COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP149 **Cir. Ct. No. 2004CF1178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN JAMAAL WELLS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Warren Jamaal Wells, *pro se*, appeals an order denying his postconviction motion, filed under WIS. STAT. § 974.06, seeking relief from his conviction for first-degree intentional homicide while armed and as a party to a crime. He claims that the State improperly charged him as a party to a

crime without also charging and prosecuting a co-actor, and that the two lawyers who represented him at trial were ineffective for failing to investigate, to present certain witnesses, and to make appropriate motions. He alleges that his postconviction lawyer was ineffective for failing to raise these claims. We reject his arguments and affirm.

I.

¶2 Wells confessed to shooting Christopher Blucher to death. The State charged Wells with first-degree intentional homicide while using a dangerous weapon, as a party to a crime. Wells moved to suppress his confession, but the trial court denied the motion. The matter proceeded to a jury trial. Three State's witnesses testified that they saw the shooting, that they knew Wells, and that they recognized him as the shooter.[1] Two of those witnesses also testified that Armondo Cornelius was present with Wells at the scene of the shooting. The jury found Wells guilty as charged.

¶3 Wells pursued a direct appeal, seeking a new trial on the ground that the trial court erroneously admitted his confession into evidence. We denied the claim and affirmed Wells's conviction. *See* ***State v. Wells***, No. 2007AP801-CR, unpublished slip op. (WI App Apr. 1, 2008).

¶4 Next, Wells filed the postconviction motion underlying this appeal. Proceeding *pro se*, he claimed that the lawyer who represented him during postconviction proceedings was constitutionally ineffective because that lawyer did not raise claims of prosecutorial misconduct or allege that Wells's trial lawyers

[1] One of the witnesses testified by videotaped deposition.

were ineffective. The circuit court rejected Wells's claims without a hearing, and he appeals.[2]

II.

¶5 Wells claims that his postconviction lawyer was ineffective for not challenging the effectiveness of his trial lawyers and for not alleging prosecutorial misconduct. The two-pronged test for claims of ineffective assistance of counsel requires a defendant to prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of the lawyer 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." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the reviewing court need not address the other. ***Id.*** at 697.

¶6 A lawyer is not ineffective for failing to make claims that would have been denied. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 228, 769 N.W.2d 110, 118–119. If Wells's allegations of prosecutorial misconduct and trial lawyer error lack merit, his postconviction lawyer had no obligation to pursue them. *See* ***State ex rel. Rothering v. McCaughtry***, 205

[2] We refer to the circuit court to identify the judge that presided over the postconviction proceedings underlying this appeal. We refer to the trial court to identify the judge that presided over the pretrial and trial proceedings.

Wis. 2d 675, 678, 556 N.W.2d 136, 138 (Ct. App. 1996). Accordingly, we turn to an examination of those allegations.

¶7 We begin by considering Wells's contentions that, because the State did not charge anyone as his accomplice in this case, the State failed to demonstrate that Wells was a party to the crime of first-degree intentional homicide while armed, and, relatedly, that the State failed to prove the elements of the offense. Wells believes that these alleged flaws in the proceedings constitute prosecutorial misconduct and that his postconviction lawyer was constitutionally ineffective for not pursuing such a claim. We disagree.[3]

¶8 First, WIS. STAT. § 939.05, which governs party-to-a-crime liability, provides that every person concerned in the commission of a crime may be charged with and convicted of committing it. *See* § 939.05(1). The statute further provides that a person is concerned in the commission of a crime if, *inter alia*, the person directly commits the crime or intentionally aids and abets the commission of it. *See* § 939.05(2)(a)–(b). Therefore, the State may prosecute a person as a party to a crime "without convicting other participants or establishing the identity of the principal." ***State v. Zelenka***, 130 Wis. 2d 34, 47, 387 N.W.2d 55, 60–61 (1986).

¶9 Second, "[t]he party to a crime charge does not add to or alter the elements of the offense to which the defendant is charged as a party. The manner of participation in a crime is not an element of the offense to which one is charged

[3] The State appears to concede that Wells acted during the trial proceedings to preserve his claim of prosecutorial misconduct and could have pursued the claim in a postconviction motion under WIS. STAT. § 974.02. We assume without deciding that the State's implied concession is warranted.

as party to a crime." ***State v. Horenberger***, 119 Wis. 2d 237, 243, 349 N.W.2d 692, 695 (1984).

¶10 The State thus did not act improperly by prosecuting Wells as a party to a homicide without also charging a co-actor or proving the identity of an accomplice. Wells's allegations to the contrary lack merit, and his postconviction lawyer was therefore not ineffective by foregoing them.

¶11 Next, Wells asserts that his trial lawyers were ineffective by failing to "investigate" Cornelius, who allegedly accompanied Wells to the scene, and by failing to offer Cornelius's testimony at trial. Wells supports his contention by pointing to a discussion during trial between the lawyers and the trial court touching on the alibi that Cornelius offered police. The Record reflects that the State disclosed this alibi to the defense during the discovery process, and Wells implies that, if called to testify at trial, Cornelius would have said that he was not present at the scene when Blucher was killed. Wells further implies that his trial lawyers failed him because Cornelius's hoped-for testimony would have undermined the credibility of the State's witnesses who claimed to have seen Cornelius with Wells at the time of the offense. Wells asserts that his postconviction lawyer was constitutionally ineffective in turn by not making these claims.

¶12 Our analysis is governed by the rule that when a defendant claims that a trial lawyer was ineffective for failing to take specific actions, the defendant "'must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.'" *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 850, 681 N.W.2d 272, 278 (citation omitted). Here, however, Wells's postconviction motion does not disclose the

details of Cornelius's statement to police, nor does the motion include any affidavits or statements from Cornelius as to what he would have said under oath. Indeed, Wells fails to demonstrate that Cornelius would have testified at all rather than invoked his right to remain silent. *See* U.S. CONST. amend. V. As the circuit court explained: "it is completely unknown what the testimony of Armondo Cornelius would have been, how it would have changed the outcome of the trial, or even if his whereabouts were known to anyone." Wells thus does not show that he suffered any prejudice as a consequence of his trial lawyers' actions or inactions in regard to Cornelius. *See* ***Strickland***, 466 U.S. at 687. Because Wells does not demonstrate that his trial lawyers were ineffective, he necessarily does not demonstrate that his postconviction lawyer erred by failing to allege their ineffectiveness. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375 (to establish postconviction lawyer's ineffectiveness for failing to challenge trial lawyer's effectiveness, defendant must show that trial lawyer was constitutionally ineffective).

¶13 Next, Wells contends that his trial lawyers were ineffective by not ensuring that an alibi witness, Francisco Mercado, testified at trial. Again, however, Wells fails to support his claim. First, Wells did not submit an affidavit from Mercado reflecting the testimony he would have given. *See* ***Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d at 850, 681 N.W.2d at 278. Second, although the Record shows that Mercado told police that Wells was at Mercado's home at some point on the date of the homicide, the jury heard Wells's admission that he was at Mercado's home only "before and after," rather than during, the time of the shooting. Wells fails to demonstrate why Mercado's testimony would have had any effect on the outcome of the trial in light of this admission. *See* ***ibid.***

¶14 Moreover, when assessing claims of a lawyer's ineffectiveness, we make every effort "to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 847–848 (1990). In this case, the parties and the trial court made a record during trial regarding the herculean efforts expended to persuade Mercado to come to the courthouse voluntarily. When Mercado refused, the trial court offered to issue a body attachment directing law enforcement officers to arrest him and bring him to court by force. Wells's trial lawyers declined that offer, deciding, as summarized by the trial court, that "it was unwise and impermissibly risky to have Mr. Mercado arrested and have him brought into the courtroom against his will to say at that point something that may not have been helpful for the defense."

¶15 The trial lawyers thus made a strategic decision about how to proceed when a potential witness proved uncooperative. We "will not second-guess a trial attorney's 'considered selection of trial tactics … in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471, 476 (Ct. App. 1996) (citation omitted). Here, Mercado's statements to police did not firmly establish the alibi that Wells needed. The potential benefits of introducing Mercado's testimony therefore did not, in the trial lawyers' view, outweigh the risks of compelling Mercado to appear when the precise scope of his testimony was rendered uncertain by his lack of cooperation. The lawyers' assessment here was well within professional norms. *Cf.* ***State v. Cathey***, 32 Wis. 2d 79, 91, 145 N.W.2d 100, 106 (1966) (stating that, "[a]s a matter of tactics it is inadvisable to ask a question directly pertaining to a crucial or critical fact on which the outcome of the case might well depend unless the

examiner is reasonably confident the answer will be favorable"). Accordingly, Wells's postconviction lawyer had no obligation to challenge that assessment. *See* ***Elm***, 201 Wis. 2d at 464–465, 549 N.W.2d at 476 ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.").

¶16 Next, Wells asserts that his postconviction lawyer should have challenged the effectiveness of his trial lawyers' response to testimony about a lie detector test. A State's witness testified that she was interviewed several times by police, and the State asked her whether she told the truth during those interviews. The witness replied, "yes sir. That is why I took a lie detector test."[4] Wells believes that the testimony ran afoul of the rule that "[t]he result of a polygraph test is inadmissible in Wisconsin."[5] *See* ***State v. Shomberg***, 2006 WI 9, ¶39, 288 Wis. 2d 1, 31, 709 N.W.2d 370, 384. In Wells's view, his trial lawyers should have either sought a curative jury instruction or moved for a mistrial.

¶17 The Record reflects that, after the jury left the courtroom, one of Wells's trial lawyers told the trial court that he and Wells had discussed the testimony about a lie detector test and that the defense did not want the court to give a curative jury instruction. The lawyer explained that an instruction would

[4] The court reporter placed a capital letter "Q" before the portion of the witness's answer that follows "yes sir." Neither party suggests that the statement "that is why I took a lie detector test" was part of a question posed to the witness. The "Q" appears to be a scrivener's error.

[5] We note that, although Wisconsin law bars testimony about the result of a lie detector test, our law allows testimony about such tests in some circumstances. *See* ***State v. Shomberg***, 2006 WI 9, ¶¶38–41, 288 Wis. 2d 1, 30–32, 709 N.W.2d 370, 384–385. Thus, a reference to a lie detector test is not, *ipso facto*, an error. A variety of considerations, however, attend the admissibility of such references. *See* ***ibid.*** We therefore assume without deciding that the testimony about a lie detector test in this case was objectionable.

only focus the jury's attention on the testimony. This is a reasonable strategic decision that a reviewing court will not second-guess. *See* ***Elm***, 201 Wis. 2d at 464, 549 N.W.2d at 476.

¶18 Wells's trial lawyers also advised the trial court that the defense elected not to move for a mistrial. Although the lawyers did not explain the basis for that decision, we need not consider whether they performed deficiently in making it.[6] Wells fails to show that he was prejudiced when his lawyers did not request a mistrial because he demonstrates no likelihood that the trial court would have granted the request.

¶19 Mistrial in a criminal case is a drastic remedy. *See* ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695, 702 (Ct. App. 1998). Whether to grant such a remedy rests in the trial court's sound discretion. *See* ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 317, 659 N.W.2d 122, 134. "[T]he [trial] court must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial." ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 13, 742 N.W.2d 61, 66.

[6] Wells asserts that his trial lawyers' decision not to seek a mistrial is invalid because the decision rests solely with the defendant. He offers no discussion of this contention and supports his theory only with a citation to ***State v. Washington***, 142 Wis. 2d 630, 419 N.W.2d 275 (Ct. App. 1987). In that case, the defendant argued on appeal that whether to accept or reject a mistrial is a tactical decision resting solely with the lawyer. ***Id.***, 142 Wis. 2d at 633–634, 419 N.W.2d at 276–277. We declined to address the issue, applying both waiver and estoppel. *See* ***id.***, 142 Wis. 2d at 635, 419 N.W.2d at 277. ***Washington*** does not suggest, let alone hold, that the decision to seek a mistrial is a fundamental decision that rests with the defendant alone. In the absence of cited authority and a developed analysis supporting a position, we will not consider a litigant's contention. *See* ***State v. Lock***, 2012 WI App 99, ¶58, 344 Wis. 2d 166, 195, 823 N.W.2d 378, 392. Accordingly, we do not address this issue further.

¶20 The Record here plainly shows that the trial court did not view the witness's mention of a lie detector test as sufficient to undermine the integrity of the trial. Rather, the trial court expressly agreed with the defense that not even a curative jury instruction was required. Indeed, the trial court stated that the witness's reference to a lie detector test "could have been lost" on the jury entirely. The Record thus establishes that Wells suffered no prejudice from his trial lawyers' decision not to request a mistrial based on testimony about a lie detector test, because the trial court did not consider the testimony significant and would not have granted the request. *See* ***Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d at 228, 769 N.W.2d at 118–119. Wells therefore does not demonstrate that his postconviction lawyer was ineffective for failing to raise the issue. *See* ***Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d at 480, 673 N.W.2d at 375.

¶21 Finally, Wells complains that the State violated WIS. STAT. § 971.23(8) during closing argument by commenting on Wells's failure to call Mercado as an alibi witness. The statute provides, in pertinent part: "if at the close of the defendant's case the defendant does not call some or any of the alibi witnesses, the [S]tate shall not comment on the defendant's ... failure to call some or any of the alibi witnesses." ***Ibid.*** Here, however, the State told the jury that "Mercado didn't walk in the door." Wells contends now that his postconviction lawyer was ineffective by not alleging that: (1) prosecutorial misconduct entitled Wells to a mistrial; and (2) Wells's trial lawyers were constitutionally ineffective by failing to seek a mistrial following the prosecutor's statement.[7] We are not persuaded.

[7] Wells does not argue that his trial lawyers should have asked for any remedy other than a mistrial.

¶22 In chambers, Wells's trial lawyers told the trial court that they had discussed the prosecutor's comment with Wells in light of WIS. STAT. § 971.23(8). One of the lawyers then explained that "we – I'm not going to ask for anything. I thought I would raise it. We don't want a mistrial. I would not ask for a curative [instruction]." In response to the trial court's inquiry, the lawyer again confirmed that the defense wanted neither a mistrial nor a curative instruction.

¶23 In light of the foregoing, a reviewing court would not have entertained a claim that Wells was wrongly denied a mistrial following the prosecutor's remark that "Mercado did not walk in the door." A party may not insist on one position before the trial court and then successfully assert error because the trial court adopts that position. ***State v. Washington***, 142 Wis. 2d 630, 635, 419 N.W.2d 275, 277 (Ct. App. 1987). Such tactics are barred by principles of judicial estoppel. ***Ibid.*** Here, Wells's trial lawyer repeatedly advised the trial court that the defense wanted no remedy for the prosecutor's comment, and Wells therefore could not complain later because he received no remedy. *See* ***ibid.*** Wells's postconviction lawyer was not ineffective for failing to raise a claim that would have been precluded. *See* ***Rothering***, 205 Wis. 2d at 678, 556 N.W.2d at 138.

¶24 The remaining questions are whether Wells shows that his trial lawyers were ineffective for not requesting a mistrial and whether he shows that his postconviction lawyer was ineffective in turn for failing to challenge the trial lawyers' alleged ineffectiveness. He has not made the necessary showings.

¶25 The Record conclusively demonstrates that Wells and his trial lawyers made a strategic decision to take their chances on the jurors hearing the case and the evidence presented to them, notwithstanding the prosecutor's

objectionable comment. Wells cannot complain now that the chosen strategy constituted ineffective assistance. *See* ***Strickland***, 466 U.S. at 690.

¶26 Moreover, the prosecutor's statement that "Mercado didn't walk in the door" constituted harmless error. *See* ***State v. Delgado***, 2002 WI App 38, ¶¶14–18, 250 Wis. 2d 689, 701, 641 N.W.2d 490, 496 (applying harmless error analysis to prosecutor's arguably improper closing argument). The remark was vague and ambiguous. As the State observes, "the jury wouldn't necessarily equate the statement ... with a comment on Wells' failure to call Mercado as a witness."

¶27 An error is harmless in a criminal case if no reasonable possibility exists that the error contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231–232 (1985). The question is one of law for our *de novo* review. *See* ***State v. Harrell***, 2008 WI App 37, ¶37, 308 Wis. 2d 166, 187, 747 N.W.2d 770, 780. Our focus is on whether the error "'undermines confidence in the outcome'" of the proceeding. *See* ***Dyess***, 124 Wis. 2d at 545, 370 N.W.2d at 232 (citation and one set of brackets omitted).

> Where the error affects rights of constitutional dimension or where the verdict is only weakly supported by the record, the reviewing court's confidence in the reliability of the proceeding may be undermined more easily than where the error was peripheral or the verdict is strongly supported by evidence untainted by error.

Ibid.

¶28 Here, the evidence against Wells was substantial. People who knew him recognized him at the scene. They identified him as the shooter at trial. He confessed. By contrast, the prosecutor's challenged remark was brief and its import unclear. Additionally, the trial court correctly instructed the jurors that the

lawyers' arguments "are not evidence," and that the jurors should "decide upon the verdict according to the evidence." *See* WIS JI—CRIMINAL 160. We presume that jurors follow the trial court's instructions. *See* ***Adams***, 221 Wis. 2d at 12, 584 N.W.2d at 700. In light of the instructions to the jury, the opacity of the prosecutor's remark, and the evidence presented, no reasonable possibility exists that the remark "contributed to the conviction." *See* ***Dyess***, 124 Wis. 2d at 543, 370 N.W.2d at 231–232. The prosecutor's remark was harmless here.

¶29 A harmless error does not warrant a mistrial. *See* ***Adams***, 221 Wis. 2d at 17, 584 N.W.2d at 702. Because the trial court would not have granted a mistrial to cure a harmless error, the trial lawyers' decision to forego such a request was not prejudicial within the meaning of ***Strickland***. Accordingly, Wells does not demonstrate that his postconviction lawyer was ineffective for failing to challenge his trial lawyers' effectiveness on this basis. *See* ***Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d at 480, 673 N.W.2d at 375. For all of these reasons, we affirm.

By the Court.—Order affirmed.

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