COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2508-CR **Cir. Ct. No. 2007CF3066**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARNELL LAMARA PEARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD and DENNIS R. CIMPL, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Carnell Lamara Pearson appeals the judgment entered on jury verdicts convicting him of armed burglary, *see* WIS. STAT. § 943.10(2)(a), and second-degree recklessly endangering safety while armed, *see* WIS. STAT.

§§ 941.30(2) & 939.63, both as party to a crime, *see* WIS. STAT. § 939.05. He also appeals the trial court's order denying his motion for postconviction relief without a hearing.[1] Pearson contends that: (1) his trial lawyer was constitutionally ineffective; and (2) the trial court improperly excluded evidence that the victim sold marijuana to a friend of her incarcerated boyfriend the day before the armed burglary. We affirm.

I.

¶2 The State charged Pearson with breaking into Mukeyra Nix's home and recklessly firing a gun at Nix and her two friends, Brandon Shacklett and Ronica McLaughlin. Nix told the jury that at about 11:30 p.m. one night in June of 2007, Shacklett, McLaughlin, and she were in her basement "rec room" watching television and smoking marijuana when she "hear[d] something … like, somebody in my house." "I started hearing rumbling and things being thrown around, and I can just tell somebody was in my house." She "dialed 911," got her gun, gave it to Shacklett, turned out the lights and hid. Once the intruders "came in the basement" Shacklett shot the gun at the intruders who "fired back, and … ran back upstairs." The police arrived at the house and arrested Pearson and his accomplice, Jarvis Garrett. Nix testified that she did not know Pearson. Shacklett and McLaughlin both told the jury a similar version of what happened.

¶3 Pearson testified and told the jury a different story. He said that he met Nix at a bar in June of 2007, and a short time after the meeting, she called him and asked him to buy marijuana from her. Pearson agreed, but said that he

[1] The Honorable M. Joseph Donald presided over the trial and entered judgment. The Honorable Dennis R. Cimpl entered the postconviction order.

brought Garrett with him for protection. Pearson testified that he asked Garrett to wait in the car but told him to come in if Pearson was gone too long. According to Pearson, Nix let him in her back door where he gave Shacklett $420 for the marijuana. Pearson and Shacklett waited while Nix went into the basement to get the marijuana. Pearson said that Garrett then came into the house and Nix screamed at them to get out. Pearson told the jury that he and Garrett followed Nix and Shacklett to the basement and the shooting started. Pearson testified that he and Garrett both ran upstairs and Pearson jumped out the attic window, and the police arrested him.

¶4 Garrett testified in the State's rebuttal. He told the jury that he pled guilty to "armed burglary party to a crime and second degree recklessly endanger [*sic*] safety while armed as party to a crime" for what happened at Nix's house. Garrett testified that Pearson asked him "to rob, to go over [to Nix's house] and retrieve some cocaine and some weed." According to Garrett, he and Pearson went into Nix's house through "[t]he top window," and "ransacked the house" "[l]ooking for the drugs." They "thought the house was empty." Garrett explained that after Pearson found a gun in the house, the two went to the basement, but "[g]unshots started happening," after which Garrett hid in a closet in the attic until police found and arrested him.

¶5 After the jury found Pearson guilty, he filed a postconviction motion claiming his trial lawyer gave him constitutionally ineffective assistance because his lawyer did not: (1) cross-examine Garrett with Garrett's statement to police and testimony at Garrett's plea hearing that, according to Pearson, contradicted Garrett's trial testimony; (2) object when the State added a "forensic firearms examiner" from the State Crime Lab as a witness; and (3) warn him that the State could call Garrett in rebuttal if Pearson testified. Garrett also argues that the trial

court excluded recorded telephone conversations between Nix and her incarcerated boyfriend about her plan to sell drugs the day before the armed burglary. The trial court denied Pearson's motion without holding an evidentiary hearing.

II.

A. *Alleged ineffective assistance of counsel.*

¶6 To establish constitutionally ineffective assistance a defendant must show: (1) deficient representation; and (2) resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must show specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must show that the lawyer's errors were so serious that the errors deprived the defendant of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, "[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.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted).

¶7 Further, we need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim is mixed.

State v. Ward, 2011 WI App 151, ¶9, 337 Wis. 2d 655, 663–664, 807 N.W.2d 23, 28. "A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. … Its legal conclusions as to whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*." ***Ibid.*** Finally, a defendant is not entitled to an evidentiary hearing on ineffective assistance of counsel claims unless "the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 580, 682 N.W.2d 433, 439.

1. *Garrett's alleged inconsistent statements.*

¶8 Pearson contends his trial lawyer should have cross-examined Garrett with the statement Garrett made to police and the testimony Garrett gave at his plea hearing about the guns used against the victims. Pearson argues that the earlier statements contradicted Garrett's trial testimony.

¶9 Garrett told the police, as recorded in a police report, that: "while in the kitchen area by the shoes, Shawn (PEARSON) gave him a large black gun which he (GARRETT) put in his pocket. GARRETT said in this interview that Shawn might of had two guns but only saw one."[2]

¶10 Garrett testified at his plea hearing: "And while [Pearson] was in the house rambling through stuff looking for the drugs and he started grabbing bag, [*sic*] putting other stuff in the bags. And then he had found the weapon. He tried to give me the weapon, but I'm not trying to take no weapon, you know what I'm

[2] According to Garrett, Pearson also wanted to steal the shoes from the house. Garrett gathered the shoes and put them into a garbage bag in the kitchen.

saying. Then when he went in the basement, that's when the shooting started." When the circuit court questioned Garrett about the statement in the complaint that he and Pearson had come "to the scene with both guns and only at the scene did defendant Pearson give you one of the guns," Garrett told the circuit court: "That's not true," and explained again: "Once we was in the house when [Pearson] ramshackled [*sic*] the room he was in, he had found the gun in there and he tried to give it to me and I wouldn't take it."

¶11 Garrett testified at trial that:

- He and Pearson "entered the house through … [a] window … [t]o go and steal drugs."
- Pearson found "a firearm" in the house.
- Neither Pearson nor Garrett brought a gun to the house; rather, Pearson "found [the gun] in the house."

¶12 Garrett's trial testimony thus is not materially inconsistent with his earlier statements. Garrett consistently said that Pearson found the gun at the victim's home. Thus, Pearson's claim that his trial lawyer did not use Garrett's "inconsistent" statements is without merit and cannot be the basis for an ineffective-assistance claim. Indeed, Garrett's pre-trial assertions to the police were *more* damaging to Pearson than was his trial testimony.

2. *Forensic testimony*.

¶13 Pearson next contends that his trial lawyer was ineffective for not objecting when, on the first day of trial, the State added a "forensic firearms examiner" from the State Crime Lab as a witness. Pearson argues: (1) if the trial

court excluded examiner's testimony, the jury would have acquitted him; (2) if his lawyer asked for a curative instruction, the jury would have been told that the State's forensic investigation was "shoddy"; and (3) Pearson would have pled guilty if he had known the State was presenting forensic evidence.

¶14 During his testimony, the examiner:

- Identified the guns found at the scene;
- Identified the casings and bullets found at the scene;
- Identified what gun the casings and bullets were fired from.

¶15 In his cross-examination, the examiner testified:

- He did not "check to see if any DNA" was on the gun.
- He did not "look[] for fingerprints … on the handle or barrel of the gun."
- He had "no idea" "whether these guns were found in a couch or on a stairwell."
- He could not say "where a person was shooting from" based on the testing he did.

¶16 There is nothing in Anderson's testimony that prejudiced Pearson. Anderson did not give any testimony that connected Pearson to the guns. Thus, the postconviction court explained:

> Kyle Anderson's testimony did no more than match the bullet casings that were found in the basement in Nix's home to Nix's .380 caliber gun and the .40 caliber gun found in the attic. … Moreover, he acknowledged there

> had been no DNA or fingerprinting testing of the weapons. In other words, Anderson's testimony did not place a gun in the hands of the defendant or his co-defendant, and therefore, his testimony had relatively minor significance at trial and was not probative on the issue of guilt.

We agree with the postconviction court's analysis, and its conclusion that: "[T]here is no reasonable probability that Anderson's testimony contributed to the verdict in any significant way." Thus, the trial lawyer's failure to object to the State calling the examiner as a witness did not prejudice Pearson.

3. *Informing Pearson that the State could call rebuttal witnesses.*

¶17 Pearson next claims his trial lawyer gave him ineffective assistance by not telling him that the State might call Garrett as a rebuttal witness if Pearson testified. Pearson contends that if he had known this, he would not have testified because the *only* reason he testified was to tell the jury he did not bring guns to the house.

¶18 First, as we have seen, Pearson testified about other things that he apparently believed would help his case. He told the jury:

- He "was introduced to [Nix] at a night club" in "June of '07."
- Nix called him later that month and "made herself clear" that she wanted Pearson to "buy[] some marijuana from her."
- He "told her I'll work with her, and she said that she wanted me to buy half a pound of weed."
- Nix wanted him to "do the deal with" "B-Rock" who was later identified as "Shacklett." Pearson agreed to a "meet and greet" with Shacklett first and went to Nix's house "after 9:00 o'clock."

- Pearson drove to Nix's house, "called her" to "[l]et her know I'm out front." "She came out, told me to come around the back. … I came around to the back of the house."

- Pearson met with Shacklett at the back of the house and told him he had the money to buy the marijuana, but according to Pearson, Shacklett "ain't got the weed right now" and would "get back to you later on tonight."

- According to Pearson, Nix said she would call Pearson when Shacklett had the marijuana. Pearson and Garrett (who, according to Pearson, had waited in the car), drove around the block, parked, and "wait[ed] on them to call."

- Nix called and said, "you can come around to the house and get that. … and I said okay, I'm on my way." Pearson told Garrett to come help if Pearson was not back in five minutes. Pearson walked back to the house, went in, gave Shacklett $420 and Nix "went down the basement" to get the "weed."

- Pearson said as he and Shacklett were waiting for Nix to get the marijuana, Garrett somehow got into the house and Nix "went in this whole tirade" and told him to get out and she was calling the police.

- Pearson testified he was not going to leave without either his money or the weed and told Garrett: "go through this house, tear their shit up. If you find anything, dog, money bring that shit to me. These mother fuckers got my money. I'm not leaving until I get my shit." Garrett did as he was told and when he did not find anything,

Pearson said they were going to have to go down into the basement where Nix and Shacklett were to find his money or weed.

- As they were "walking down the stairs … I heard … gunshots … I hear windows breaking, I still hear gunshots. I'm bleeding." Pearson ran back upstairs to the kitchen, but saw lights out that window, so ran up to the attic, found a window, opened it and jumped out, when police grabbed him.

- "That night I went [in] through that back door." "I didn't shoot at nobody." "Never had a gun. … I never seen a gun."

¶19 Only Pearson testified that he was invited in through the back door to buy marijuana. Knowing that the State could call Garrett in rebuttal would not have changed the need for Pearson to testify if he wanted the jury to hear his version. If Pearson did not testify, the jury would have heard only the victims' version of events—that Pearson broke into the home to burglarize it.

¶20 Second, as we have seen, Garrett's trial testimony was more favorable to Pearson than Garrett's earlier assertions to the police. Pearson has not shown ***Strickland*** prejudice.

B. *Exclusion of evidence.*

¶21 Lastly, Pearson complains that the trial court erroneously exercised its discretion when it excluded the recorded telephone conversations between Nix and her incarcerated boyfriend discussing the sale of marijuana the day before the armed burglary.

¶22 Admission of evidence is left to the discretion of the trial court. ***State v. Sullivan***, 216 Wis. 2d 768, 780–781, 576 N.W.2d 30, 36 (1998). We affirm if the trial court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion. ***State v. Veach***, 2002 WI 110, ¶55, 255 Wis. 2d 390, 414, 648 N.W.2d 447, 459. To be admissible, evidence must be relevant. WIS. STAT. RULE 904.01 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

¶23 Here, the trial court found the earlier drug sale irrelevant to Pearson's case because: (1) Pearson did not know about the sale; (2) the sale did not take place at Nix's house; (3) the sale was to a man not connected to the armed burglary; and (4) the prior drug sale does not make Pearson's guilt any more or less probable. Pearson has not shown that the trial court erroneously exercised its discretion.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.