

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1103

Cir. Ct. No. 2006CF4990

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATTHEW RICHARD,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Matthew Richard, *pro se*, appeals the order denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2013-14) and *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556

N.W.2d 136 (Ct. App. 1996).¹ Richard argues that his trial counsel gave him ineffective assistance by failing to impeach Johanna Velazquez with prior inconsistent statements and by failing to adequately expose James Howard's motivation to testify. Richard further asserts that his postconviction counsel gave him ineffective assistance by either not raising these claims of trial counsel's ineffectiveness or by raising them inadequately. Alternatively, Richard asks that we exercise our discretionary power of reversal because the real controversy was not fully tried. We affirm.

BACKGROUND

¶2 As set forth in our 2009 decision resolving Richard's direct appeal:

The underlying facts are that around 10:00 p.m. on September 13, 2006, Velazquez's boyfriend, Gualberto Gonzalez, returned a call to Richard. After Gonzalez called Richard, Richard and two other men arrived at the residence where Velazquez and Gonzalez were staying to purchase Gonzalez's vehicle. According to Velazquez, Richard wanted Gonzalez to follow him so that Richard could get money and drugs to be used as payment for the vehicle. Gonzalez asked Velazquez to accompany him as he followed Richard in a separate vehicle, and she agreed. They eventually ended up in an alleyway where Richard got out of his vehicle and came to the driver's side of the vehicle Gonzalez and Velazquez were driving. After a conversation, Velazquez noticed Richard lean down slightly and stand up with a gun in his hand. Richard fired four shots. One shattered the window next to Velazquez, one hit her arm, one hit her head, and one hit Gonzalez.

Velazquez waited to hear Richard leave before she drove to the hospital. As she was driving toward the hospital, she noticed a police van with its lights off and stopped to ask for help. According to Velazquez, the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

officer in the police van refused to help and told her to continue to the hospital. As relayed by the State, the officer was later identified and dismissed by the police department.

Before she knew Gonzalez was dead, Velazquez told the police that the initial purpose of the meeting with Richard was to sell a car stereo, but later admitted that it was both for the sale of a vehicle and for a drug purchase. She testified that she did not mention the drugs at first because she did not want to get Gonzalez in trouble.

James Howard, an acquaintance of Richard, was a new witness for the State in the second trial. [Richard's first trial resulted in a mistrial.] At the time he testified, Howard was being held in custody on three felony charges. He testified that Richard called him looking for a handgun before meeting with Gonzalez. Howard said Richard told him he wanted a gun "to take out someone who he believed was setting him up with the police." Howard also suggested Richard may have received his handgun from Jimmy Cruz. Cruz exercised his Fifth Amendment right not to incriminate himself and did not testify during Richard's trial. Two of the charges against Howard were ultimately disposed of without prosecution.

Detective Chavez, the lead detective in this case, interviewed Velazquez and Howard before the trial. Velazquez gave Chavez two possible locations for where the vehicle that Gonzalez intended to sell to Richard might be located. Chavez testified to finding the vehicle in one of the specified locations. Chavez also testified that he told Howard he would seek some form of consideration for the charges pending against Howard in exchange for Howard's cooperation with the State's case against Richard.

The jury found Richard guilty of intentional and attempted first-degree homicide while armed, and possession of a firearm by a felon.

State v. Richard, No. 2008AP1853-CR, unpublished slip op. ¶¶2-7 (WI App Aug. 11, 2009) (footnote omitted), *review denied*, 2010 WI 5, 322 Wis. 2d 125, 779 N.W.2d 178 (Abrahamson, C.J., dissenting).

¶3 After he was convicted, Richard filed a WIS. STAT. RULE 809.30 motion alleging that he received ineffective assistance from his trial counsel. The trial court denied the motion without an evidentiary hearing.

¶4 In his direct appeal, Richard argued:

[H]is trial counsel was ineffective for failing to investigate and present exculpatory evidence, which would impeach the credibility of the State's witnesses. Specifically, he points to what he describes as counsel's failure to interview Johanna Velazquez, James Howard, and Jimmy Cruz before the trial, failure to enter phone records into evidence at trial, failure to thoroughly investigate the actions of a police officer, failure to impeach Howard's testimony or cross-examine Howard on his motives to lie at trial, and failure to object to Detective Chavez's testimony.

Richard, No. 2008AP1853-CR, unpublished slip op. ¶1 (footnoted omitted). We rejected these claims. *See id.*

¶5 More than four years later, Richard, *pro se*, filed the postconviction motion that underlies this appeal. He argued that trial counsel was ineffective for failing to impeach Velazquez with prior inconsistent statements and phone records and for failing to adequately question Howard about his motive to testify favorably for the State. Richard asserted that his postconviction counsel was ineffective for failing to adequately raise and argue these issues and that this constituted a sufficient reason for not making the claims in his prior postconviction motion and appeal.

¶6 The postconviction court denied the motion without a hearing. Richard's motion for reconsideration was also denied.

DISCUSSION

I. Ineffective Assistance of Counsel

¶7 When a defendant claims ineffective assistance of counsel, he must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When a defendant claims ineffective assistance of postconviction counsel, to establish prejudice he must assert more than his counsel's failure to raise an issue. *State v. Balliette*, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. He must show the issues raised in his present motion are clearly stronger than the issues his counsel presented. *State v. Romero-Georgana*, 2014 WI 83, ¶4, — Wis. 2d —, 849 N.W.2d 668. If the motion fails to establish ineffective assistance by postconviction counsel, the motion is procedurally barred by the rule against successive postconviction motions set out in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

¶8 Richard faults his trial counsel for not doing a better job of diminishing the credibility of Velazquez and Howard, and he faults his postconviction counsel for not raising or for inadequately raising these issues.

A. Velazquez

¶9 Richard argues that trial counsel failed to highlight the many inconsistent statements made by Velazquez and the phone records that purportedly refuted her testimony. Richard acknowledges Velazquez testified at trial that she lied about Gonzalez's drug use to police to protect him, but claims that there were more lies by Velazquez that should have been highlighted, namely:

The fact that Velazquez told Det. Chavez that she and Gonzalez were together at the residence of [Gonzalez's mother] was material and contrary to her trial testimony. The fact that Velazquez told Det. Chavez that she witnessed and overheard the alleged phone call was material and contrary to her trial testimony. That fact that Velazquez told Det. Chavez that she and Gonzalez went outside to clean out the [J]eep because Richard was on his way to see it was material and contrary to her trial testimony. The fact that Velazquez told Det. Smith that Gonzalez had no idea why Richard was at their home, after she had already said this meeting was arranged over phone calls between Richard and Gonzalez, was material and contrary to her trial testimony.

Richard also submits that Velazquez should have been impeached because she did not describe him as using crutches, which was an “obvious fact” when he was interviewed by the police.

¶10 In our decision resolving Richard's direct appeal, we wrote:

Counsel's cross-examination of Velazquez takes up fourteen pages of the transcript and addresses discrepancies in her previous statements. During the cross-examination, Velazquez admitted that she lied about Gonzalez's drug dealing, acknowledged that she initially failed to mention to the police the fact that Richard was on crutches at the time of the incident, and claimed that she never told Detective Chavez that the vehicle for sale was parked somewhere other than her residence. Richard acknowledges the effectiveness of trial counsel in this regard, stating, “[t]o be sure trial counsel did impeach Ms. Vela[z]quez's testimony by bringing up the inconsistencies in her statements to the police,” but Richard nevertheless contends that “numerous areas of cross[-]examination which would have severely damaged the credibility of her testimony were ignored by trial defense counsel.”

In particular, Richard faults his trial counsel for failing to introduce into evidence certain phone records that he claims would have impeached Velazquez's testimony. He asserts that the phone records concerning his calls to Gonzalez would have conflicted with Velazquez's account of the events leading to the incident.

Richard, No. 2008AP1853-CR, unpublished slip op. ¶¶14-15 (brackets in *Richard*).

¶11 The arguments in this appeal related to Velazquez are variations of those previously raised, and as such, we need not address them. 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.”). Even if we were to set aside *Witkowski* and conclude trial counsel was deficient for not doing a better job of highlighting the inconsistencies in Velazquez’s testimony, the prejudicial effect was minimal.

¶12 Richard likens the circumstances presented to those at issue in *State v. Thiel*, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305, where we held “that prejudice should be assessed based on the cumulative effect of counsel’s deficiencies,” see *id.*, ¶59. The *Thiel* court, however, also held “a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial. A criminal defense attorney’s performance is not expected to be flawless.” *Id.*, ¶61.

¶13 In assessing prejudice, we consider “the effect of counsel’s acts or omissions on the reliability of the trial’s outcome.” *Id.*, ¶80. Richard asserts that each of the purported lies by Velazquez was “material” because her credibility was key; but simply asserting something is material does not make it so. Richard submits “a laundry list of mistakes,” and has not convinced us that the deficiencies in counsel’s performance should undermine our confidence in the outcome of the case.

¶14 Insofar as Richard is arguing in this appeal that his postconviction counsel should have done a better job of identifying the inconsistencies in Velazquez’s testimony, he has not shown that the alleged inconsistent statements he identifies here provide a clearly stronger argument that his trial counsel was ineffective. See *Romero-Georgana*, 849 N.W.2d 668, ¶4. It is up to postconviction counsel to decide which issues to raise, and counsel need not “raise every ‘colorable’ claim.” See *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983).

B. Howard

¶15 Richard also argues that trial counsel should have made clear for the jury that Howard would have faced two felony charges had he not testified. This, Richard argues, “was an absolute failure to expose the biggest bias and motivation” on the part of Howard to testify in a manner to satisfy the State that he was cooperating.

¶16 Richard explains that Howard was the only new witness in the second trial and concludes that it must have been his testimony “that made the critical difference in the verdict.” Richard acknowledges that trial counsel asked Howard about the implications his testimony would have on his bond, but argues that trial counsel was ineffective for not asking him about two felony charges against Howard that were not processed. Richard further claims that if Howard had been convicted of the reissued charges, he would have faced having his parental rights terminated—and that this gave Howard additional incentive to lie and testify in a manner that would satisfy the State.

¶17 In our decision resolving his direct appeal, we addressed Richard’s claim that trial counsel was ineffective for failing to impeach Howard with the fact that two felony charges against him had been dismissed:

Richard also claims his trial counsel failed to effectively impeach Howard on the consideration he received in exchange for his testimony. Richard asserts that the fact that two felony charges were dropped against Howard after he testified was not brought to the jury's attention. In addition, Richard believes his trial counsel was ineffective for failing to illuminate Howard's motivation to testify, which, according to Richard, was compelled by his anger at Richard for Richard's refusal to previously help him pay rent. Furthermore, Richard argues that his trial counsel was ineffective for failing to impeach Howard on matters relating to the timing and duration of the phone calls Howard claimed he received from Richard.

First, after Howard acknowledged during direct examination that he was testifying in the hopes that he would receive consideration from the State on the charges that were pending against him, trial counsel thoroughly cross-examined Howard on this point. The following exchange took place:

[RICHARD'S TRIAL COUNSEL:] You say you don't want to be here?

[HOWARD:] No, I do not.

[RICHARD'S TRIAL COUNSEL:] Well, you sure do because you're trying to buy your way out of 14 years of prison, right?

[HOWARD:] No, I'm not.

[RICHARD'S TRIAL COUNSEL:] You're not?

[HOWARD:] I don't really know what my charge even carries.

[RICHARD'S TRIAL COUNSEL:] Well, you had a first appearance in court, right?

[HOWARD:] Yes.

[RICHARD'S TRIAL COUNSEL:] And they told you you were charged with delivery of [a] controlled substance, cocaine, one gram or less, second or subsequent offense, right?

[HOWARD:] Yes.

[RICHARD'S TRIAL COUNSEL:] And that you're facing 14 years in prison or [a] \$25,000 fine or both, right?

[HOWARD:] I don't remember that.

[RICHARD'S TRIAL COUNSEL:] Oh, you don't recall that. And the bail is 7,500 cash, right?

[HOWARD:] Yes, it is.

....

[RICHARD'S TRIAL COUNSEL:] [Detective Chavez] said there would be consideration if you cooperated in trying to convict Matthew Richard, right?

[HOWARD:] Yes.

Detective Chavez was also questioned about the consideration Howard might receive in exchange for his testimony against Richard. *Richard criticizes his trial counsel for not bringing to light the fact that it appears two charges against Howard were dismissed.* However, given trial counsel's aggressive examination in all other regards, his conduct cannot be said to have caused prejudice such "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See *Strickland*, 466 U.S. at 694. Furthermore, regarding counsel's failure to inquire whether Howard was motivated to testify because Richard would not help him with his rent, Richard does not indicate how the omission of this testimony prejudiced his defense.

Richard, No. 2008AP1853-CR, unpublished slip op. ¶¶19-21 (emphasis added).

¶18 Richard acknowledges that the issue involving Howard was raised by postconviction counsel but claims that postconviction counsel's "presentation ... was conclusory and impotent." *Witkowski*, however, precludes Richard from relitigating this issue, which he has repackaged under *Rothering*. See *Witkowski*, 163 Wis. 2d at 990.

II. New Trial in the Interest of Justice

¶19 Finally, Richard seeks a new trial under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried. Richard 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.” *See State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). 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).

¶20 Richard’s request for a new trial largely amounts to a rehashing of his meritless claims that he was prejudiced by trial counsel’s failure to impeach Velazquez and Howard. We are not convinced that this is an exceptional case that warrants the exercise of our discretionary authority to grant a new trial.

By the Court.—Order affirmed.

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

