gregory Adams shouted to them that he was the burglar. Officer Vetter specifically identified the defendant as the person carrying the large object out of the building. Both the defendant and his assistant (Harris) then stood in the entry hall of the apartment building and were taken into custody by the officers. The description of the defendant with a short afro in the police report does not mean that he had on a skull cap at all times, and the defendant said nothing at trial about wearing a skull cap or being misidentified. He admitted being present in the building. The eyewitness testimony and immediate arrest of the defendant at the scene renders the possible presence of a skull cap in a sealed bag immaterial and irrelevant. Moreover, since no positive showing can be made that it actually was in the sealed bag on the inventory list, the defendant has not demonstrated that trial counsel was deficient in his performance.
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> In addition, counsel was not ineffective for failing to show that the inventory sheet did not list keys or drugs/drug paraphernalia. None of the officers testified from whom they took the keys (Harris or Tallie), so the fact

> that Tallie's inventory listing does not have keys noted doesn't matter. Even if counsel could have shown that the keys were not on the inventory sheet, there is not a reasonable probability this would have affected the outcome of the trial. As to the car keys, Gregory Adams said he saw Tallie go into the trunk of the blue Chevy after the first burglary at 4356 N. 84th Street (count one). Tallie testified it was Harris'[s] car, so it is reasonable that Harris would have had the keys. Moreover, the defendant was acquitted of this burglary so it doesn't matter if the car keys were on the inventory listing. As to the building keys, it would just have been assumed that Harris had the key. Further, none of the officers testified they took drugs or drug paraphernalia off of Tallie, so the fact that drugs or drug paraphernalia were not on his inventory listing is inconsequential.
>
> In sum, the court finds that counsel's failure to present the inventory listing did not undermine confidence in the outcome of the trial. There is simply not a reasonable probability that presentation of the inventory listing would have resulted in an acquittal on count two given the eyewitness testimony of the police officers in this case.

(Record citations and footnote omitted.) Having reviewed the record, we agree with the trial court.

¶14 Additionally, we note Tallie supports his argument on appeal with his own conclusory assertions, which are wholly insufficient. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) ("'A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'") (citation and brackets omitted). As noted, a sealed bag was listed on the inventory, but the bag's contents are not described. On appeal, "Tallie swears that in the sealed bag was his 'skull cap,' a hat-like item that keeps his hair very close to his head." Tallie further asserts: "The inventory does not list keys or drug paraphernalia, and Tallie swears that those items were not in the bag." Tallie's allegations of deficient investigation related to the inventory list are

premised on speculation as to the items that were or were not in the sealed bag; as such, his assertions amount to "'might haves' strung together in a series that leads nowhere." *See* ***id.***

By the Court.—Judgment and order affirmed.

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