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DISTRICT I

June 13, 2023

To:

Hon. David A. Feiss
Circuit Court Judge
Electronic Notice

Hon. Jonathan D. Watts
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Kieran M. O'Day
Electronic Notice

Christopher D. Sobic
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP1035-CR State of Wisconsin v. Kendrick Deavane Alexander
(L.C. # 2013CF1967)

Before Brash, C.J., Dugan and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kendrick Deavane Alexander appeals from a judgment of conviction and from an order that denied his postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The background facts are undisputed. On the night of April 6, 2013, two women fought in the street, while others watched.[2] At one point, a man exited a burgundy-colored vehicle, raised a gun, and fired shots that struck and injured two individuals, E.W. and C.J. The alleged shooter, Alexander, was charged with two counts of first-degree recklessly endangering safety and one count of being a felon in possession of a firearm.

At trial, the issue was the identity of the shooter. Both E.W. and C.J. testified that they did not previously know Alexander, but they identified him in a photo array and in court, as the man who shot them. One of the two female combatants, S.J., and her friend K.F., also identified Alexander from a photo array. S.J. testified that she knew Alexander prior to this incident. She further testified that she showed police Alexander's Facebook page when they interviewed her. K.F. testified that she saw the shooter and that she had seen a photo of Alexander on Facebook after the shooting, but before identifying him in the photo array.

Alexander's trial counsel questioned Detective Jeffrey Sullivan about the photo arrays he used with the witnesses, inquiring about the effect of a witness seeing an individual's photo on Facebook prior to viewing a photo array. Sullivan acknowledged that "it does lessen the anonymity of a photo array if people are shown" an individual's photo ahead of time. However, when asked whether people sometimes "make false identification[s]" of a person in a photo array, Sullivan stated: "In my 22 years, I can't recall of it happening. I don't know throughout the country. I can't speak specifically on the case. In my 22 years, I have never known a person to identify [someone] that actually wasn't the suspect in cases that I have been involved in."

[2] Police officers were dispatched to the scene shortly before 1:00 a.m. on April 7, 2013.

Sullivan also disagreed with trial counsel's suggestion that "at night it's harder to identify somebody than during the day." Sullivan said: "No, I wouldn't agree with that blanket statement. Depends on the lighting; depends on the distance. During the day, if they're a block away, it would be hard to identify someone. At night, with lights, it's much easier."

The jury found Alexander guilty of all three charges. The trial court sentenced him to a total of ten years of initial confinement and six years of extended supervision.[3]

Alexander filed a postconviction motion seeking a new trial on grounds that his trial counsel performed deficiently in two ways. The first alleged deficiency was failing to present expert testimony on eyewitness identification, which Alexander claimed was necessary to "explain[] to the jury the pitfalls of eyewitness identification and the concerns about the reliability of the identifications in this particular case." Alexander argued that "an expert witness could have countered some of the questionable statements made by [Detective] Sullivan regarding identification, or eliminated the need to ask [Detective] Sullivan identification questions." The second alleged deficiency was that trial counsel failed to present an alibi witness. In addition to his ineffective assistance claims, Alexander also sought a new trial in the interests of justice, resentencing, and vacatur of three DNA surcharges. The circuit court denied the motion.[4] Alexander appealed. On appeal, we concluded that Alexander was entitled to an evidentiary hearing on his ineffective assistance claims, but we otherwise affirmed the trial

[3] The Honorable Jonathan D. Watts presided over the trial and sentencing.

[4] The Honorable Frederick C. Rosa denied the original postconviction motion.

court's exercise of sentencing discretion. *See* ***State v. Alexander***, No. 2017AP2273-CR, unpublished slip op., ¶2 (WI App Nov. 26, 2019).

Following remand, the circuit court held an evidentiary hearing on Alexander's ineffective assistance claim relating to expert testimony; Alexander withdrew the ineffective assistance claim regarding the alibi witness. At the hearing, Alexander's attorney asked trial counsel whether he considered or thought about calling an eyewitness identification expert in this case. Trial counsel answered that he did not, but acknowledged that an expert could "help explain the problems with eyewitness ID." On cross-examination, trial counsel elaborated, explaining that in all of his prior cases where he successfully attacked identification, he had not called an expert. In this case, counsel thought that he "was very good [at] cross-examination, [he] was very good at persuasion in front of a jury, and [he] felt confident in [his] abilities to win a trial without an expert." Trial counsel considered the choice to argue the case without an expert to be a "strategic decision" and stated that he was confident he could "effectively argue to the jury and examine witnesses on that issue [of identification] without the use of an identification expert."

The circuit court denied the motion,[5] explaining that even if it assumed trial counsel had been deficient, Alexander could not show prejudice, particularly because one of the witnesses—S.J.—indicated she had known Alexander for three years. Alexander appeals.

"To prevail on an ineffective assistance claim, a defendant must prove both that counsel performed deficiently and that the deficient performance prejudiced the defense." ***State v.***

[5] The Honorable David A. Feiss conducted the hearing on remand and denied the motion.

Prescott, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515. "If a defendant fails to establish either prong … we need not determine whether the other prong was satisfied." ***Id.***, ¶11. To demonstrate deficient performance, Alexander must show facts from which we can conclude that the attorney's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. To establish prejudice, Alexander "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." *See* ***id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

"[T]he law affords counsel the benefit of the doubt; there is a presumption that counsel is effective unless shown otherwise by the defendant." ***State v. Balliette***, 2011 WI 79, ¶27, 336 Wis. 2d 358, 805 N.W.2d 334. "This court will not second-guess a reasonable trial strategy, [unless] it was based on an irrational trial tactic or based upon caprice rather than upon judgment." ***State v. Breitzman***, 2017 WI 100, ¶75, 378 Wis. 2d 431, 904 N.W.2d 93 (citation omitted; brackets in ***Breitzman***).

Although the circuit court denied the motion based on Alexander's failure to satisfy the prejudice prong, we conclude that Alexander has failed to show that trial counsel performed deficiently. Expert testimony is permitted when it will "assist the trier of fact to understand the evidence[.]" *See* WIS. STAT. § 907.02; ***State v. Whitaker***, 167 Wis. 2d 247, 255-56, 481 N.W.2d 649 (Ct. App. 1992) Expert testimony is only required, however, "if the issue to be decided by the jury is beyond the general knowledge and experience of the average juror." *See* ***Whitaker***, 167 Wis. 2d at 255. Stated another way, "if the matter is one of common knowledge or within

the realm of ordinary experience, expert testimony is not required." *See* ***Pinter v. Village of Stetsonville***, 2019 WI 74, ¶63, 387 Wis. 2d 475, 929 N.W.2d 547.

Here, while an expert certainly might have provided a greater understanding of the difficulties of eyewitness identification, we are not persuaded that the general difficulties inherent in eyewitness identification exceed the knowledge and experience of an average juror. Accordingly, it was not an unreasonable trial strategy to rely on cross-examination and other methods of attacking the credibility of witnesses and their identifications of a suspect. Counsel did not perform deficiently, so Alexander is not entitled to relief. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) ("[W]e may affirm on grounds different than those relied on by the [circuit] court.").

Alexander also requested a new trial in the interests of justice, arguing that "the real controversy was not fully tried because the jury never heard testimony from an eyewitness identification expert." We may grant a new trial in the interests of justice when it appears from the record that the real controversy has not been fully tried. *See* ***State v. Peters***, 2002 WI App 243, ¶18, 258 Wis. 2d 148, 653 N.W.2d 300.

However, "[o]ur discretionary reversal power is formidable[.]" *See* ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. It "should be exercised sparingly and with great caution," *see* ***id.***, and "only in exceptional cases," *see* ***State v. Burns***, 2011 WI 22, ¶25, 332 Wis. 2d 730, 798 N.W.2d 166 (citations omitted).

> Such exceptional cases are generally limited to cases in which the jury was erroneously denied the opportunity to hear important testimony bearing on an important issue of the case, when the jury had before it evidence not properly admitted that "so clouded a crucial issue that it may be fairly said that the real controversy was

> not fully tried," or when an erroneous instruction prevented the real controversy in a case from being tried.

Id. In considering whether to exercise that discretionary power, we consider the totality of the circumstances. *See* ***State v. McGuire***, 2010 WI 91, ¶59, 328 Wis. 2d 289, 786 N.W.2d 227. Simply, we are unpersuaded that Alexander's case is exceptional.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals