COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP832-CR **Cir. Ct. No. 2009CF1088**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM A. KING,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: BARBARA A. KLUKA and JASON A. ROSSELL, Judges. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. After hearing evidence that William King used a knife when he attacked his stepson, James Evans, the jury convicted King of second-degree recklessly endangering safety and disorderly conduct while using a

dangerous weapon and as a form of domestic abuse. King appeals from the judgments of conviction and from the circuit court order denying his postconviction motion without a hearing.[1] We affirm.

¶2 We review whether the circuit court erroneously denied King's postconviction motion without a hearing. A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

> The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

¶3 A postconviction motion must assert material facts in support of the grounds for the motion, not conclusory allegations. *See* ***id.***, ¶29. Specifically, the motion must allege "who, what, where, when, why, and how." ***Id.***, ¶23. "A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim." ***Id.*** In addition, to obtain a hearing on an ineffective assistance of counsel claim, the motion must allege what actions counsel should have taken, specific material facts demonstrating the result of such actions, and specific material facts

[1] The Honorable Barbara A. Kluka presided over the trial and entered the judgments of conviction. The Honorable Jason A. Rossell entered the order denying the postconviction motion.

demonstrating how those results would have altered the outcome of the proceeding. ***Id.***, ¶¶18-24, 29-33.

¶4 In denying King's postconviction motion without an evidentiary hearing, the circuit court repeatedly faulted King for not making his allegations via affidavit. The State echoes this "requirement" in its respondent's brief without citing authority for the proposition. We have not located any authority for the proposition that postconviction claims must be supported by an affidavit. Rather, ***Allen*** requires that the "motion … allege[] [sufficient material facts], *within the four corners of the document itself*." ***Id.***, ¶23 (emphasis added). To the extent the circuit court denied King's motion for lack of an affidavit, that ground was not well founded. Even if the circuit court applied the wrong legal standard to King's postconviction motion, we may still affirm if the circuit court reached the right result for the wrong reason. ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

¶5 We turn to the postconviction claims King raises on appeal: newly discovered evidence, ineffective assistance of trial counsel, the prosecutor's improper remarks during closing argument, and a challenge to the disorderly conduct conviction on the grounds that disorderly conduct is a lesser included offense of second-degree recklessly endangering safety. King also challenges his sentence.

¶6 The circuit court

> may grant a new trial based on newly discovered evidence only if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at

> trial; and (5) it is reasonably probable that a different result would be reached at a new trial.

State v. Terrance J.W., 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). A postconviction motion must allege material facts so that the circuit court may assess whether the claims require a hearing. ***Allen***, 274 Wis. 2d 568, ¶23.

¶7 In his postconviction motion, King alleged that his appellate counsel had learned the following new evidence: (1) Evans had a motive to fabricate his testimony because Evans was angry with King because Evans was excluded from bequests made to other family members; (2) Evans was admitted for psychiatric treatment and, while there, he called King's daughter and screamed about how he was going to kill King; (3) Evans takes an antidepressant which can cause memory loss, confusion, hallucinations and aggressive behavior;[2] (4) Evans extorted money from King's son; (5) after the date of the incident for which King was convicted, Evans was involved in other violent interactions; (6) at the time of the offense, King's daughter, Rose, had evicted Evans from her apartment, making Evans a visitor or trespasser when King attacked him;[3] and (7) Evans's violent and self-injuring acts, had they been known by the jury, made it more likely that Evans fabricated his allegations against King.[4]

[2] While the jury learned that Evans took a medication that affected his memory, the medication was not identified for the jury.

[3] King does not argue that Evans's alleged status as a trespasser or a visitor provided King with a defense to the charges arising from his conduct with Evans. This evidence is neither material nor likely to cause a jury to acquit King at a new trial. *See* ***State v. Terrance J. W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996).

[4] King also alleged that in approximately November 2011 and January 2012 Evans may have injured himself and damaged someone's vehicle. Newly discovered evidence does not include evidence that did not exist or could not have been discovered at the time of King's June 2010 trial. For that reason, we do not consider this claim.

¶8 The circuit court declined to hold a hearing on King's newly discovered evidence claims because King failed to allege how the allegedly newly discovered evidence would be relevant and admissible at trial. The court concluded that the motion lacked a sufficient factual basis and a number of the pieces of allegedly newly discovered evidence would be excluded as impermissible character evidence and may have required a ***Shiffra-Green***[5] determination regarding access to Evans's privileged mental health records.

¶9 King argues that the circuit court should not have required that the newly discovered evidence be relevant and admissible. King views the newly discovered evidence requirements too narrowly. The concepts of relevance and admissibility are implied in the newly discovered evidence requirement that the evidence would have rendered it "reasonably probable that a different result would be reached at a new trial." ***Terrance J.W.***, 202 Wis. 2d at 500. For evidence to have this effect on a new fact finder at a new trial, the evidence must be relevant and admissible.

¶10 King argues that he made the requisite showing to have an evidentiary hearing on his newly discovered evidence claims. However, our review of the postconviction motion reveals that King's claims lacked specificity. While King listed numerous pieces of newly discovered evidence, he did not show that he was not negligent in discovering the evidence. The motion does not indicate when the new evidence was actually discovered. We cannot determine which new evidence was arguably available before trial and which came into

[5] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), *abrogated by* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

existence after trial. King's allegation that appellate counsel discovered the evidence does not adequately address the requirement that the moving party not have been negligent in seeking the evidence. *See* ***id.*** King's newly discovered evidence claims were not supported by sufficient material facts to warrant an evidentiary hearing.

¶11 We conclude that the circuit court did not misuse its discretion in denying King's newly discovered evidence claims without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶12. King's allegations were either conclusory and not supported by sufficient material facts or they did not qualify as newly discovered evidence because the evidence did not exist at the time of trial.

¶12 We turn to King's ineffective assistance of trial counsel claims. One of these claims is premised on trial counsel's failure to investigate after King's daughter approached counsel with information that Evans had been admitted to a hospital for mental health issues. We agree with the circuit court that King failed to provide factual allegations about when trial counsel was informed of this information. In addition, when a defendant alleges a failure to investigate, a defendant "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted). King's postconviction motion did not allege sufficient material facts to warrant a hearing on this claim. *See* ***Allen***, 274 Wis. 2d 568, ¶23.

¶13 King argues that trial counsel should have discovered or investigated other aspects of Evans's behavior. However, King's appellate argument does not focus our attention on which aspects of Evans's behavior trial counsel should have investigated. We will not piece together King's argument from his postconviction

motion and the circuit court's denial of that motion. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we will not independently develop a litigant's argument).

¶14 King argues that trial counsel should have filed a ***Shiffra-Green*** motion to gain access to Evans's mental health records to prepare a defense. The postconviction motion asserts that " a prima facie case could have been made that mental health records existed which would be necessary for King to present a defense that Evans was framing him" as a result of Evans's mental health issues. The motion does not address or apply the ***Shiffra-Green*** standards to this claim or develop any facts in support of this claim.

¶15 King argues that the circuit court should have held a hearing on his claim that trial counsel was ineffective in relation to King's decision not to testify at trial. King concedes that the circuit court conducted a proper colloquy with him before he waived his right to testify. However, in his postconviction motion, King claimed that he did not intelligently waive his right to testify because his trial counsel erroneously told him that all eleven of his prior convictions would be shared with the jury if he testified. The State's motion in limine identified King's convictions from 1975 to 1997 (obstructing, multiple operating after revocations, fleeing/eluding, hit and run, disorderly conduct, resisting, sexual assault and aggravated battery). Trial counsel advised the circuit court that King conceded that he had eleven prior convictions. Postconviction, King alleged that had he known that the jury would have learned that he had many fewer convictions, he would have testified. In support of his claim that fewer convictions would have been mentioned had he testified, King cites a remark by the circuit court at the outset of the trial when Evans's prior convictions were being discussed. As the

court discussed Evans's prior convictions, the court noted that Evans had one prior conviction which was

> relatively recent … in the sense it is within the 10-year parameter of the Federal rules, which is a standard that I for the most part adhere to absent some other circumstance. They were a crime of dishonesty in my view because it is taking something that doesn't belong to a person under whatever circumstances they were.

¶16 From this statement, King argues that the circuit court would not have admitted any prior conviction of King's that was more than ten years old or that was not also a crime of dishonesty. We think King reads more into the circuit court's remark than is warranted and essentially invites us to speculate about how the circuit court would have ruled on the number of King's prior convictions had it been asked to do so before King testified. In addition, King's postconviction motion did not apply the law governing prior convictions to the facts he offered. The circuit court did not err in denying an evidentiary hearing on this claim.

¶17 King also alleged ineffective assistance of trial counsel because counsel mentioned during voir dire that King had been unemployed for two years. Counsel's remark came in response to a potential juror's statement that he might have worked with King. The circuit court then asked trial counsel where King worked. In response, counsel revealed that King was currently unemployed, and counsel gave details of King's last place of employment two years before. The court concluded that counsel's reference to King's unemployment may have been deficient performance, but it did not undermine the reliability of the guilty

verdict.[6] We agree. Furthermore, on appeal, King attempts to buttress his postconviction motion claim by citing studies and cases in support of his argument that he was prejudiced by counsel's reference to his employment status. Our review is limited to what was before the circuit court at the time King requested an evidentiary hearing on his postconviction motion. *See* ***State v. Aderhold***, 91 Wis. 2d 306, 314-15, 284 N.W.2d 108 (Ct. App. 1979). The circuit court did not err in denying an evidentiary hearing on this ineffective assistance of counsel claim.

¶18 King argues that the circuit court should have held a hearing on his claim that trial counsel failed to limit or counter Evans's prejudicial testimony. The circuit court denied a hearing on this claim because the postconviction motion did not cite to that portion of the record where Evans's testimony could be found.[7] The circuit court also concluded that even if such testimony had been the subject of an objection, it would have been admissible as an exception to hearsay on the grounds of excited utterance or effect on the listener. In addition, even if this evidence was erroneously admitted, there was insufficient prejudice to undermine the reliability of the guilty verdicts.

¶19 We turn to King's specific complaints about how his trial counsel reacted to Evans's testimony. King complains that his trial counsel did not react to Evans's testimony that King was high on heroin at the time of the incident.

[6] Not only did the jury acquit King of battery, indicating that the jury was able to sort through the evidence, the jury was also instructed that counsel's remarks are not evidence. Jurors are presumed to follow the court's instructions. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

[7] This finding is partially erroneous. Paragraphs 52-53 of King's motion include citations to the trial transcript while paragraphs 49-50 of the motion do not.

King's postconviction motion was insufficient because it relied upon a statement made by Evans to the police in which he did not assert that King was under the influence of heroin. However, the statement was neither sufficiently identified nor offered to the circuit court in support of the postconviction motion.

¶20 King argues that trial counsel should have countered the following testimony by Evans: (1) King purchased a knife because he could not own a gun, which suggested to the jury that King had a firearm restriction due to a past felony, and (2) King fled the scene when police arrived. As to these claims, we conclude that an evidentiary hearing was not required. Regarding the knife purchase, King's postconviction motion merely speculates that the jury could have inferred from this remark that King had a firearm restriction arising from a felony conviction. Regarding Evans's reference to King's flight, evidence of King's flight first came in via the testimony of the responding officer. The officer heard someone yell, "He just ran out the back door." The officer pursued King and observed him travelling away from the scene. Even if the officer's testimony had been objected to, it would have been admissible as an excited utterance under WIS. STAT. § 908.03(2) (2009-10)[8] or a present sense impression under § 908.03(1).

¶21 King alleged that trial counsel should have explored (1) Evans's claim that King terrified and intimidated witnesses and family members and (2) should have called Bob Miller to rebut Evans's testimony that Miller was afraid of King. These claims were inadequately substantiated with facts. The

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

postconviction motion did not adequately set out what Bob Miller would have testified to had trial counsel presented his testimony at trial.

¶22 King argues that his trial counsel failed to emphasize Evans's contradictory testimony about when, after the incident, he found the knife King held against his neck. We disagree. King's counsel argued during closing that Evans was not credible and noted his varied testimony about the size of the knife, when and where the knife was found, and how the knife was turned over to the police. The circuit court noted that trial counsel impeached Evans consistently and argued that he was not truthful. Furthermore, while King's postconviction motion relied upon Officer Traxler's report, which was excluded from the trial on hearsay grounds, King's motion did not aver anything about the contents of the report as it relates to this claim. King's motion was not sufficient and did not require a hearing.

¶23 We turn to King's ineffective assistance of trial counsel claims arising from the prosecutor's closing argument. King argues that his trial counsel did not properly confront the prosecutor's improper argument. King complains that during his rebuttal, the prosecutor referred to the jury instruction regarding flight as evidence of consciousness of guilt when no such instruction was requested or given. In addition, the prosecutor suggested that the jury could infer guilt when a defendant flees even though the actual flight instruction merely states that such questions are exclusively for the jury to decide. The circuit court denied an evidentiary hearing on this claim because even though the jury was not so instructed, the prosecutor had the right to argue inferences from the evidence that King fled after the incident. We agree with the circuit court that the prosecutor did not offer improper argument on the question of King's flight from the scene. Counsel is allowed "considerable latitude" in arguing inferences from the evidence

during closing arguments. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

¶24 King argues that the prosecutor also argued improperly when he (1) suggested the danger King posed to Evans when he moved the knife against Evans's neck and (2) referred to the vital arteries found in the neck and to the risk of death or great bodily harm posed by King as he wielded the knife against Evans's neck. The circuit court found that there was a basis in the evidence for the prosecutor's remarks. Evans testified that King "was a little bouncing, little jittery" as he held the knife against Evans's neck. Evans described King as enraged during the incident. The prosecutor offered the jury a permissible inference from Evans's testimony and only required that the jurors use their common sense, not medical knowledge. *See* ***De Keuster v. Green Bay & W. R.R. Co.***, 264 Wis. 476, 479, 59 N.W.2d 452 (1953). The court found no error in the prosecutor's remarks. We agree.

¶25 Next, King challenges his sentence on the grounds that the circuit court relied on inaccurate information and should have accepted King's proferred new factors. At sentencing, the court reviewed the crime of conviction, recklessly endangering safety while using a dangerous weapon, and King's history of criminal offenses, including a dismissed and read-in offense of recklessly endangering safety from 1997 that involved a knife. The court found that some of King's prior history echoed the current offense. The court ruled out probation given King's past revocation from probation. But, the court declined to impose the lengthy sentence sought by the State. The court imposed a five-year term for second-degree recklessly endangering safety (three years of initial confinement and two years of extended supervision) and a concurrent nine-month jail term for disorderly conduct.

¶26 Postconviction, the circuit court denied relief from King's sentence because the record demonstrated that the sentence was a proper exercise of sentencing discretion. The court found that King offered no proof that the court relied upon inaccurate information at sentencing. The court also rejected King's new factors because King's 1997 conviction was not highly relevant to the court's sentencing rationale. We agree. We conclude that the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶76-77, 270 Wis. 2d 535, 678 N.W.2d 197.

¶27 Finally, King argues that his conviction for disorderly conduct should be vacated because it was a lesser included offense of recklessly endangering safety. King concedes that we held the opposite in relation to these crimes, ***State v. Kanarowski***, 170 Wis. 2d 504, 511, 489 N.W.2d 660 (Ct. App. 1992), but argues that ***Kanarowski*** was wrongly decided. Because we are bound by our decisions, ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), we do not address this argument.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).