COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1276 **Cir. Ct. No. 2008CF5582**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLOYD WHITE STAMPS, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Floyd White Stamps, Jr., appeals from an order of the circuit court, which denied his WIS. STAT. § 974.06 (2011-12)[1] motion without

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

a hearing. Stamps had alleged ineffective assistance of trial counsel, and the circuit court rejected Stamps' claims. We affirm.

BACKGROUND

¶2 Someone robbed a Citgo station in West Allis on October 15, 2006. The masked man entered the store, brandished a gun, and demanded that the clerk put money into a bag. The clerk complied. The robber fled when other people, including the store's two owners, emerged from a back room. The owners followed the robber outside. One of them noticed the robber trying to pick something up off the ground as the robber got into the car. The other, on the phone with the 911 operator, claimed to have gotten a good look at the now-unmasked robber's face and thought he could make a positive identification. The clerk described the getaway car as a green four-door Cadillac with a tan top.

¶3 Police recovered, from the area where the car had been parked, a brown knit winter hat with eye holes cut into it; this appears to have been what the robber was trying to pick up. When the hat was processed two years later,[2] two DNA specimens were isolated. One of the specimens was sufficiently developed into a full profile, and the technician matched it to Stamps. At trial, the technician testified there was a one in ten billion chance that the DNA was from someone else. The technician was unable to develop a full profile for the second specimen. Stamps was charged with one count of armed robbery and one count of second-degree recklessly endangering safety.[3]

[2] The crime lab was suffering from a backlog at the time.

[3] As the robber fled the scene, he allegedly drove the car straight toward the owner who was speaking to the 911 operator.

¶4 When police interviewed Stamps, he admitted that his wife had previously owned a green four-door Cadillac with a tan top. A detective obtained photographs of the car. The store clerk and two other witnesses identified the vehicle as the one from the robbery.

¶5 The owner who claimed to have gotten a good look at the robber participated in a photo array. The suspect he identified was not Stamps. All of the individuals interviewed who described the suspect indicated a height of six feet or greater. Stamps is five feet and eleven inches tall.

¶6 A former jailhouse bunkmate of Stamps, Andrae Crowe, contacted prosecutors, claiming Stamps had confessed his involvement in the robbery. In exchange for Crowe's testimony, the State offered to inform the Parole Commission of his cooperation.

¶7 A jury convicted Stamps of both charges after hearing the foregoing information at trial. On September 15, 2009, the circuit court sentenced Stamps to eight years' initial confinement and eight years' extended supervision for the armed robbery and a concurrent two years' initial confinement and two years' extended supervision for the reckless endangerment.

¶8 On January 5, 2012, Stamps filed the underlying motion, alleging ineffective assistance of trial counsel.[4] He claimed counsel was deficient because counsel failed to properly impeach Crowe, failed to properly object to leading questions asked of Crowe, and pursued a "trillion to one" defense when he could

[4] It appears that the time for filing for relief under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30 expired on June 25, 2010. As noted, the current motion is filed pursuant to WIS. STAT. § 974.06.

have pursued a "fifty-fifty" defense. Stamps also claimed that singularly and cumulatively, these errors prejudiced him. The circuit court denied the motion without a hearing, and Stamps appeals. Additional facts will be included below as necessary.

DISCUSSION

I. Standards of Review

¶9 The fundamental issue in this case is whether Stamps' WIS. STAT. § 974.06 motion is sufficient on its face to entitle him to a hearing on his ineffective-assistance claim. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. Sufficiency of the motion is a question of law we review *de novo*. *See* ***id.*** If the motion raises sufficient material facts which, if true, show the defendant is entitled to relief, the circuit court is obligated to hold an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not raise such facts, if it offers only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief, the decision whether to grant a hearing is left to the circuit court's discretion. ***Id.***

¶10 As noted, Stamps claims trial counsel was ineffective. Whether counsel was ineffective presents a mixed question of fact and law. ***Balliette***, 336 Wis. 2d 358, ¶19. The circuit court's factual findings are not overturned unless clearly erroneous, but the ultimate conclusion of whether counsel was ineffective is a question of law. ***Id.***

¶11 "To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of 'reasonably effective

assistance.'" ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted). We strongly presume counsel's conduct fell within that range, defer to counsel's strategic choices, and take care to effect the distortion of hindsight. *See* ***id.*** To establish prejudice, a 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.***, ¶54 (internal quotation marks and citation omitted). We review only the allegations contained within the four corners of the postconviction motion, not any additional allegations within the briefs. ***Allen***, 274 Wis. 2d 568, ¶27.

II. Contents of the Motion

A. Failure to Impeach Crowe

¶12 Crowe testified that Stamps had confessed his role in the robbery to him. Stamps disputes this and claims that Crowe obtained his information by accessing Stamps' court documents in a shared footlocker; Crowe denied having access to the locker. In his postconviction motion, Stamps contends:

> Mr. Crowe did not have a lock for his own footlocker, and Mr. Stamps was generous enough to let him share his own. When Mr. Crowe made this false claim, evidence could have been introduced to rebut this false testimony: Mr. Stamps erroneously became in possession of evidence from Mr. Crowe's own case, which was mixed together in his footlocker where they both kept their important documents. This would have demonstrated that Mr. Crowe's testimony was not credible.[5]

[5] We note here that the jury was informed that Crowe received concessions from the State in exchange for his testimony.

¶13 Stamps' motion does not tell us specifically what this evidence is, though in his reply brief, he indicates that the document is a "privileged" communication between Crowe and Crowe's attorney. Assuming that to be true, however, Stamps has not sufficiently alleged any basis on which he believes such correspondence would be admissible. *See* ***State v. Muckerheide***, 2007 WI 5, ¶40, 298 Wis. 2d 553, 725 N.W.2d 930 ("'The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence.'") (citation omitted).

¶14 Further, as the circuit court noted, "only Stamps could have provided evidence that Crowe had access to [the locker], and Stamps opted not to testify." In his reply brief to this court, Stamps posits several questions that he believes could have been asked of Crowe to lay a foundation for the documents in Stamps' possession. Aside from the fact that we question the efficacy of those questions, which culminate in asking Crowe to speculate on how Stamps obtained the document in question,[6] we note that they were not pled in the motion. Stamps does not contend that he would have testified to lay a foundation if needed.

¶15 Stamps' motion also does not allege that trial counsel was aware of this additional evidence before trial. "This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel." ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325. We thus ultimately agree with the circuit court

[6] In a later section of his reply brief, Stamps asserts, "The obvious question is: how else could Stamps possibly have become in possession of it; if Crowe's statement that they didn't store their documents in the same place were true?" Stamps evidently believes the only answer is that he and Crowe shared a locker, but other obvious answers include barter, forgery, and theft.

that counsel "was not ineffective because counsel could not have shown in any other fashion [than Stamps' testimony] that Crowe had access to the defendant's footlocker."

B. Leading Questions

¶16 Stamps next complains that trial counsel was ineffective because he "did not object to a wealth of leading questions by the State's attorney during the Direct Examination of Mr. Crowe." He takes issues with questions like "Did he talk to you about whether he had committed this offense alone or with someone else?" and "[D]id he say that the DNA that was the second DNA that was on the hat was this guy's DNA?"

¶17 In rejecting Stamps' motion, the circuit court explained that "the State was permitted to ask leading questions in order to limit Crowe's reference to the defendant as a gang member.… Trial counsel indicated that he was the one who had made the suggestion to do so." Stamps does not dispute these facts. Accordingly, any objection that trial counsel made to leading questions asked at his own suggestion would necessarily have been denied. Trial counsel is not ineffective for failing to pursue a meritless objection. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶18 Further, Stamps does not allege that it was ineffective for trial counsel to suggest the State proceed by asking leading questions. Thus, we could decline to review what is essentially invited error. *See* ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 642-43, 566 N.W.2d 158 (Ct. App. 1997).

¶19 Moreover, Stamps fails to sufficiently allege any prejudice from the leading questions; he simply complains that counsel should have objected. As the

circuit court noted, however, "the information would have been divulged in some other fashion." We thus agree with the circuit court's conclusion that there was no prejudice from trial counsel's failure to object to these questions, though we also expressly hold that under the circumstances, there was also no deficient performance.

III. Trillion-to-One Shot

¶20 The odds of the identified DNA sample belonging to anyone other than Stamps were approximately ten billion to one. Stamps estimates the odds of someone else having a green and tan Cadillac as one hundred to one.[7] He thus calculates that trial counsel's strategy, of calling the appearance of the Cadillac a coincidence, means that counsel was unreasonably arguing a trillion-to-one chance of being correct. He asserts that counsel instead should have simply conceded Stamps' DNA was found *and* that the Cadillac belonged to Stamps' wife. He suggests that counsel's alternate theory should have been:

> The State would still have no explanation as to why every witness put the actual armed robber at well over 6 feet tall, despite the fact that Mr. Stamps isn't nearly 6 feet tall. The State still could not explain how a witness could see pronounced cheek bones … but somehow have missed a remarkably distinguishing feature in the middle of Mr. Stamps' face (his mole).… There are two contributors of DNA in that hat, and Mr. Stamps does not in any way match every single witness's description of someone else[,] save for being a black man.

[7] We will assume for argument's sake that this estimate is based in reality rather than wholly fabricated.

According to Stamps, this alternate theory, coupled with the presence of two DNA specimens, means that counsel should have been arguing there was only a fifty-fifty chance that Stamps was guilty.

¶21 The circuit court characterized Stamps' claim as one that defense counsel "should rather have pursued the difference between his physical characteristics and the witnesses' physical description of the robber[.]" To this end, however, Stamps' motion effectively concedes that counsel did exactly that. He says that trial counsel:

> did a wonderful job of distinguishing the accused from the essentially identical descriptions of every witness who described someone else altogether. He further pointed out definitively that the witness, who gave the most detailed description of the actual perpetrator, put his initials beneath the photo in the photo array of a gentleman that did indeed match his excited, shortly after the incident, description. This man looked nothing like Mr. Stamps, besides being another black male.

Thus, trial counsel utilized at least part of the very theory Stamps claims he should have pursued.

¶22 But while Stamps contends that the State "had no evidence beyond Stamps' hat linking Stamps to the crime," which is evidently how he settles on a fifty-fifty shot, the circuit court concluded otherwise. It determined that there was no reasonable probability that the "difference of a few inches in height, Stamps being 'near 6 feet,' would have altered the outcome[,]" particularly given that multiple witnesses had identified the vehicle, that such a vehicle was traced to Stamps and his wife, and that the State had DNA evidence and testimony that Stamps had confessed. Quite simply, we agree with this conclusion as well: "'When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a

reasonable doubt respecting guilt.'"[8] ***Domke***, 337 Wis. 2d 268, ¶54 (citation omitted).

¶23 Stamps' motion does not sufficiently allege deficient performance by trial counsel or prejudice from any alleged deficiencies. The decision to grant or deny a hearing was thus discretionary with the circuit court, and we discern no erroneous exercise of that discretion.

By the Court.—Order affirmed.

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

[8] We would disagree with the presumption that the mere presence of two DNA profiles translates to a fifty-fifty defense. The jury could have inferred, for instance, that the fact that only Stamps' DNA was present in sufficient quantity to develop a full profile meant that he was the person to have most recently worn the hat which, because the hat was in police custody immediately following the robbery, would make him the robber.