**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 12, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP1272** **Cir. Ct. No. 2006CF399**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PETER GAMBLE WHYTE,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Peter Whyte, pro se, appeals orders denying his WIS. STAT. § 974.06[1] motion for postconviction relief and motion for sentence

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

modification. Whyte contends the circuit court erred by denying his motions and alternatively argues he is entitled to a new trial in the interest of justice. We reject Whyte's arguments and affirm the orders.

## BACKGROUND

¶2 In September 2007, a jury found Whyte guilty of second-degree intentional homicide for the stabbing death of his girlfriend. The court imposed a sixty-year sentence consisting of forty years' initial confinement and twenty years' extended supervision. On direct appeal, Whyte argued that the admission of hearsay evidence at trial violated his right to confrontation. We concluded the error, if any, in admitting the challenged testimony was harmless in light of the overwhelming evidence of Whyte's guilt. We therefore affirmed the judgment. *See* ***State v. Whyte***, No. 2009AP1245-CR, unpublished slip op. (WI App Oct. 26, 2010).

¶3 In January 2013, Whyte filed a WIS. STAT. § 974.06 motion for postconviction relief raising numerous claims regarding the fact that he was required to wear a stun belt at trial. Whyte also alleged prosecutorial misconduct; claimed the circuit court erroneously exercised its discretion by admitting other acts evidence; asserted ineffective assistance of both trial and postconviction counsel; and, alternatively, sought a new trial in the interest of justice.[2] Whyte subsequently moved for sentence modification incorporating the arguments from

[2] We note that although Whyte's WIS. STAT. § 974.06 motion alleged prosecutorial misconduct and claimed the circuit court erroneously admitted other acts evidence, on appeal, he makes specific reference to these claims as part of his argument for a new trial in the interest of justice and indirect reference to them as part of his challenge to the effectiveness of "postconviction" counsel. *See* infra, ¶¶6, 15-16. Under either framework, these arguments fail for the reasons outlined below.

his § 974.06 motion and alleging "new factors" warranted sentence adjustment. The circuit court denied the motions without a hearing, and this appeal follows.

## DISCUSSION

¶4 We conclude that the claims raised in Whyte's WIS. STAT. § 974.06 motion, and repeated in his motion for sentence modification, are barred by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).[3] In ***Escalona-Naranjo***, our supreme court held that "a motion under sec. 974.06 could not be used to review issues which were or could have been litigated on direct appeal." ***Id.*** at 172. The statute, however, does not preclude a defendant from raising "an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions." ***Id.*** at 184. Here, Whyte's motions alleged ineffective assistance of his postconviction/appellate counsel as a sufficient reason for failing to properly raise his claims on direct appeal.

¶5 Ineffective assistance of postconviction counsel may constitute a sufficient reason for the failure to raise an issue that could have been raised on a previous direct appeal. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To prove constitutionally ineffective assistance, however, a defendant must show both deficient performance by counsel and prejudice from that performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must

[3] We note that a more-detailed brief from the State would have been helpful to our analysis in this case. Despite two extensions of the time for filing the State's brief, the brief is full of generalizations and fails to tie the State's legal arguments to the facts of the case in a way that is beneficial to our review.

show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To satisfy the prejudice prong, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We may address the tests in the order we choose, and we need not discuss both prongs "if the defendant makes an insufficient showing on one." ***Strickland***, 466 U.S. at 697.

¶6 Whyte intimates that postconviction counsel was ineffective by failing to challenge the effectiveness of trial counsel. Although Whyte concedes his trial counsel provided a generally "stellar defense," he alleges several deficiencies, including the failure to object to the visibility of the stun belt Whyte was required to wear at trial; the failure to impeach witnesses who gave hearsay testimony; the failure to challenge the alleged omission of college students from the jury pool; the failure to call witnesses to rebut and clarify testimony;[4] and the failure to object when the State allegedly used Whyte's post-***Miranda***[5] silence to impeach him. Whyte also faults trial counsel for failing to call an expert witness to testify regarding the reasonableness of Whyte's use of force under the circumstances of this case. Whyte additionally claimed "postconviction" counsel was ineffective by failing to adequately pursue the issue raised on direct appeal

[4] This alleged deficiency also forms the basis for that part of Whyte's sentence modification motion alleging a new factor. *See infra* ¶11.

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

and by omitting the other arguments identified in Whyte's WIS. STAT. § 974.06 motion.[6]

¶7 Even assuming Whyte's trial attorney was deficient as alleged in the WIS. STAT. § 974.06 motion, Whyte failed to establish that he was prejudiced by the alleged deficiencies. Whyte contends the cumulative effect of trial counsel's deficient performance caused prejudice. We are not persuaded.

¶8 As noted in our decision affirming Whyte's conviction on direct appeal, there was overwhelming evidence of Whyte's guilt, including the size disparity between Whyte and the victim; the victim's intoxication; and the sheer number of stab wounds the victim suffered, many of which could have been independently fatal. In light of the overwhelming evidence of Whyte's guilt, trial counsel's alleged deficiencies—either individually or collectively—do not undermine our confidence in the outcome at trial. Because Whyte's challenge to the effectiveness of his trial counsel fails, Whyte's derivative challenge to the effectiveness of his postconviction counsel likewise fails. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (postconviction counsel not deficient for failing to pursue meritless claim).

¶9 With respect to Whyte's challenge to the effectiveness of his appellate counsel, Whyte again fails to establish prejudice. Whyte indicates: "At

[6] We note that although postconviction and appellate counsel are often the same person, their functions differ. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Ct. App. 1997). While "postconviction representation involves proceedings in the trial court where such are a prerequisite to filing a notice of appeal," appellate counsel's work "involves briefing and oral argument in this court." ***Id.*** Although a challenge to the effectiveness of appellate counsel is properly raised by a petition for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992), we will nevertheless address Whyte's claims on their merits.

a hearing, the defendant will establish that post-conviction counsel's deficient performance prejudiced him." We determine the sufficiency of a defendant's reason for circumventing ***Escalona-Naranjo***'s procedural bar, however, by examining the "four corners" of the subject postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Whyte, therefore, was required to show both deficient performance *and* prejudice within his WIS. STAT. § 974.06 motion. Motions containing only conclusory and legally insufficient allegations that postconviction counsel was ineffective are insufficient to circumvent ***Escalona-Naranjo***'s procedural bar. ***Allen***, 274 Wis. 2d 568, ¶¶84-87.

¶10 Whyte nevertheless claims the circuit court erred by denying his motion without an evidentiary hearing. If a postconviction motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Here, the circuit court concluded that Whyte's claims were procedurally barred by ***Escalona-Naranjo*** and, therefore, properly denied the motion without an evidentiary hearing.

¶11 Whyte alternatively claims a new factor justified sentence modification. A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶36-37.

¶12 A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Id.***, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

¶13 In his sentence modification motion, Whyte argued the sentencing court misconstrued witness testimony when concluding Whyte had the ability to flee the scene rather than stab the victim. Specifically, the sentencing court focused on Tom Belisle's testimony that Whyte told him the victim "wigged out" on him and he "should have just walked." Whyte claimed additional witness testimony could have provided context for these statements, as Whyte was not referencing his ability to walk away from the attack that led to the victim's death but, rather, spoke generally about leaving the relationship. Whyte, however, clarified at sentencing that when he mentioned walking away, he meant walking away from the relationship. Thus, this clarification is not a new factor.

¶14 Whyte claims the court's misunderstanding of the "walking away" comment continued at sentencing when the court later stated Whyte "had the wherewithal to walk away and … didn't." The court's observation, however, followed a discussion with Whyte about his and the victim's relative intoxication levels at the time of the altercation. Whyte claimed he had "a beer and half and a couple shots," while the victim had a blood alcohol concentration of 0.31% at the time of her death. Because Whyte failed to identify a new factor justifying sentence modification, the circuit court properly denied the motion.

¶15 Finally, Whyte seeks a new trial under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried. Whyte 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).

¶16 Our review of the record 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 Whyte's theory. Nothing Whyte has presented in this appeal persuades us that a new trial in the interest of justice is warranted.

*By the Court.*—Orders affirmed.

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