COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1114 **Cir. Ct. No. 2000CF877**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD W. WOLFE, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Ronald W. Wolfe, Jr. appeals from an order denying his WIS. STAT. § 974.06 (2011-12)[1] postconviction motion for a new trial

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

on the grounds of newly discovered evidence, ineffective assistance of postconviction counsel, and in the interest of justice. Wolfe additionally argues that the trial court erred by denying his motions for the appointment of counsel and postconviction discovery. We reject each of Wolfe's claims and affirm.

¶2 In 2001, a jury found Wolfe guilty of first-degree intentional homicide in connection with the death of Ronald D. Carter. As pertinent to this appeal, Carter was found stabbed to death in his home. Wolfe was linked to the crime through physical evidence. Wolfe told police he had informed Carter that they could not have a sexual relationship and that later, Carter came at him with a steak knife stating "[i]f I can't have you, no one else can." Wolfe told police that he wrestled the knife from Carter and stabbed him in the neck several times. According to Wolfe, although he was bleeding profusely, Carter assured him he would be okay and told him not to call for assistance. Wolfe said he then passed out and awoke to find Carter dead. Wolfe portrayed Carter as a jealous, drunk, suicidal, angry man and argued that he stabbed Carter in self-defense.[2] At trial, the State presented a letter that Carter wrote to the circuit court several days before his death indicating that though he had posted Wolfe's bail, he now wanted the bail revoked because Wolfe was using cocaine. Carter added that Wolfe had been verbally abusive and threatening, and that he feared for his safety as long as Wolfe was not in custody.

[2] In support, Wolfe presented a witness who testified that Carter had helped him obtain release on bail, offered him a place to live, and that once he refused Carter's sexual advances, Carter "lunged at" him with a knife saying, "if I can't have you, no one is going to have you." The witness also testified that Carter would get angry when he refused Carter's sexual advances and would threaten to kick him out or call his probation officer.

¶3 Wolfe pursued postconviction relief alleging various claims, including the ineffective assistance of trial counsel. The trial court denied his postconviction motion and Wolfe appealed. This court affirmed the judgment of conviction and order denying postconviction relief. *See* ***State v. Wolfe***, No. 2002AP3076-CR, unpublished slip op. (WI App Nov. 5, 2003). In pertinent part, we rejected Wolfe's argument that trial counsel was "deficient for not seeking the admission of letters recovered from Carter's house or using those letters in cross-examination" to demonstrate "Carter's moods and capacity for anger and threats." ***Id.***, ¶11. We stated:

> Evidence was presented that Carter threatened another inmate with a knife when sex was rejected. Further, the evidence was that Wolfe was aware of that behavior. In contrast, there was no suggestion that Wolfe was aware of the numerous letters and their content such that it would have impacted on his interpretation of Carter's behavior on the day of the stabbing. There was also some evidence that Carter had written threatening letters with vile language. The jury knew the information Wolfe contends the letters would have imparted. The letters would have served nothing more than prejudicial piling on of extraneous information. No legal basis for admission of the evidence has been advanced. Our confidence in the outcome is not undermined by counsel's failure to utilize the letters at trial.

Id., ¶12. The Wisconsin Supreme Court denied Wolfe's petition for review. Thereafter, Wolfe filed a WIS. STAT. § 974.06 postconviction motion which was summarily denied by the trial court. We affirmed the trial court's order. ***State v. Wolfe*** (***Wolfe II***), No. 2009AP734, unpublished slip op. (WI App Apr. 21, 2010).[3]

[3] We also denied Wolfe's petition for a writ of habeas corpus in this court. ***State ex rel. Wolfe v. Grams***, No. 2009AP870-W, unpublished slip op. (WI App Apr. 15, 2009). Additionally, Wolfe filed a Federal Habeas Corpus Petition, which was similarly denied. ***Wolfe v. Grams***, No. 05-C-85, unpublished slip op., 2007 U.S. Dist. LEXIS 41620, 2007 WL 1655457 (E.D. Wis. June 7, 2007).

¶4 In December 2012, Wolfe filed the 162-page WIS. STAT. § 974.06 postconviction motion underlying this appeal. In addition to re-alleging various ineffective assistance of counsel claims, Wolfe's primary contention was that he had discovered new evidence entitling him to a new trial. In support, Wolfe attached affidavits from Todd Thornton, an inmate in the Wisconsin Prison System who stated that prior to Carter's death, they had corresponded about Carter's relationship with Wolfe. Thornton stated that during his telephone calls with Carter in September 2000, Carter had informed him that he had fallen for a man named Ron Wolfe "in every way physically, mentally and sexually" and had bailed Wolfe out of jail. Thornton's affidavit further averred that in September 2000, Carter stated he was extremely angry with Wolfe because he had seen Wolfe having sex with someone else and believed that Wolfe was just using him after Carter posted his bail. According to Thornton's affidavit, Carter told him that because Wolfe had cheated on him, "he was planning to do whatever he could to hurt Mr. Wolfe, and falsely accuse Mr. Wolfe of stealing Mr. Carter's money and revoke his bail." Thornton further averred that the last time he heard from Carter was "by phone or mail during September 2000," at which time Carter was extremely angry and "said he should rape and kill Mr. Wolfe like Jeffrey Dahmer, and could use pills he saved to kill himself."

¶5 The trial court scheduled a motion hearing for April 25, 2013, and Wolfe and the State filed additional pleadings. At the hearing, Wolfe argued that Thornton's affidavits were relevant to demonstrate Carter's angry state of mind and "aggressive homosexuality," and to impeach Carter's letter to the circuit court requesting the revocation of Wolfe's bail. The trial court denied Wolfe's motions for a new trial and postconviction discovery, determining that most of his arguments were "in effect" raised in prior appeals, and that the "gist" of the

information Wolfe now claims should have been presented at trial was in fact placed before the jury "even though the witnesses were not called and that this matter was fully vetted."

The trial court properly denied Wolfe's motion for a new trial based on newly discovered evidence.

¶6 Wolfe argues that the affidavits of Todd E. Thornton constitute newly discovered evidence because they corroborate Wolfe's claim of self-defense by:

> describing how and why [Wolfe] had a reasonable belief that he was preventing or terminating an unlawful interference with his person, was in imminent danger of death or great bodily harm from Ronald Carter, and had a need to use force on the date in question.

A defendant seeking a new trial based on newly discovered evidence must prove by clear and convincing evidence all of the following: (1) the evidence was discovered after trial, (2) "the defendant was not negligent in seeking the evidence, (3) the evidence is material to an issue in the case," and (4) the evidence is not merely cumulative to the evidence that was introduced at trial. ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. If all four factors are proven, "then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. A trial court's decision whether to grant or deny a newly-discovered evidence motion is reviewed for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590.

¶7 We will assume for purposes of this decision that Wolfe has established the first two prongs.[4] As to the third prong, we agree with the trial court that Wolfe has failed to demonstrate that the information contained in Thornton's affidavit is material to the issue of self-defense.[5] When self-defense is raised as an issue, "the defendant may, in support of the defense, establish what the defendant believed to be the victim's violent character by proving specific instances of violence within his knowledge at the time of the incident." ***State v. Wenger***, 225 Wis. 2d 495, 507, 593 N.W.2d 467 (Ct. App. 1999). "If the defendant seeks to admit evidence of the victim's prior violent acts to establish the defendant's own state of mind at the time of the assault, it must be shown that before the assault, the defendant knew of the victim's violent acts." ***Id.*** Because it is undisputed that Wolfe did not learn about Carter's statements to Thornton until

[4] The State concedes that the evidence was discovered after trial, and we agree. Though the State argues that Wolfe was negligent in seeking to discover the evidence sooner, we will assume for the sake of this opinion that he was not negligent.

[5] As explained in the State's trial brief and considered by the trial court, we previously concluded that because Wolfe was not aware of Carter's acts of violence as reported by his daughter, he was not entitled to use this information to support his self-defense claim. *See* ***Wolfe II***, No. 2009AP734, unpublished slip op., ¶10. Despite Wolfe's claim that the trial court did not evaluate the merits of his newly discovered evidence claim, it is clear from the record that the trial court applied the correct analysis.

years after the assault, Thornton's testimony is immaterial to Wolfe's state of mind.[6]

¶8 We also reject Wolfe's claim that Thornton's affidavits are material to impeach the credibility of Carter's bail letter to the circuit court, Thornton's account of Carter's anger does not directly contradict Carter's letter to the court indicating that Wolfe had verbally abused and threatened him and that Carter was afraid of Wolfe. Fear and anger are not mutually exclusive, and nothing in Thornton's affidavit states that Carter told him he had lied about being afraid of Wolfe in order to get his bail revoked. Additionally, Carter's letter to revoke bail was premised on Wolfe's cocaine use, not his thievery.[7] The bail letter did not state that Wolfe had stolen money from him, nor does Thornton's affidavit indicate that Carter told him his statement that Wolfe had used cocaine was false.

¶9 We similarly reject Wolfe's assertion that Carter's statements to Thornton corroborate his self-defense claim by evincing Carter's angry state of mind and "aggressive homosexuality." Here, Wolfe claims that Carter's bail letter

[6] According to Wolfe, ***State v. Wenger***, 225 Wis. 2d 495, 593 N.W.2d 467 (Ct. App. 1999), stands for the proposition that a threat of which the defendant was unaware can support a self-defense claim. He cites to language stating that evidence other than the defendant's own statements may be admitted to corroborate a defendant's self-defense claim, and that "the witnesses need not have communicated these observations to the defendant." ***Id.*** at 508. Wolfe's out-of-context citation fundamentally misconstrues ***Wenger***. The ***Wenger*** court recognized that where a defendant is aware of a victim's violent acts, corroboration of the defendant's observations may be helpful and necessary. Therefore, in support of a self-defense claim, a defendant may offer the testimony of witnesses who observed a victim's violent acts but did not communicate their observations to the defendant in order "to prove that the particular acts *of which the defendant claims knowledge* actually occurred." ***Id.*** (emphasis added).

[7] Carter's bail letter eschewed the use of cocaine, stating that it was "not consistent with the law and is not considered by me to warrant [Wolfe] remaining on release." However, the jury learned that in fact, cocaine was found in Carter's system at the time of his death. This fact impeached the credibility of Carter's bail letter and the jury was given reason to question Carter's veracity.

"describ[ed] Wolfe as the first aggressor" and that Thornton's affidavits are relevant to show that Carter was actually the aggressor on the night in question. We disagree with both characterizations. The bail letter did not speak to the events of the night in question. Carter never claimed to Thornton that he was planning to stab Wolfe. In any event, Carter's generalized threats to get back at Wolfe do not explain why Wolfe stabbed Carter several times in the neck and then did nothing about it for many hours.

¶10 Finally, we conclude that under the newly discovered evidence test, there is no reasonable probability that the information would have changed the jury's verdict. ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 ("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.'") (citation omitted). Whether newly discovered evidence would change the result of the trial is a question of law considered independently by an appellate court. ***Plude***, 310 Wis. 2d 28, ¶33.

¶11 First of all, Thornton's statements are hearsay, which is generally inadmissible. Second, because Wolfe was unaware of the statements, they are irrelevant to the issue of self-defense. Third, even assuming that Thornton would be permitted to testify consistent with his affidavits, there are inherent credibility problems with Thornton's ability to vividly recall detailed statements made more than a decade earlier which he admittedly did not take seriously or consider to be important. Fourth, even if the jury did believe that Carter made the statements attributed to him by Thornton, it is not reasonably probable that the jury would have reached a different result. The information in the affidavits was cumulative. Wolfe's theory that Carter was the angry, rejected aggressor and that Wolfe acted

in self-defense was vetted at trial and rejected by the jury. Additionally, there was ample evidence other than the bail letter that Carter was afraid of Wolfe, and the wounds Wolfe admittedly inflicted were consistent with an intent to kill.

The trial court properly denied Wolfe's motions seeking the appointment of counsel, the testing of evidence, and postconviction discovery.

¶12 Wolfe requested that the trial court appoint counsel, arguing that he was indigent, "the legal issues involved are complex," and he needed assistance with subpoenaing witnesses and testing "the blood and pills in possession of the State[.]" The trial court informed Wolfe that based on his submissions, it would not appoint counsel. Wolfe admitted that he had decided not to contact the Office of the State Public Defender (SPD). Wolfe argues that the trial court erroneously exercised its discretion by "ignor[ing]" WIS. STAT. § 974.06(3)(b), which provides:

> (3) Unless the [974.06] motion and the files and records of the action conclusively show that the person is entitled to no relief, the court shall:
>
> ….
>
> (b) If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and the appointment of counsel under [WIS. STAT.] ch. 977.

¶13 The trial court properly exercised its discretion in denying Wolfe's motion to appoint counsel. Wolfe had no constitutional right to counsel in this WIS. STAT. § 974.06 postconviction motion collaterally attacking his conviction. ***State v. Evans***, 2004 WI 84, ¶32, 273 Wis. 2d 192, 682 N.W.2d 784, *criticized on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d

352, 714 N.W.2d 900. Similarly, Wolfe had no statutory right to appointed counsel in this matter.[8] The trial court determined that Wolfe's motion was without merit and that it was unnecessary to refer the matter to the SPD. *See* § 974.06(3)(b). Wolfe's reliance on ***State v. Dean***, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991), is misplaced because he did not first seek SPD representation and had no constitutional right to counsel in this matter.

¶14 Wolfe also filed motions requesting postconviction discovery. A defendant has a right to postconviction discovery when he or she establishes that the sought-after evidence is consequential to an issue in the case and there is a reasonable probability that the evidence would have changed the result of the trial. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 320-21, 323, 588 N.W.2d 8 (1999). Wolfe's first motion requested the testing of "pills" found in Carter's apartment, and his own blood sample taken in 2000 as part of the State's investigation. Wolfe states that he reported to police having felt "drowsy after consuming drinks with Carter" and opines that Carter may have used the unidentified pills to drug him.

¶15 The trial court properly denied Wolfe's motion for evidence testing. Wolfe was aware of his alleged drowsy state, the recovery of pills, and the taking of his blood at the time he prosecuted his prior appeals. He has not offered a sufficient reason for failing to raise this claim earlier, and it is procedurally barred. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); *see also* WIS. STAT. § 974.06(4). Aside from any procedural bar, Wolfe

[8] In matters such as a WIS. STAT. § 974.06 postconviction motion, pursuant to WIS. STAT. § 977.05(4)(j), upon the request of an indigent person or referral by the court, the State Public Defender may, in its discretion, appoint counsel if it "determines the case should be pursued."

has failed to show that the pills or his blood sample are preserved and available for testing. It is purely speculative to assume that even if they could be tested, the pills would be shown to cause drowsiness, that Carter put the pills in Wolfe's drink, or that the pills caused Wolfe to violently and repeatedly stab Carter.

¶16 Wolfe also contends that the trial court erred in denying his motion which was filed three days before the hearing and requested access to various police records from the original investigation, including letters that Carter may have written to his family members and daughter. As noted by the trial court, this court previously addressed and rejected Wolfe's contention that trial counsel was ineffective for not further investigating or seeking the admission of letters recovered from Carter's house, ***Wolfe***, No. 2002AP3076-CR, unpublished slip op., ¶¶11-12, or "a police report that would have demonstrated or led to proof of Carter's 'deviant personality' and violent tendencies." *See* ***Wolfe II***, No. 2009AP734, unpublished slip op., ¶¶8-12. A matter once litigated may not be relitigated on a subsequent postconviction motion no matter how artfully rephrased. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

The trial court properly denied Wolfe's ineffective assistance of counsel claims.

¶17 Wolfe argues that trial counsel was ineffective because he "failed to review available discovery material information, and locate identified witnesses whose testimony could support/corroborate Wolfe's claim of self defense." Wolfe has alleged the ineffective assistance of counsel in at least three prior proceedings. With the exception of his claim relating to the Thornton affidavits, we decline to address Wolfe's allegedly new claims of ineffective assistance of counsel. Many of these claims were raised and decided in prior appeals. To the extent that Wolfe

offers new details in an attempt to cast his stale claims in a fresh light, they will not be re-addressed. *See* ***Witkowski***, 163 Wis. 2d at 990. To the extent that Wolfe disagrees that his claims are merely repackaged, they are nonetheless procedurally barred because they could have been raised in his prior appeals, and Wolfe has a failed to establish a sufficient reason for failing to raise them earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶18 We now turn to Wolfe's claim that trial counsel was ineffective for failing to discover the information provided in Thornton's affidavits, and that postconviction counsel was ineffective for failing to raise this claim.[9] The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

¶19 We determine that trial counsel's failure to locate and interview Thornton was not deficient. See ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985) (whether counsel's conduct violated the defendant's right to

[9] In addressing Wolfe's claim that postconviction counsel was ineffective, we first focus our analysis on trial counsel's performance. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

effective assistance of counsel is a legal determination, which this court decides de novo).[10] According to Wolfe, within the discovery provided to trial counsel was a police report listing letters found during a search of Carter's residence, including a letter to Carter signed only "Todd." Counsel's failure to follow up on this brief reference did not fall below an objective standard of reasonableness. Counsel did not perform deficiently by failing to find a person that no one, including Wolfe, knew about.

A new trial in the interest of justice is not warranted.

¶20 Finally, Wolfe seeks a new trial under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried. Wolfe must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

[10] We note that Wolfe did not subpoena any of his prior attorneys to the April 25, 2013 hearing, and, therefore, could not establish his ineffective assistance of counsel claim. A hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), is "a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *See* ***State v. Beauchamp***, 2011 WI 27, ¶39 n.32, 333 Wis. 2d 1, 796 N.W.2d 780. Nonetheless, we have examined Wolfe's pleadings and determine that the record conclusively demonstrates that he was not entitled to an evidentiary ***Machner*** hearing. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (a defendant is entitled to an evidentiary hearing if his or her motion raises sufficient facts which, if true, would entitle him or her to relief; a defendant is not entitled to an evidentiary hearing if the motion presents only conclusory allegations or the record conclusively demonstrates that the defendant is not entitled to relief).

¶21 Our review of the files and proceedings in this case convinces us that the central controversy in this case, including the issue of self-defense, was fully vetted at trial. The jury was presented with and rejected Wolfe's theory. Nothing Wolfe has presented in this appeal persuades us that a new trial in the interest of justice is warranted.

By the Court.—Order affirmed.

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