COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP391 **Cir. Ct. No. 2007CF3288**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PRECIOUS M. WARD,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Precious M. Ward, *pro se*, appeals from a trial court order denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction

relief.[1] We affirm.

BACKGROUND

¶2 In 2010, this court affirmed Ward's conviction for first-degree reckless homicide and being a felon in possession of a weapon. In doing so, we summarized the background facts as follows:

> A criminal complaint was filed charging Ward with first-degree reckless homicide while armed arising out of an incident that occurred on July 1, 2007. The complaint was based on a shooting that took place during an altercation at a clothing store in the City of Milwaukee. When police arrived at the scene, they found the victim, Willie McCollum, lying in front of the store with a bullet wound to his neck.[2]
>
> Prior to trial, the State filed a third-amended information charging Ward with first-degree intentional homicide while armed as a party to the crime and possession of a firearm by a felon. A jury found Ward guilty of the lesser charge of first-degree reckless homicide while armed and of being a felon in possession of a firearm. Ward filed a postconviction motion for a new trial, which the trial court denied without holding a hearing.

State v. Ward, No. 2009AP2085-CR, unpublished slip. op., ¶¶2-3 (WI App Oct. 5, 2010) (footnote omitted).

¶3 At trial, a crucial piece of evidence was a security camera video of numerous altercations that took place over a thirty-minute period among store

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

[2] At trial, a forensic pathologist testified that the bullet first entered McCollum "on the right side of the underside of his jaw." The pathologist said that "sooty like deposits" and "gun powder particles" indicated "that the barrel of the gun was pressed up against the skin at the time the trigger was fired."

employees, customers, and friends who were called to the scene. It appears undisputed that the video shows Ward exiting the store and having physical contact with McCollum, and then McCollum falling to the ground. However, the video apparently does not show a gun.[3]

¶4 At trial, Ward testified that he had a gun in his pocket during his altercation with McCollum. He said that right before McCollum was shot, Ward was pushed out the front door of the store where McCollum was standing. Ward said that McCollum punched him in the mouth. Ward said he was "dizzy and dazed" and then heard a gunshot. Ward said he ran to his car and only after feeling that his gun was warm did he realize that his gun had discharged. Ward said he did not intend to shoot McCollum and only raised his hands to protect himself "because [McCollum] was still punching me real good."

¶5 In our opinion affirming Ward's conviction, one of the issues we addressed was Ward's postconviction assertion that he falsely testified at trial when he said he was the person who shot McCollum. Ward said that he provided this false testimony after his trial attorney told him that a pretrial ruling prevented Ward from arguing that his uncle, Edtwon Maggett, who was also present at the crime scene, was the man who shot McCollum.[4] Ward also asserted that there were witnesses he wanted to call at trial who would have identified Maggett as the shooter.

[3] In the postconviction litigation at issue in this appeal, the trial court said that it had reviewed the video and that "it is not apparent on the video who shot the victim."

[4] Maggett died before Ward's trial.

¶6 This court recognized that prior to trial the State had "filed a motion *in limine* to 'prohibit the defense from introducing any evidence of a 3rd party defense as notice has not been given under ***State v. Denny***,[5] 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).'" ***Ward***, No. 2009AP2085-CR, unpublished slip. op., ¶11 (quoting the State's motion *in limine*; brackets omitted). This court also noted that it was "undisputed that there is no ruling on the motion in the record" and acknowledged Ward's argument that "the lack of a record on this issue denies him his constitutional and statutory right to appeal." ***Id.***

¶7 This court rejected Ward's argument that he was entitled to reconstruct the record concerning the trial court's ruling. In doing so, we noted that Ward had "not submitted affidavits from any of the [witnesses] he referenced, nor has he submitted the discovery materials his postconviction attorney referenced in the affidavit." ***Id.***, ¶16. Based on this lack of documentation, we agreed with the State that Ward was not entitled to record reconstruction "'because Ward's motion failed to demonstrate that there was any substance to his claim that the court's ruling violated his right to present a defense.'" ***Id.*** (quoting the State's brief).

¶8 This court also addressed Ward's assertion that he committed perjury:

[5] In ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), this court adopted the "'legitimate tendency'" test to be applied when a defendant seeks to introduce third-party defense evidence. *See* ***id.*** at 623-24.

Whenever the ***Denny*** case is referenced in this decision, this court has omitted underlining and added italics and bolding.

> We further agree with the State that Ward's claim that he and his trial counsel agreed that Ward needed to perjure himself because of the court's ruling was insufficient to require reconstruction. The State writes: "[W]hile Ward asserted that his counsel was responsible for telling him to lie under oath, this claim, like Ward's arguments about the witnesses he wanted to call, is based solely on Ward's conclusory and unsupported assertions." We agree. Furthermore, we cannot condone Ward's decision to commit what amounts to perjury in response to an unfavorable ruling on a motion *in limine*.

Id., ¶18 (footnote omitted; brackets in original). In a footnote, we added: "We would be shocked if Ward was, in fact, able to substantiate his claim in this regard given that if trial counsel endorsed Ward's decision to lie on the stand, counsel would have suborned perjury." ***Id.***, ¶18 n.7.

¶9 The Wisconsin Supreme Court denied Ward's petition for review in February 2011. In March 2011, Ward filed a *pro se* WIS. STAT. § 974.06 motion that led to a series of postconviction filings and proceedings. That motion alleged that Ward's trial counsel (as well as the different attorney who represented him before trial) failed to provide adequate representation, and that postconviction counsel provided ineffective assistance by failing to provide sufficient documentation to support the allegations in Ward's first postconviction motion.

¶10 After the trial court reviewed Ward's motion, the State's response, and Ward's reply, it appointed an attorney to represent Ward.[6] That attorney later moved to withdraw after concluding that Ward's WIS. STAT. § 974.06 motion and

[6] The Honorable Jeffrey A. Conen reviewed Ward's WIS. STAT. § 974.06 motion and appointed counsel for him. The case was later transferred back to the Honorable Jeffrey A. Wagner, who had presided over the jury trial and the WIS. STAT. § 974.02 postconviction proceedings that preceded Ward's direct appeal. Judge Wagner's order denying Ward's § 974.06 motion is the order at issue in this appeal.

subsequent filings lacked arguable merit. In response, Ward supported the attorney's motion to withdraw and indicated that he would like to proceed *pro se*. Counsel was permitted to withdraw, and Ward was permitted to file an additional written argument.

¶11 The trial court considered the numerous filings and issued an order rejecting some of Ward's arguments. However, the trial court concluded that an evidentiary hearing was necessary to address Ward's claim "that he only testified at trial because the court would not allow evidence to be presented with respect to Maggett being the actual shooter." The trial court explained:

> If this allegation is true, the court will then consider reconstructing the arguments made at the unrecorded motion in limine hearing. In other words, the remaining issues in the defendant's motion will hinge on the court's determination with respect to the defendant's claim that counsel advised him to perjure himself by claiming he shot in self defense in order to reduce his exposure…. The issue of [trial counsel's] ineffectiveness is based on the record as it existed at the time he purportedly advised the defendant, and he was supposedly not part of the motion in limine that was argued.

¶12 A new attorney represented Ward at the hearing. Prior to the hearing, that attorney filed a second amended WIS. STAT. § 974.06 motion and a motion asking the trial court to recuse itself because the court may need to be a fact witness, presumably concerning the motion *in limine* ruling. At the hearing, the trial court implicitly declined to recuse itself and indicated that after trial counsel testified, the parties could offer additional submissions and requests for hearings as needed.

¶13 Trial counsel testified that when he first took over as lead counsel in the case, Ward told him "that he was not the shooter." Trial counsel said Ward told him that Maggett approached the victim and shot him from a distance of five

to ten feet away. Trial counsel said that prior to trial, he and his investigator met with Ward to discuss the case after the physical evidence showed that "the muzzle of the gun was actually against [McCollum's] skin … and there was powder burns on both the clothing and the skin." Trial counsel explained: "So it was a contact wound. So there is no way that the uncle could have done the shooting." Trial counsel said that Ward "eventually admitted that in fact he was the shooter and in fact that the gun accidentally went off in a struggle." Trial counsel denied that he pressured Ward to take the stand and said that he would "never allow a defendant to perjur[e] himself."

¶14 Trial counsel also testified concerning the State's motion *in limine* that sought to prohibit Ward from arguing that a third party shot the victim. Trial counsel said that he did not believe that the trial court ever ruled on the motion *in limine*. Trial counsel added: "I have never seen the transcript of this case but I don't believe [the motion] was [decided] because I believe we abandon[ed] that defense. So in my opinion whether there was a ruling or not, we weren't going with that defense."

¶15 In contrast to trial counsel's testimony, Ward testified that he first learned that his trial counsel was not going to call witnesses to say that Maggett shot McCollum on "[t]he same day that [trial counsel] had me testify," which was the second day of the trial. Ward said that he "[a]bsolutely" did not tell his trial counsel that he did not want to pursue a defense that someone else shot the victim.

Ward also stated that he did not learn that his defense would be "either self-defense or accidental shooting" until the day he testified.[7]

¶16 Ward said that right before Ward testified, trial counsel told him that "the only available defense at that point" was to say it was an accident, or else Ward would spend the rest of his life in prison. Ward said trial counsel told him that the trial court "wouldn't allow [Ward] to testify that [Maggett] was the one tha[t] done the shooting."

¶17 After the hearing, the parties submitted arguments in writing and the trial court issued a written order denying Ward's postconviction motion.[8] The trial court made findings of fact that were consistent with trial counsel's testimony. Specifically, it found that trial counsel and his investigator "determined that [Ward's] version was inconsistent with the physical evidence" and that Ward subsequently admitted to them, prior to trial, that he "was the shooter and that his gun went off accidentally." The trial court further found that trial counsel did not pressure Ward to testify that the gun went off accidentally. Finally, the trial court explicitly found that Ward's testimony "was not credible."

¶18 The trial court concluded that there was no basis for WIS. STAT. § 974.06 relief. It said that while postconviction/appellate counsel's performance

[7] This testimony appears inconsistent with the fact that on the first day of the trial, during opening statements, trial counsel implicitly acknowledged that Ward fired the gun and told the jury that the issue at trial would be whether Ward possessed the intent to kill in the two seconds between the time that he was punched by the victim and the gun went off.

[8] Ward's attorney submitted a letter asserting that it was necessary to address whether the trial court decided the motion *in limine*. The attorney argued that the trial court should recuse itself so that it and the assistant district attorney could be witnesses at a future hearing on that issue.

was deficient "for failing to present the police reports or affidavits from the other witnesses to both the trial court and the appellate court" regarding the alleged hearing on the State's motion *in limine* concerning ***Denny*** evidence, Ward was not prejudiced. Specifically, Ward was not prejudiced because "[t]here is no evidence that a ***Denny*** hearing was held off the record," and in any event:

> [a] reconstruction of the motion in limine that may (or may not) have been heard off the record is not necessary because the defendant knowingly, intelligently and voluntarily determined to pursue a defense that the gun accidentally went off based on the physical evidence in order to increase his chances for acquittal or for obtaining a verdict on a lesser included offense.

The trial court also found that "[b]ased on the physical evidence, there is not a reasonable probability that the jury would have acquitted [Ward] had the ***Denny*** evidence (the other witnesses who believed the uncle had shot the victim) been presented at trial."

¶19 Ward, once again representing himself, filed a motion for reconsideration that included an affidavit from the attorney who represented Ward at the hearing. The affidavit indicated that the attorney believed that additional testimony should be heard concerning trial counsel's testimony that the motion *in limine* had not been decided. The motion further indicated that Ward's mother was available to testify that trial counsel told her that the trial court made a ruling that prevented Ward from calling certain witnesses from the witness list.

¶20 The trial court denied the motion in a short written order, relying on its earlier reasoning. This appeal follows.

DISCUSSION

¶21 Ward presents six primary arguments on appeal: (1) "Ward continues to be denied the right to appeal as a result of the trial court's refusal to reconstruct the trial record"; (2) the trial court's finding that Ward was not entitled to a new trial based on trial counsel's testimony is clearly erroneous; (3) "Ward was compelled to testify by the [trial] court's ruling prohibiting the ***Denny*** defense"; (4) "Ward was denied his absolute right to be present during all critical stages of the trial"; (5) "Ward was denied the effective assistance of postconviction counsel during his direct appeal"; and (6) "Ward was denied the opportunity to call witnesses" at the evidentiary hearing on his WIS. STAT. § 974.06 motion. (Some bolding and some capitalization omitted.)

¶22 We begin by addressing the posture of this case. As noted, Ward had a direct appeal and subsequently filed the WIS. STAT. § 974.06 motion that raised some of the same issues that were addressed on direct appeal, as well as some new issues. A motion brought under § 974.06 is typically barred when filed after a direct appeal unless the defendant shows a sufficient reason why he did not or could not raise the issues previously. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may constitute a sufficient reason. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Here, the trial court considered Ward's claims in the context of ***Rothering***. Specifically, the trial court said that Ward was asserting that his postconviction counsel gave ineffective assistance by not providing adequate documentation to support Ward's first postconviction motion and appeal, and by not asserting that the two attorneys who represented Ward before and at trial were ineffective. With that background in mind, we consider the trial court order denying Ward's

§ 974.06 motion, which was based on the parties' written arguments and the evidentiary hearing.

¶23 At the evidentiary hearing, the trial court weighed the competing testimony and found trial counsel to be the more credible witness. The trial court found that Ward abandoned his position that his uncle was the shooter "three to four weeks prior to trial" after being confronted by trial counsel and an investigator who told Ward that his version "was inconsistent with the physical evidence." It also rejected Ward's testimony that trial counsel forced Ward to admit that he shot the victim. These findings are consistent with trial counsel's testimony—which the trial court was free to accept—and are not clearly erroneous. *See* ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736 ("'[I]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact.'") (citation omitted).

¶24 The trial court further found that there was "no evidence that a ***Denny*** hearing was held off the record" and that in any case, "[a] reconstruction of the motion in limine that may (or may not) have been heard off the record is not necessary." We agree with this analysis. Once the trial court accepted trial counsel's testimony that the decision to abandon the third-party defense was based on the physical evidence and Ward's confession, and not on any pretrial ruling, the specifics of that alleged pretrial ruling became irrelevant. For this reason, we reject Ward's first argument: that he "continues to be denied the right to appeal as a result of the trial court's refusal to reconstruct the trial record." (Bolding and some capitalization omitted.) We reject Ward's argument for a second reason as well: we held in Ward's direct appeal that we could not "condone Ward's decision to commit what amounts to perjury in response to an unfavorable ruling

on a motion *in limine*." *See* ***Ward***, No. 2009AP2085-CR, ¶18. Ward cannot relitigate in a WIS. STAT. § 974.06 motion our ruling that he could not seek to reconstruct the record in order to justify his decision to commit what he later claims was perjury. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

¶25 Ward's next argument is that "the trial court's finding that Ward is not entitled to a new trial based on trial counsel's testimony is clearly erroneous." (Bolding and some capitalization omitted.) Ward argues that the trial court's findings were clearly erroneous for several reasons, none of which this court finds compelling. For example, Ward argues that trial counsel's testimony about when the decision was made to abandon the third-party defense was contradicted by the fact that trial counsel filed a witness list that included the names of those who would testify that Ward's uncle shot the victim. However, trial counsel explained his reason for doing so at the hearing: negotiations in the case continued right up until the trial and for strategy reasons, he did not tell the State that he no longer intended to call those witnesses.

¶26 Ward also argues that trial counsel's testimony that the third-party defense was abandoned weeks before trial is contradicted by a letter he wrote to the Division of Hearings and Appeals seeking to overturn Ward's revocation in a prior criminal case where the revocation was based on the shooting of McCollum. The letter, which appears to have been filed several days before Ward's jury trial in this case began, takes issue with the administrative law judge's finding that Ward was the shooter and urges the Division of Hearings and Appeals to overturn the revocation. At the evidentiary hearing on Ward's WIS. STAT. § 974.06 motion,

neither side asked trial counsel about the letter. This alone provides a basis to reject Ward's argument: he did not elect to present testimony about the letter or include argument about the letter in the post-hearing briefing. Further, we are unconvinced that the letter provides proof that trial counsel's testimony at the hearing was false. The letter was written in a different context and made arguments based on evidence presented several months earlier. It is not inconceivable that trial counsel would pursue one defense in the revocation proceeding and plan to pursue a different defense at trial if the case failed to settle.

¶27 Next, Ward argues that he "was compelled to testify by the [trial] court's ruling prohibiting the ***Denny*** defense." (Some bolding and some capitalization omitted.) This argument fails. Ward is essentially challenging the trial court's findings that Ward decided to abandon the third-party defense after being confronted with the physical evidence and that there was no evidence that a ***Denny*** hearing was conducted. For the reasons stated above, we have concluded that the trial court's findings are not clearly erroneous.

¶28 Ward's fourth argument is that he "was denied his absolute right to be present during all critical stages of the trial." (Bolding and some capitalization omitted.) He argues that there was an unrecorded hearing on his motion *in limine*, that he was not present for the hearing, and that he is therefore entitled to a new trial. We reject this argument for several reasons. First, Ward did not properly raise this issue in the trial court. The attorney who represented Ward for the evidentiary hearing filed a second amended motion for relief under WIS. STAT. § 974.06 that contained two paragraphs of argument related to this issue, asserting that Ward was denied his "absolute right" to be present for all stages of the trial and that postconviction counsel was ineffective for not presenting that argument. However, the attorney did not seek leave of the trial court to file a second

amended postconviction motion and the trial court did not consider the issues raised in that filing. This issue was inadequately presented at the trial court and we decline to be the first court to make rulings on it. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (We generally do not review an issue raised for the first time on appeal.).

¶29 The second reason we reject Ward's argument concerning his right to be present at proceedings is that the trial court found that Ward had not shown that there was, in fact, an off-the-record hearing. This finding is not clearly erroneous. Finally, we agree with the State that Ward has inadequately briefed this issue on appeal by failing to couch his argument in terms of ineffective assistance; he presents no argument concerning what postconviction counsel should have done and how Ward was prejudiced. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may decline to review issues inadequately presented).

¶30 Ward's fifth argument is that he was denied the effective assistance of counsel on direct appeal. Ward argues that his postconviction counsel provided constitutionally deficient representation for failing to include with the postconviction motion documentation supporting Ward's request to reconstruct the record. We have already concluded that even if counsel performed deficiently, Ward was not prejudiced. Therefore, we reject this argument.

¶31 Ward's final argument is that he was denied the opportunity to call certain witnesses during the evidentiary hearing. "The admission of evidence is a decision that is left to the discretion of the [trial] court. We will not find an erroneous exercise of that discretion when the [trial] court has properly applied the facts of record to the accepted legal standards." ***State v. Dunlap***, 2002 WI 19,

¶31, 250 Wis. 2d 466, 640 N.W.2d 112 (citation omitted). In deciding whether to admit evidence or limit testimony, the trial court considers a variety of factors, including whether the evidence is relevant, *see* WIS. STAT. § 904.01, and whether even relevant evidence should be excluded on grounds of prejudice, confusion or waste of time, *see* WIS. STAT. § 904.03.

¶32 Ward asserts that the trial court should have allowed additional testimony concerning whether there was a formal ruling on the motion *in limine*, including testimony from the assistant district attorney and the trial court. For reasons stated above, we are unconvinced that testimony concerning the motion *in limine* was necessary once the trial court determined that Ward admitted to his trial counsel prior to trial that he was the shooter and abandoned his third-party defense. The trial court did not erroneously exercise its discretion in limiting the testimony.

¶33 Ward also argues that he "intended to call [his mother] to testify … as to what her discussions with [trial counsel] were, prior to Ward's trial, as they related to why Ward's witnesses would not be allowed to testify." While that may have been Ward's intention, he never asked the trial court to allow his mother to testify and he did not submit an affidavit from his mother outlining what she would have testified to until after the evidentiary hearing. Further, this potential testimony appears to relate to the alleged motion *in limine* ruling, which we have already ruled became irrelevant after Ward was confronted with the physical evidence and admitted he shot McCollum. For these reasons, Ward has not shown that the trial court erroneously exercised its discretion by not hearing testimony from Ward's mother, especially where he did not even ask to present her as a witness at the evidentiary hearing.

¶34 For the foregoing reasons, we reject Ward's arguments and affirm the trial court's order denying Ward's WIS. STAT. § 974.06 motion for postconviction relief.

By the Court.—Order affirmed.

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