COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0557-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL K. MATAYA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Randall K. Mataya appeals from a judgment of conviction of first-degree intentional homicide and first-degree sexual assault and from an order denying his motion for postconviction relief. He seeks a new trial on the grounds that the prosecution failed to disclose exculpatory evidence, that newly discovered or discoverable evidence exists, and that he was denied the

effective assistance of counsel. We reject his claims and affirm the judgment and the order.

Pamela Claflin was seen leaving a Manitowoc tavern with Mataya around 9:00 p.m. on September 13, 1993. She was reported missing the next day and her body was discovered on September 21, 1993, in West Manitowoc.

The first issue pertains to the testimony provided by Donald Hertel. Hertel described a three-week automobile trip he took with Mataya in November 1993 during which Mataya said that he had killed a woman called "Pamela." Hertel recounted what Mataya had said about the killing, including a description that Mataya had bitten the woman's breast, beat her in the head in the temple area, strangled her with her pants around her neck, removed her clothes after the death, thrown the pants away from the body, and subsequently cleaned blood stains from his own white pants by soaking the pants in bleach. Mataya had told Hertel that the next day he washed out his car. Hertel disclosed Mataya's admissions to a Manitowoc County sheriff's officer in meetings held on February 17, February 21, March 7 and August 15, 1994.[1] During these discussions, Hertel was seeking to have certain misdemeanor charges dropped and be reinstated to parole in a Sheboygan County case. Early in his testimony, Hertel admitted that in exchange for his cooperation and testimony he would receive $1000 reward money and a favorable letter to the parole commission. On cross-examination, Hertel was asked whether consideration for his testimony included burglary charges in Sheboygan County being dropped. Hertel answered "no."

[1] The first three meetings with Hertel were conducted while he was in custody in the Sheboygan County jail. The August 15, 1994 meeting was held at the Racine Correctional facility where Hertel was serving a sentence on a Sheboygan County conviction.

Mataya claims that the State violated its continuing duty to disclose exculpatory evidence by not revealing that Hertel had in fact entered into a nonprosecution agreement in exchange for his testimony. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963); ***State v. Ruiz***, 118 Wis.2d 177, 187-88, 347 N.W.2d 352, 357 (1984). The State concedes that Hertel testified in part due to an August 15, 1994 nonprosecution agreement which resulted in four Sheboygan County burglary charges being dropped. The State assumes that it must bear the responsibility for the failure to correct Hertel's denial that the charges were dropped in consideration of his testimony.[2]

> In ***Brady***, the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment. The ***Brady*** rule applies as well where the nondisclosure of the evidence goes to the credibility of a witness. However, evidence is material under ***Brady*** "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

State v. Pettit, 171 Wis.2d 627, 644, 492 N.W.2d 633, 641 (Ct. App. 1992) (citations omitted; quoted source omitted).

Here, the first two components of the required showing for a ***Brady*** violation—that the prosecutor withheld evidence and the evidence was favorable to the defendant—are satisfied. Our consideration of Mataya's claim is immediately focused on whether the materiality component is met. Under the

[2] The nonprosecution agreement was presented to Hertel by a City of Sheboygan Police Department detective at the August 15, 1994 meeting at which the Manitowoc County sheriff's officer was present. The trial court found that the Manitowoc County prosecutor was unaware of the agreement with Hertel. Because the Manitowoc County sheriff's officer was aware of the agreement and sitting with the prosecution during Hertel's testimony, the State accepts responsibility for the failure to correct Hertel's testimony about consideration he received.

materiality prong, we consider whether there is a "showing that the favorable [nondisclosed] evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***Kyles v. Whitley***, 514 U.S. 419, 435 (1995). With respect to the prosecution's failure to correct Hertel's testimony, "[a] new trial is required if 'the false testimony could … in any reasonable likelihood have affected the judgment of the jury.'" ***Giglio v. United States***, 405 U.S. 150, 154 (1972) (quoted source omitted). These standards are closely aligned with the often stated harmless error standard. *See* ***State v. Sullivan***, 216 Wis.2d 768, 792, 576 N.W.2d 30, 41 (1998) (the harmless error test is whether there is a reasonable possibility that the error contributed to the conviction).

We acknowledge that Hertel's nonprosecution agreement provided a potential motive for his testimony and may have borne on his credibility. However, Hertel had provided investigators with information about Mataya's role in Pamela's death before the nonprosecution agreement was executed. Moreover, the record shows that details Hertel provided to investigators—the bite marks on the body, the manner of death, the way the body was concealed, and Pamela's missing purse—could only have come from Mataya because such details had not been made public until after Mataya was charged. The jury would have no basis to believe that the nonprosecution agreement had compelled Hertel to give false testimony about the murder.[3]

[3] Hertel was in a secure halfway house in Green Bay at the time of Pamela's murder. Although Hertel had spoken at length with Mataya's wife before execution of the nonprosecution agreement, Mataya's wife did not know the details of the murder that Hertel revealed.

Disclosure of the agreement would not have put a whole new light on the case for the additional reason that Hertel's testimony was corroborated by other evidence. Bartenders saw Pamela leave the tavern with Mataya on the night of September 13, 1993, and another witness saw Pamela get into a car with Mataya. This corroborated Hertel's testimony that Mataya said he had conned Pamela into leaving the bar with him. Mataya's stepson testified that at midnight on September 13, 1993, he saw Mataya bleaching a pair of white pants which appeared to be speckled with blood, and that early the next morning Mataya washed the inside of his car. This was consistent with Hertel's testimony about Mataya's efforts to clean up after the murder. Finally, pattern bite marks on Pamela's breast were discovered and found to be consistent with Mataya's dentition. This corroborated Hertel's report that Mataya had bitten Pamela's breast.

We conclude that neither the disclosure of the nonprosecution agreement nor the correction of Hertel's testimony would have, in any reasonable likelihood, affected the judgment of the jury. The materiality or prejudice component of the ***Brady*** test has not been satisfied. No due process violation occurred.[4]

Mataya claims that "newly discovered" evidence justifies a new trial. He looks to the posttrial discovery of Hertel's nonprosecution agreement and testimony from Michael Porteous that when he was in jail with Hertel, Hertel

[4] Mataya makes an abbreviated argument that he was denied due process because the State waited until five days before trial to turn over State Crime Lab test results showing that a human hair found on Pamela's jeans and two human hair fragments found in her necklace were inconsistent with Pamela's and Mataya's hair. For reasons stated later in this opinion, we summarily reject Mataya's assertion that the delayed disclosure prejudiced his opportunity to explore a third-party defense.

stated that he had lied in reporting to police what he knew about Pamela's murder.[5]

Review of a trial court's decision regarding newly discovered evidence is addressed to the trial court's discretion. *See* ***State v. Johnson***, 181 Wis.2d 470, 489, 510 N.W.2d 811, 817 (Ct. App. 1993). To obtain a new trial based on newly discovered evidence, the defendant must establish by clear and convincing evidence that each of the following five criteria exists: (1) the new evidence was not discovered until after trial; (2) the party moving for a new trial must not have been negligent in seeking to discover such new evidence; (3) the new evidence must be material to the issue; (4) the new evidence must not be merely cumulative to testimony introduced at the trial; and (5) the new evidence must be such that it will be reasonably probable that a different result would be reached on a new trial. *See* ***State v. Avery***, 213 Wis.2d 228, 234, 570 N.W.2d 573, 576 (Ct. App. 1997).

We have already determined that disclosure of Hertel's nonprosecution agreement would not have made a difference with respect to the credibility of Hertel's testimony. The fifth criterion cited above—that it is reasonably probable that the evidence would produce a different result on a new

[5] In the trial court, Mataya argued that newly discovered information that Mataya's stepson was promised a $5000 "Crime Stoppers" reward for his trial testimony also supported a new trial. Mataya has not briefed that issue. It is deemed abandoned and rightly so because it lacks merit. "Evidence which merely impeaches the credibility of a witness does not warrant a new trial on this ground alone." ***Greer v. State***, 40 Wis.2d 72, 78, 161 N.W.2d 255, 258 (1968).

trial—is not satisfied with respect to newly discovered evidence of the nonprosecution agreement.[6]

At a postconviction motion hearing, Porteous testified that he had been in jail with Hertel while Hertel was trying to reach a deal with police in exchange for testimony about a Manitowoc County homicide. Porteous testified that Hertel said he had no knowledge of the murder and was lying to the police in suggesting he did. Porteous revealed his conversations with Hertel to Mataya in the summer of 1996 when they were both incarcerated at the Waupun Correctional Institution.

The trial court found that Porteous's testimony was not credible. The trial court's credibility finding will not be disturbed on appeal unless clearly erroneous. *See* ***State v. Terrance J.W.***, 202 Wis.2d 496, 501, 550 N.W.2d 445, 447 (Ct. App. 1996). On cross-examination, Porteous qualified his testimony by explaining that only once did Hertel explicitly say he was "bullshitting" investigators to get a deal. Porteous was unable to explain what information Hertel had supposedly falsified. Porteous also admitted that he did not believe Hertel's story that he was lying to investigators until after he had met Mataya.

Porteous's testimony was not credible. The impeaching nature of Porteous's testimony is discounted by the corroboration of Hertel's testimony on details not publicly disclosed. Porteous's testimony is not strong enough to prove that the verdict was based on perjured evidence from Hertel. *See* ***State v. Herfel***,

[6] The "reasonable probability" prong of the test for newly discovered evidence is more stringent than the prejudice component of the due process test governing a claim of a failure to disclose exculpatory evidence. *See* ***State v. Avery***, 213 Wis.2d 228, 238-240, 570 N.W.2d 573, 578-79 (Ct. App. 1997).

49 Wis.2d 513, 522, 182 N.W.2d 232, 237 (1971). The impeachment evidence would not probably cause a different result on a new trial.

Mataya sought postconviction discovery in the form of a court order that one or more of four suspects submit hair, blood and saliva samples to the Wisconsin Crime Lab for testing against the three hairs found on Pamela's body. Mataya sought the testing to support his claim that a third-party defense was viable and should have been pursued.[7] The trial court concluded that regardless of what additional testing would have revealed about the source of the unidentified hairs, Mataya could not have made a sufficient showing on the test set forth in ***State v. Denny***, 120 Wis.2d 614, 624, 357 N.W.2d 12, 17 (Ct. App. 1984),[8] for admitting third-party culpability evidence. It denied Mataya's motion for postconviction testing.

Mataya argues that he made a sufficient showing under the guidelines adopted in ***State v. O'Brien***, 214 Wis.2d 328, 343, 572 N.W.2d 870, 877 (Ct. App. 1997), *aff'd*, ___ Wis.2d ___, 588 N.W.2d 8 (1999), to entitle him to the requested postconviction discovery. Although the supreme court affirmed in ***O'Brien***, it rejected the guidelines adopted by the court of appeals. *See* ***id.*** at ___, 588 N.W.2d at 16. In ***O'Brien***, the court concluded that "a defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an

[7] Mataya contends that trial counsel was ineffective for not proffering evidence at trial that one or more of four suspects was the real perpetrator.

[8] In order to avoid "degenerating the proceedings into a trial of collateral issues," ***State v. Denny***, 120 Wis.2d 614, 623-24, 357 N.W.2d 12, 16-17 (Ct. App. 1984), establishes the "legitimate tendency" test for the admission of evidence that some third party committed the charged crime. To gain admission of third-party culpability evidence, the defendant must offer proof of motive, opportunity and a direct connection between the third party and the crime. *See* ***id.*** at 624, 357 N.W.2d at 17.

issue of consequence." ***Id.*** "Evidence that is of consequence … is evidence that probably would have changed the outcome of the trial." ***Id.***

We conclude that ***O'Brien*** does not have a direct application in this case because Mataya was not seeking postconviction discovery of evidence in possession of the State.[9] Section 971.23(5), STATS., requiring the production of physical evidence for scientific analysis, applies only to evidence which is intended to be introduced at the trial. Mataya seeks to compel third persons to submit bodily samples. He has not provided any authority of a court to compel the production of such bodily samples absent a request for a search warrant by the State and the existence of probable cause. *See* § 968.12, STATS. To establish probable cause, the suspect must be "linked to the crime with sufficient probability to justify taking a sample." ***Bast v. State***, 87 Wis.2d 689, 693, 275 N.W.2d 682, 685 (1979). Mataya does not establish a sufficient link. It was not error to deny the request for postconviction discovery.

The final issue is Mataya's claim that he was denied the effective assistance of trial counsel because counsel failed to "reasonably attempt to investigate and present evidence of a third party defense."[10] "There are two components to a claim of ineffective assistance of trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on

[9] Even considering the standard for obtaining postconviction discovery set forth in ***State v. O'Brien***, ___ Wis.2d ___, 588 N.W.2d 8 (1999), we would affirm the trial court's denial of discovery on the grounds that the evidence was not of consequence. Our resolution of Mataya's claim of ineffective assistance of counsel pertains to this issue as well.

[10] Mataya also asserts that counsel was deficient in several respects for reasons not directly related to presenting a third-party defense.

both components." ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.***

If we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient. *See* ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993). Here, we move directly to the second prong of the test because we conclude that Mataya could not have been prejudiced by his trial counsel's failure to present a third-party defense. The measure of prejudice does not turn on an assessment of whether the defendant will probably be found guilty at a new trial should that trial take place. It involves a determination of confidence in the result of the trial that did take place. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. The question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. *See* ***State v. Pitsch***, 124 Wis.2d 628, 640-41, 369 N.W.2d 711, 718 (1985).

Hertel's testimony and, most importantly, his knowledge of details of the murder not made public are strong evidence of Mataya's guilt. This evidence, coupled with the stepson's observation of Mataya bleaching his pants and cleaning his car, and other corroboration, would have overwhelmed any evidence suggesting that the crime was committed by a third party. This is particularly true where the third-party defense was not compelling. Each of the four suspects Mataya identified had innocent reasons for contact with Pamela and

there was no strong suggestion of a motive for any one of those suspects to murder her. We conclude that given the evidence against Mataya, our confidence in the outcome is not undermined by the alleged deficiencies of trial counsel.[11]

By the Court.—Judgment and order affirmed.

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

[11] Our conclusion that no prejudice exists also disposes of Mataya's claims of counsel's deficiencies not directly related to the presentation of a third-party defense. *See supra* note 10.