COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2384 **Cir. Ct. No. 2000CF3363**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD S. CURTIS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Reginald S. Curtis, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction relief.[1] We

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

affirm on both procedural and substantive grounds, and we decline to order a new trial in the interest of justice.

BACKGROUND

¶2 This is the third appeal related to Curtis's conviction for first-degree reckless homicide. In his direct appeal, we summarized the background facts:

> Curtis was in the home of Juwan Bates to obtain drugs that he could sell. Curtis had a gun, and he testified that he had seen Bates with a gun at times in the past. Curtis testified that he owed Bates money, and Bates became angry. Curtis told the jury that Bates began to reach behind his back. According to his own testimony, Curtis panicked, pulled his gun, and fired. The shot hit Bates in the neck, severing his spinal cord. Bates died. Although Curtis maintained that he had fired in self-defense, he admitted that he never saw Bates with a gun that day.

State v. Curtis, No. 2002AP292, unpublished slip order at 2 (WI App March 10, 2003). While Curtis's defense was that he shot Bates in self-defense, the State argued that Curtis "was planning on going over there with a loaded gun, going into that house and robbing Mr. Bates of his drugs and possibly his money." The jury found Curtis guilty of first-degree reckless homicide and not guilty of armed robbery.[2]

¶3 After postconviction counsel was appointed, Curtis filed a postconviction motion seeking a new trial based on newly discovered evidence. The motion offered an expert report to refute trial testimony concerning a gun that

[2] Curtis argued that a shoe box that he took from the home when he fled was empty, so he could not be guilty of armed robbery. The State suggested that there were drugs in the shoe box, but it did not produce any direct evidence that the shoe box contained drugs or other property.

was discovered near Bates while paramedics were administering medical treatment. That report, written by Dr. Kenneth Siegesmund, Ph.D., contradicted testimony from a detective that "the gun was warm because it was next to the defendant's skin." The trial court denied the motion.[3] On appeal, Curtis argued that the newly discovered evidence warranted a new trial. We affirmed, concluding "that the [trial] court correctly held that the new evidence was not relevant to Curtis's case and was not likely to yield a different result if a new trial were to be granted." *See* ***id.*** at 1-2.

¶4 In 2006, Curtis filed a *pro se* WIS. STAT. § 974.06 motion alleging that the trial court "committed constitutional error when it" answered some jury questions outside Curtis's presence. The motion alleged that both trial counsel and postconviction counsel provided ineffective assistance by failing to object or file a motion related to that issue. The trial court denied the motion and this court affirmed. *See* ***State v. Curtis***, No. 2006AP909, unpublished slip op. (WI App Feb. 6, 2007).

¶5 In 2013, Curtis filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. Curtis sought a new trial based on what he claimed was newly discovered evidence concerning the bullet's trajectory and his state of mind. Curtis supported his motion with two expert reports.

¶6 The first report, dated February 2013, was authored by Dr. Siegesmund, the same expert who offered an opinion related to the

[3] The Honorable Daniel L. Konkol denied the postconviction motion, while the Honorable Jeffrey A. Wagner presided over the trial, sentencing, and the *pro se* postconviction motions that were filed after Curtis's direct appeal, including the motion that is at issue in this appeal.

temperature of the gun that was cited years earlier in Curtis's WIS. STAT. § 974.02 postconviction motion. Dr. Siegesmund's report opined that, based on the trajectory of the bullet, Curtis "was running when he shot Mr. Bates," as Curtis testified. According to the motion, Curtis hired Dr. Siegesmund to produce the report, and was able to do so only "after Curtis saved sufficient funds to pay for the services of Dr. Siegesmund."

¶7 Curtis's postconviction motion also contained a July 2013 expert report from a Tennessee police officer, Rochell Staten, who offered several opinions about Curtis's likely state of mind at the time of the shooting. For instance, the officer opined that based on the record, "[i]t was reasonable [for Curtis] to assume by the content and volume of Bates'[s] statements [to Curtis], that Bates was reaching for the small of his back." The report also offered the opinion that it was "more plausible, that Curtis struck Bates, as described by Curtis and supported by the physical evidence, as he was running for the door, shooting behind, and upward."

¶8 The trial court denied Curtis's motion in a written order. The trial court said that although the motion indicated that it was based on the existence of new evidence, "it is in substance an ineffective assistance claim [because t]he issue raised is an issue that existed all along and only required an expert to support the argument." (Footnote omitted.) The trial court concluded that the motion was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Curtis "should have raised the trajectory issue previously in his former 2006 motion which was filed under [WIS. STAT. §] 974.06 … and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675[, 556 N.W.2d 136] (Ct. App. 1996)[,] when he alleged that postconviction counsel was ineffective for other reasons." (Bolding and italics added; underlining omitted.)

¶9 As for Curtis's suggestion that his presentation of Dr. Siegesmund's report was delayed due to Curtis's indigency, the trial court stated: "If he did not have the funds [at the time he filed his first WIS. STAT. § 974.06 motion] to hire an expert to support his argument, he should have held off on filing his ***Rothering*** motion until he could raise all of his issues at one time." (Bolding and italics added; underlining omitted.)

¶10 The trial court further concluded that even if it were to consider Dr. Siegesmund's opinion, "it would find that his report would not be grounds to order a new trial" because "the report is based on multiple assumptions of facts, and some of those assumed facts contradict the testimony at trial." The trial court continued:

> Even if the facts he assumes were accurate, however, his report does not support or contribute to the defendant's self[-]defense claim. Whether the bullet was fired straight on at shoulder level or at an angle from the beltline doesn't make a difference to the reasonableness of the defendant's decision to fire his weapon under the circumstances presented to the jury. It simply doesn't matter which way his arm was raised or which way he was turned. The trajectory of the bullet doesn't change the crux of the jury's finding, i.e.[,] that [Curtis] didn't act reasonably in response to the victim's statements. The issue in self[-]defense is the reasonableness of the defendant's decision to fire a weapon. There is not a reasonable probability that the jury would have found his behavior was justifiable or reasonable had it heard expert testimony that the defendant was turned 90 degrees away from the victim with his gun pointed upward 20 to 30 degrees at beltline from the floor. The report simply does not establish that self[-]defense was more probable than not. The jury found that it wasn't reasonable to use the kind of force that the defendant did under the particular circumstances, and the expert's opinion doesn't change that finding in any respect.

This appeal follows.

DISCUSSION

¶11 On appeal, Curtis argues: (1) Curtis's inability to hire experts constituted a sufficient reason for not raising the issue in his previous WIS. STAT. § 974.06 motion; (2) the trial court failed to review the expert's report concerning Curtis's state of mind; (3) the two expert reports constitute newly discovered evidence; and (4) Curtis deserves a new trial in the interest of justice.[4] As noted, the trial court denied Curtis's motion on both procedural and substantive grounds. We affirm on those grounds as well, and we decline to grant a new trial in the interest of justice.

I. Procedural grounds.

¶12 We agree with the trial court that Curtis's motion is procedurally barred. He has not offered a sufficient reason for failing to present these expert opinions in his WIS. STAT. § 974.02 postconviction motion or in his WIS. STAT. § 974.06 motion. *See* § 974.06(4).[5] The only reasons he offers for not previously

[4] Curtis also presents a single-paragraph argument that asserts: "The combined effect of the new evidence and the identified errors demonstrate a prejudicial effect on the criminal proceedings." (Some capitalization omitted.) Curtis argues that the court should consider "the cumulative effect of all of the errors that matter." Curtis has not adequately explained how this standard relates to his motion or his appeal. He has failed to adequately develop this argument, and we will not abandon our neutrality by developing the argument for him. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

[5] WISCONSIN STAT. § 974.06(4) provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or

(continued)

including the expert opinions are that he lacked the funds to pay the experts to produce the reports and he did not know until the reports were written that they would provide a basis for appeal. But as the State notes, "there is no 'indigency' exception to [WIS. STAT.] § 974.06(4)'s 'sufficient reason' argument." Moreover, a lack of funds does not explain why Curtis's postconviction counsel—who had access to funds to hire Dr. Siegesmund on the gun temperature issue—did not pursue the issue. Curtis explicitly declines to fault either his trial counsel or postconviction counsel for failing to address the issues he now raises.[6] Thus, he cannot rely on ineffective assistance as a reason for not raising the issue in his WIS. STAT. § 974.02 motion. *See* ***Rothering***, 205 Wis. 2d at 682 (ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise an issue in an earlier motion).

¶13 Curtis has already had two opportunities to raise postconviction issues related to the bullet's trajectory and his state of mind. He has not shown a sufficient reason for not raising these issues sooner, or for waiting to file a single WIS. STAT. § 974.06 motion that raised all of his issues at the same time. Curtis argues that he should not be penalized for diligently pursuing some claims in his first § 974.06 motion and waiting until he had available funds to pursue his other claims in a second motion, but § 974.06 "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended

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> was inadequately raised in the original, supplemental or amended motion.

[6] Curtis states that he did not discuss these potential issues with either trial or postconviction counsel.

motion." *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Curtis's motion is procedurally barred.

II. Substantive grounds.

¶14 We agree with the trial court that Curtis's motion also fails on substantive grounds, and we will briefly address Curtis's arguments with respect to the substance of the motion.

¶15 First, we reject Curtis's argument that the trial court "failed to reference or consider the report of Officer Rochell Staten surrounding the state of mind of the defendant at the time of the shooting." In its written decision, the trial court included a long footnote addressing the report from Officer Staten. The trial court wrote:

> The court rejects this report as wholly speculative as to this case. [The officer] opines in her report that the defendant could not have intentionally fired his gun, that he was running when he fired his gun, and that he would have aimed for the torso of the victim if he were trying to intentionally shoot him. She further opines where the bullet would have hit the victim based on where the defendant claims he was standing and where the victim was carrying his gun, all of which is completely speculative. It does not constitute "evidence," but is rather more in the nature of general experience. Moreover, it focuses a great deal on whether the defendant's actions were intentional or not. The case was presented to the jury as first[-]degree *reckless* homicide; the defendant claimed he acted in self[-]defense, which constitutes an intentional act. For this report to contend that the defendant did not act with intent flies in the face of his theory of defense. The court finds the "report" to be of little evidentiary value except as to the premise that drug dealers tend to be armed.

Clearly, the trial court considered—and rejected—Curtis's assertion that this expert's report constituted new evidence that justified a new trial.

¶16 In his reply brief, Curtis states that he "remains steadfast in his argument [that] the trial court failed to properly review this expert's findings when making [its] decision." Thus, he does not attempt to address the trial court's assessment that the officer's expert opinion failed to justify a new trial. We will not develop arguments for him, *see* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988), and, therefore, we will not analyze the substance of the officer's expert report.

¶17 The second issue related to the substance of the motion is whether the trial court erroneously exercised its discretion when it denied Curtis's request for a new trial based on newly discovered evidence. To obtain a new trial based on newly discovered evidence, a "defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant makes this showing, the trial court must determine whether there is a reasonable probability that a new trial would produce a different result. ***Id.*** "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis. 2d 28, 750 N.W.2d 42 (citations and one set of quotation marks omitted; bracketing supplied by ***Plude***). This final determination presents a question of law that we review *de novo*. *See* ***id.***, ¶33.

¶18 Curtis argues that he established the first four factors. In response, the State argues that at least the first two factors have not been established, and it adds: "[e]ven assuming he proves the first four factors by clear and convincing

evidence, Curtis faces a high hurdle with respect to the fifth factor because, 'the hardest requirement to meet is that the offered evidence in view of the other evidence would have probably resulted in an acquittal.'" *See* ***Lock v. State***, 31 Wis. 2d 110, 117, 142 N.W.2d 183 (1966). The State explains:

> Curtis must prove a reasonable probability that retrial with the new evidence would result in acquittal. If the new evidence would only serve to impeach the credibility of witnesses who testified at trial, it is insufficient as a matter of law to warrant a new trial because it does not create a reasonable probability of a different result.

(Citation omitted.)

¶19 We read the trial court's decision as concluding that Curtis failed—at a minimum—to establish the third and fifth factors of the test for newly discovered evidence, and we agree with those conclusions. Curtis has not proven that the trajectory evidence "is material to an issue in the case" or that a new trial that included the testimony of Dr. Siegesmund would produce a different result. *See* ***McCallum***, 208 Wis. 2d at 473. The issue at trial was whether Curtis caused Bates's death by criminally reckless conduct that showed utter disregard for human life and whether Curtis acted in self-defense. Curtis's conduct was criminally reckless whether he shot the gun while it was pointed at Bates or while he was turning to run. Further, Curtis's claim of self-defense was that he fired the gun at Bates because he believed Bates was reaching for a gun. Again, as the trial court observed: "It simply doesn't matter which way his arm was raised or which way he was turned."

III. Request for a new trial in the interest of justice.

¶20 The final issue we address is Curtis's argument that this court should exercise its discretionary authority and grant him a new trial in the interest of

justice "because the real controversy has not been fully tried." *See* WIS. STAT. § 752.35. The real controversy is not fully tried when the jury is not given an opportunity to hear important testimony bearing on an important issue in the case. ***State v. Schumacher***, 144 Wis. 2d 388, 400, 424 N.W.2d 672 (1988). For the reasons already discussed, we do not believe that the jury was deprived of an opportunity to hear important testimony that bears on an important issue in the case. We decline to exercise our discretionary authority to grant Curtis a new trial in the interest of justice.

By the Court.—Order affirmed.

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