COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2395-CR **Cir. Ct. No. 2011CF1590**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUANNE D. TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEFFREY A. WAGNER, Judges. *Affirmed*.

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

¶1 PER CURIAM. Duanne D. Townsend appeals from a judgment of conviction entered on jury verdicts for one count of first-degree intentional homicide by use of a dangerous weapon, two counts of attempted first-degree

intentional homicide by use of a dangerous weapon, and two counts of possession of a firearm by a felon, contrary to WIS. STAT. §§ 940.01(1)(a), 939.63(1)(b), 939.32, and 941.29(2) (2011-12).[1] He also appeals from orders denying his postconviction motion and motion for reconsideration. Townsend seeks a new trial in the interest of justice on grounds that the real controversy was not fully tried. In the alternative, he argues that he is entitled to a ***Machner*** hearing on his postconviction motion.[2] We affirm.

BACKGROUND

¶2 It is undisputed that Townsend shot three people during an argument in an apartment. One victim, Brandon Thomas, died from his wounds. The other two victims, a woman named L.T. and a man named J.W., were seriously injured from multiple gunshots. The argument concerned a beating Townsend and other men administered to a man named R.W. earlier in the day. At the time of the shootings, Townsend's brother (Antonio Stewart), sister (Simone Stewart), and girlfriend (April Brown) were also present in the apartment, along with Antonio Stewart's girlfriend (Erica Brown).

¶3 At trial, the State elicited testimony that during the argument, L.T. and Antonio Stewart were attempting to calm down J.W. and Townsend, respectively. L.T. testified that Townsend began shooting at her while she had her back to him. Townsend also shot J.W. and he fell down next to L.T. L.T. said that she saw Thomas with his hands in the air in what the prosecutor described at

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

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

trial as "the surrender posture," and then Thomas jumped over L.T. as he tried to flee the apartment. L.T. said Townsend shot Thomas as Thomas was exiting the apartment.

¶4 Simone Stewart testified that she saw Townsend shoot his gun and that after the shooting stopped, she saw a different gun on the floor. She said she screamed out "whose gun is this?" and Townsend took it out of her hand and "ran out [of] the door." When the police apprehended Townsend in an adjacent apartment, they found two guns in the bathroom: one was the gun used to shoot the victims and the other was the gun Simone Stewart picked up from the floor.

¶5 The primary issues presented at trial were whether Townsend shot the victims in self-defense and, even if he did not act in self-defense, whether he should be convicted of lesser-included offenses. Townsend did not testify and did not present any defense witnesses, but trial counsel elicited testimony from the State's witnesses and argued that Townsend acted in self-defense. The self-defense claim was premised on the theory that Thomas had a gun and that J.W. told Townsend during the argument that Townsend was not the only one with a gun. The jury rejected the self-defense claim and found Townsend guilty of five charges, as detailed above.

¶6 At sentencing, the trial court imposed a mandatory life sentence for the first-degree intentional homicide and ordered that Townsend would be eligible for release on extended supervision after serving forty-five years of initial

confinement. The trial court imposed concurrent sentences for the other four counts.[3]

¶7 Postconviction counsel filed a postconviction motion on Townsend's behalf that asserted Townsend was entitled to a new trial based on the alleged ineffective assistance of trial counsel. In the alternative, Townsend sought a new trial in the interest of justice. After the issues were briefed by both parties, the postconviction court denied the motion in a written order. The postconviction court subsequently denied Townsend's motion for reconsideration that was based on the submission of an affidavit from Antonio Stewart. This appeal follows.

DISCUSSION

¶8 Townsend seeks a new trial in the interest of justice on grounds that the real controversy was not fully tried. In the alternative, he argues that he is entitled to a ***Machner*** hearing on his postconviction motion. We begin our analysis with the second issue.

I. Denial of the postconviction motion.

¶9 Townsend's postconviction motion alleged that he was denied the effective assistance of counsel, which is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)). To establish that an attorney's

[3] The Honorable Richard J. Sankovitz presided over the trial and sentenced Townsend. The Honorable Jeffery A. Wagner denied the postconviction motion and the motion for reconsideration.

representation was constitutionally deficient, a defendant must prove: (1) "counsel's performance was deficient"; and (2) "the deficient performance resulted in prejudice to the defense." ***Id.*** When considering the first prong, "a court looks to whether the attorney's performance was reasonably effective considering all the circumstances." ***Id.***, ¶22. When considering the second prong, a court must consider "whether '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.'" ***Id.***, ¶24 (quoting ***Strickland***, 466 U.S. at 694).

¶10 A defendant is not automatically entitled to a hearing on his postconviction motion. *See* ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48. "[A] defendant must 'allege [ ] facts which, if true, would entitle the defendant to relief.'" ***Id.*** (citation omitted; second set of brackets in ***Howell***). Our supreme court has explained: "'[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [postconviction] court may in the exercise of its legal discretion deny the motion without a hearing.'" ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). "If the defendant's motion and the record fail to meet these requirements, a [postconviction] court in its discretion may grant or deny an evidentiary hearing." ***Howell***, 301 Wis. 2d 350, ¶75.

¶11 On appeal, we determine independently whether a motion "'on its face alleges facts which would entitle the defendant to relief,' and whether the record conclusively demonstrates that the defendant is entitled to no relief." ***Id.***, ¶78 (citation and footnote omitted). When a "motion fails to allege sufficient facts

entitling the defendant to relief or presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled to relief," then this court considers whether the postconviction court erroneously exercised its discretion when it decided to grant or deny a hearing. ***Id.***, ¶79.

¶12 With those standards in mind, we consider whether the postconviction court erroneously exercised its discretion when it denied Townsend's postconviction motion without a hearing. The motion asserted that "[t]he jury did not adequately hear from Townsend, through Townsend's attorney, regarding Townsend's theory of defense," which was that "[J.W.] and/or [Thomas] were armed and that Townsend acted in self-defense when he shot the three victims" and that "Townsend never had a motive to intentionally kill the victim." Townsend argued that his trial counsel provided ineffective assistance in six ways. We conclude with respect to all six issues that the postconviction court did not erroneously exercise its discretion when it denied the motion without a hearing.

A. Alleged failure to adequately cross-examine witnesses.

¶13 Townsend's motion argued that his trial counsel failed "to adequately cross examine" L.T. and Simone Stewart. Noting that L.T. "testified that she did not see any of the victims with a gun," Townsend asserted that trial counsel failed to "adequately impeach [L.T.] with her prior inconsistent statement" to the police that "she saw [Thomas] with a silver gun." However, the record reveals that both the State and trial counsel questioned L.T. about her statement to a detective the night of the shooting, during which she allegedly said that when Thomas jumped over her, she saw a silver gun on his person. Further, the State subsequently introduced testimony from that detective, who said that L.T. told him

that "when Brandon Thomas jumped over [L.T. and J.W.], he had his left hand inside the jacket that was open on his right side. And when he did this … she could see what she described being a chrome-colored gun with brown on it." In closing argument, trial counsel argued that Thomas had a gun, and even the State conceded that either Thomas or J.W. brought a gun to the argument.

¶14 The postconviction motion does not identify any particular questions that trial counsel failed to ask or what additional information could have been elicited to impeach L.T.'s testimony, with one exception: the motion asserted that there is a video that would have "confirmed that a silver object was inside Brandon's left jacket pocket" when he entered the apartment complex. Townsend further argued that the same video would have demonstrated that L.T., Simone Stewart, and J.W. "all falsely testified that none of the victims were in possession of a firearm at the time of the shooting." Townsend's assertions are not persuasive, for several reasons. First, there is no video in the appellate record, so this court cannot review it.[4] Second, even if we assume that there is a video showing Thomas entering the apartment building with a gun in his pocket, Townsend has not shown how that evidence would have affected the outcome of the trial. Even if Thomas had a gun, it does not automatically follow that he displayed it or threatened Townsend with it. Third, Townsend mischaracterizes the testimony of L.T., Simone Stewart and J.W. They testified that they did not

[4] On appeal, the State in its brief pointed out that there is no video in the appellate record. Townsend's reply brief does not address that fact and Townsend did not seek to supplement the appellate record. It is the appellant's duty to see that the record is sufficient for the court to review the issues raised on appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). We also note that the only transcript reference to a video concerns a video showing activity that took place outside the apartment complex, such as Townsend fleeing the building. There is no indication in the record that there is a video of anything that occurred inside the building where the shootings took place.

see Thomas with a gun. They could have truthfully testified that they did not see a gun even if Thomas had a gun that was not visible to them.

¶15 We conclude that the postconviction motion's argument concerning trial counsel's cross-examination of L.T., Simone Stewart, and J.W. "fail[ed] to allege sufficient facts entitling the defendant to relief" and also "present[ed] only conclusory allegations." *See* ***Howell***, 301 Wis. 2d 350, ¶79. It was within the postconviction court's discretion to deny the motion without a hearing.

B. Alleged failure to "secure defense witnesses."

¶16 Townsend's second argument is that trial counsel should have located and subpoenaed Townsend's brother, Antonio Stewart, and Antonio Stewart's girlfriend, Erica Brown, to testify that J.W. "had a gun in his right hand at the time of the shooting." Townsend further argues that R.W. should have been called to testify that Thomas made threatening statements earlier in the day.

¶17 The postconviction court denied these arguments on grounds that Townsend had not submitted affidavits from those three individuals. The postconviction court's order explained that three months earlier, it issued a scheduling order indicating that the motion concerning those witnesses "would be summarily denied if affidavits were not submitted in support of the motion." Townsend did not submit affidavits, so the postconviction court rejected the arguments without considering the merits of Townsend's arguments.

¶18 Subsequently, Townsend obtained an affidavit from Antonio Stewart and filed a motion for reconsideration. The postconviction court considered that affidavit and concluded that even if Antonio Stewart had been called to testify, his

testimony that J.W. had a gun in his hand at the time of the shooting would not have affected the outcome of the trial. The postconviction court explained:

> For the jury to believe Antonio Stewart that [J.W.] had a revolver in his right hand at the time of the shooting, it would have to disregard the testimony of two of the shooting victims and the defendant's sister. The defendant has not demonstrated that there is a reasonable probability that the jury would have done so. Even if the jury had believed that [J.W.] had a gun in his right hand, such evidence, by itself, would not have been sufficient to show that [Townsend] lawfully acted in self-defense when he shot [J.W.] and the other victims. [Antonio] Stewart makes no assertion that [J.W.] held the gun in a manner to lead [Townsend] to reasonably believe he needed to use deadly force against [J.W.].

¶19 We conclude that the postconviction court did not erroneously exercise its discretion when it denied Townsend's motion concerning Antonio Stewart. The record conclusively demonstrates that Townsend is not entitled to relief, because Townsend has not shown that he was prejudiced by trial counsel's failure to produce Antonio Stewart as a witness. Townsend has also not shown that trial counsel performed deficiently, because he has not shown that Antonio Stewart was available as a witness at the time of trial and that trial counsel failed to make a reasonable effort to find and subpoena him. *See* ***Strickland***, 466 U.S. at 691 (A trial attorney has a duty to make either a reasonable investigation or a reasonable decision that an investigation is unnecessary.).

¶20 With respect to Townsend's arguments concerning Erica Brown and R.W., we note that Townsend has not challenged the postconviction court's order requiring the submission of affidavits or its order denying Townsend additional time to procure affidavits. Therefore, we affirm the postconviction court's rejection of Townsend's arguments concerning these witnesses without further

discussion. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 700 n.10, 530 N.W.2d 34 (Ct. App. 1995) ("We generally do not address issues not briefed.").

C. Alleged failure "to timely provide Townsend with all discovery materials so Townsend could assist with his defense."

¶21 Townsend asserts that his trial counsel was ineffective because: Townsend was not provided copies of discovery materials; was not told that two witnesses were given plea deals in exchange for their testimony; and "was not shown the surveillance video from the apartment prior to the trial." In a single sentence, Townsend argues that he "was prejudiced by the above errors by the fact that the jury did not return a guilty verdict on lesser included charges or a not guilty verdict." Townsend has not even attempted to explain how having this additional information before trial would have helped him assist in his defense. Because Townsend's motion presented only conclusory allegations, the postconviction court's decision to deny his motion without a hearing was not an erroneous exercise of discretion. *See* ***Bentley***, 201 Wis. 2d at 309-10.

D. Alleged failure "to present video evidence which showed that Townsend's brother was the one who initially possessed the firearm."

¶22 In a single sentence, Townsend's motion argued that there is video evidence that would have shown that Antonio Stewart, rather than Townsend, initially possessed the gun, which he claims would contradict testimony from three witnesses. The postconviction court did not erroneously exercise its discretion when it denied this conclusory allegation without a hearing. *See* ***id.*** Not only did Townsend present only a conclusory allegation, he also did not demonstrate that he is entitled to relief. As previously noted, there is no video in the record for this court to review. Moreover, even if Antonio Stewart originally possessed a gun, it

is undisputed that Townsend shot three people. Townsend has not demonstrated how his allegation concerning Antonio Stewart would change that fact.

E. Alleged failure "to adequately articulate Townsend's theory of defense to the jury."

¶23 Townsend's motion stated that he does not dispute that he shot the victims. He emphasized that his argument is that his trial counsel "provided deficient performance by not fully presenting self-defense to the jury." However, he offered no supporting argument or explanation of what he believes trial counsel should have done differently. Further, the motion baldly asserted "that his trial counsel never planned a thorough strategic plan or defense" and "did not review the physical evidence in his case as part of his investigation." Townsend added: "Trial counsel placed names on witness lists without knowing what the witnesses' testimony would be." Townsend's motion contains only conclusory allegations. The postconviction court did not erroneously exercise its discretion when it denied the motion without a hearing. *See* ***id.***

F. Allegedly "[m]isleading Townsend into giving up his right to testify."

¶24 In a two-sentence argument, Townsend's motion alleged "that he was misled by his trial counsel into giving up his constitutional right to testify." He indicated that he "will provide further description of being misled when he testifies at the ***Machner*** hearing." Townsend "fail[ed] to allege sufficient facts in his motion to raise a question of fact" and "present[ed] only conclusory allegations." *See* ***Bentley***, 201 Wis. 2d at 309-10. Therefore, the postconviction court did not erroneously exercise its discretion when it denied the motion without a hearing. *See* ***id.***

II. Request for discretionary reversal.

¶25 Townsend argues that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried.[5] We may order a new trial under WIS. STAT. § 752.35 if we conclude that the real controversy has not been fully tried, and we exercise this power of reversal "only sparingly," ***State v. Prineas***, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206, and "'only in exceptional cases,'" ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). Townsend's argument in favor of discretionary reversal rests in part on his previously rejected contentions that his trial counsel failed to adequately present a self-defense case to the jury. He also makes conclusory allegations that the DNA evidence was limited, although he does not explain how that affected the outcome of the trial. Townsend has not demonstrated a compelling reason for us to exercise our discretion and reverse the judgment. We decline to do so.

By the Court.—Judgment and orders affirmed.

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

[5] Townsend's brief discusses the authority of circuit courts to order new trials in the interest of justice, but he does not present any argument concerning the postconviction court's decision to deny his request for discretionary reversal. We infer that Townsend is asking this court to exercise its discretion and grant him a new trial pursuant to WIS. STAT. § 752.35.