COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP956-CR **Cir. Ct. No. 2008CF3382**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. James Washington appeals a judgment of conviction for four counts of first-degree intentional homicide, as party to a crime, and an order denying his motion for postconviction relief. Washington contends that he is entitled to a new trial because: (1) the jury during voir dire was given

information that he claims made it more likely for them to convict him; (2) he received ineffective assistance of trial counsel; (3) a key witness recanted his testimony, which Washington asserts constitutes newly-discovered evidence warranting a new trial; and (4) the real controversy was not tried. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Washington was charged with four counts of first-degree intentional homicide, as party to a crime, for the shooting deaths of Kendrick Jackson, Jacoby Claybrooks, Theresa Raddle, and Mariella Fisher on July 4, 2008. That complaint alleged that Antonio Williams, Rosario Fuentez, and Washington went to the area of 27th and Wright Streets in Milwaukee where "[t]hey observed a large group of people in the street appearing to be participating in an after hours party" in front of a house. The complaint alleged that Williams and Washington were each armed with an assault rifle, that Fuentez was armed with a handgun, that Washington positioned himself at a different location from Williams and Fuentez, and that Williams and Fuentez opened fire on the crowd, killing four individuals.

¶3 Fuentez entered into a plea agreement with the State, one condition of which was that he agreed to testify at Washington's trial. Fuentez's testimony corroborated allegations set forth in the complaint. He testified that although he could not see Washington when the shooting began, he heard shots coming from Washington's location and that after the shooting had ceased, Washington stated that "he was out" of ammunition.

¶4 Washington was found guilty of all charges and sentenced to life imprisonment without the possibility of extended supervision. Washington filed a postconviction motion, arguing that he is entitled to a new trial for the following

reasons: (1) newly discovered evidence suggested that Fuentez lied about Washington's involvement in the shooting; (2) Washington's trial counsel was prejudicially ineffective for having failed to call to testify at trial "a materially exculpatory witness"; and (3) in the interest of justice. The circuit court ordered an evidentiary hearing on Washington's allegation that Fuentez lied about Washington's involvement in the shooting, but denied Washington's motion as to the other grounds. Following the hearing, the circuit court denied Washington's motion on Washington's allegation that he had obtained newly discovered evidence that Fuentez had lied about Washington's involvement in the shootings. Washington appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶5 Washington contends that he is entitled to a new trial because: (1) the circuit court "improperly advised the jury that Wisconsin [does] not have the death penalty" during voir dire; (2) his trial counsel was ineffective for failing to call a certain witness at trial; (3) Washington had obtained newly discovered evidence that Fuentez recanted his testimony that Washington was involved in the shootings of the victims; and (4) the real controversy was not tried. We address each issue in turn below.

1. Death Penalty Reference During Voir Dire

¶6 During voir dire, the prosecution asked the prospective jurors whether they could "sit in judgment of another human being?" In response, one of the jurors asked whether Wisconsin has capital punishment. The court answered as follows:

> Here is what I will tell you to that. The jury is going to have nothing to do with sentencing at all, if, in fact, there

> was a decision by the jury to do something. So what the end result is, what is gonna happen, whether [] he is found guilty, not found guilty, none of that is gonna be at all in the hands of the jury. I'll tell you, just as a matter of fact, we don't have capital punishment. But what I am more concerned with is the question kind of came at the end of is the jury somehow gonna have a say in any kind of the outcome based on the verdict. And the jury isn't. Whatever the verdict is, that is going to be my issue, not the jury's, okay.

Washington objected to the court informing the prospective jurors that Wisconsin does not have capital punishment and argued that the court should convene a new panel of prospective jurors. The court denied Washington's request.

¶7 Citing ***State v. Ferron***, 219 Wis. 2d 481, 579 N.W.2d 654 (1998), Washington asserts on appeal that circuit courts "must ensure that circumstances outside the evidence [do] not influence a juror." Washington argues that the circuit court's explanation to the entire jury panel that Wisconsin does not have capital punishment "had no bearing upon the jury's duty," and that as a result of the court's explanation, the jurors were "more likely to convict [him] knowing that there was no death penalty."

¶8 In ***Ferron***, our supreme court "caution[ed] and encourage[d]" circuit courts to strike prospective jurors when the court reasonably suspects that juror bias exists. ***Id.*** at 495-96. The supreme court stated, however, that this recommendation "does not require … that an appellate court overturn the circuit court's assessment of a prospective juror's impartiality whenever the appellate record presents a reasonable suspicion that circumstances outside the evidence will influence the juror," observing that such a requirement would undermine the circuit court's discretion during voir dire. ***Id.***

¶9 Washington asserts that after the circuit court informed the prospective jurors that Wisconsin does not have the death penalty, the jurors were "more likely to convict" him, but he does not explain why. Furthermore, even assuming Washington had made a showing that there is a reasonable suspicion that this information influenced the jury, Washington has not explained why the court's failure to strike the entire prospective jury panel was an erroneous exercise of the court's discretion. Washington's contention that he was entitled to a new panel of prospective jurors is undeveloped and, therefore, we reject it on that basis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are inadequately brief).

¶10 However, even if we were to fully address Washington's contention, we would likely reject it. In denying Washington's request that a new panel of prospective jurors be impaneled, the circuit court stated that it believed that "most jurors know [Wisconsin does not] have capital punishment." Washington refers to the court's statement as "mere speculation," and points out that the prospective juror's question on capital punishment "clearly indicated" that at least one prospective juror was not aware that Wisconsin does not have the death penalty. However, we think it is certain that many adults in Wisconsin, and likely that a large majority of them, are aware that Wisconsin does not have the death penalty, even if one particular prospective juror was apparently unaware of this. There are many features of criminal law in Wisconsin that are not common knowledge. However, the fact that Wisconsin does not have a death penalty is not one of them because it relates to the criminal cases that get the most public attention. Because Wisconsin's lack of a death penalty is common knowledge, it is implausible that a juror selected, who was concerned about that issue, would not have learned from other jurors during deliberations that Wisconsin does not have the death penalty.

Accordingly, we are confident that the circuit court's statement that Wisconsin does not have the death penalty had no influence on the verdicts.

2. Ineffective Assistance of Counsel

¶11 Washington contends that the circuit court erred in denying, without a ***Machner***[1] hearing, his postconviction argument that he received ineffective assistance of counsel at trial as a result of his trial counsel's failure to call Detective Richard McKee to testify at trial.

¶12 Whether a defendant receives ineffective assistance of counsel presents a mixed question of fact and law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the court's legal conclusions as to whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review de novo. ***Id.*** at 128.

¶13 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). A ***Machner*** hearing is an "evidentiary hearing to evaluate counsel's effectiveness, which includes counsel's testimony to explain his or her handling of the case." ***State v. Balliette***, 2011 WI 79, ¶31, 336 Wis. 2d 358, 805 N.W.2d 334. A ***Machner*** hearing is not required in all cases in which ineffective assistance of counsel is alleged. but the motion cannot be granted without a ***Machner*** hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-310, 548 N.W.2d 50 (1996).

demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 689. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show 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." ***Id.*** at 694.

¶14 A circuit court must hold a ***Machner*** hearing on a defendant's ineffective assistance claim if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** at 310. If, however:

> "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 [circuit] court may in the exercise of its legal discretion deny the motion without a hearing."

Id. at 309-10 (quoted source omitted).

¶15 Part of the State's theory at trial was that, on the night of the murders, Washington went to Questions Nightclub in order to ascertain the whereabouts of the individuals who Williams claimed assaulted and robbed him. Consistent with this theory, two witnesses testified at trial that they saw Washington at Questions on the night of the shootings.

¶16 Washington alleged in his postconviction motion that the testimony of Detective McKee would have rebutted the testimony of the two witnesses

placing him at Questions on the night of the shootings. Washington alleged that Detective McKee would have testified that he conducted an "analysis … of the computer used at Questions to record the identification cards of all of the patrons entering the nightclub on the night of the killings" and that Washington's name was not recorded that night.

¶17 Taking Washington's allegation as true for purposes of analysis, we conclude that Washington failed to allege sufficient facts to entitle him to an evidentiary hearing, because the showing of potential prejudice was so weak.

¶18 As the circuit court pointed out, the testimony of Detective McKee was of "'small importance,'" given the overall evidence adduced at trial, and "there is not a reasonable probability that the absence of Washington's name on the print[]out would have made [a] difference in the outcome of the trial."

¶19 Even focusing more narrowly on the significance of the detective's testimony about the record of patrons at Questions the night of the killings, Washington's allegations fall short. Washington does not assert that the detective or anyone else would have testified that all or even most of Questions' patrons on any given night show up in the bar's records. Indeed, one of the two witnesses who testified at trial that he saw Washington at Questions on the night of the shootings, additionally testified that he had not been carded that night. The witness testified that Questions does not request identification from every patron, especially those who go to the bar regularly. Thus, testimony from Detective McKee that Washington's identifying information had not been recorded at Questions would not have cast significant doubt as to whether the witnesses who placed Washington at Questions the night of the shootings were telling the truth. Accordingly, the circuit court did not err in denying Washington's motion.

3. Fuentez's Recantation

¶20 Washington contends that the circuit court erred in determining that evidence that Fuentez recanted his trial testimony that Washington was present at the shootings did not warrant a new trial.

¶21 "Motions for a new trial based on newly discovered evidence are entertained with great caution," and are submitted to the discretion of the circuit court. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). We will uphold a circuit court's discretionary decision if the court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶22 In order to set aside a judgment of conviction based on newly discovered evidence, it must be determined that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to the case; (4) the evidence is not merely cumulative; and (5) it is reasonably probable that a different result would be reached at trial. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42; ***Terrance J.W.,*** 202 Wis. 2d at 500.

¶23 Washington submitted to the court an affidavit by Fuentez wherein Fuentez averred:

> I am confessing that I falsely accused James Washington of being a participant in the July 4th[,] 2008 homicides during his trial.
>
> Mr. Washington was never present at the scene or possessed a firearm like I said he did. When I was being questioned by the Milwaukee police detectives, I felt

> pressured because they kept saying to me "to make a way for myself" that I took [to] lessen my role in the homicides.
>
> I actually possessed a handgun as well as one of the assault rifles, but only fired both weapons over the crowd of people to only scare them into running. I made mention of Washington by his street name "BD" to the detectives because that was one of the names that came to mind. I didn't think anything would come back on him, but once I saw his photo I was forced to continue to lie, because at that point I felt I had to do what I had to do to save my ass.
>
> I've always had somewhat of a dislike for Washington anyways that goes back far because he was a Black Disciple member who was considered an enemy. Especially hanging around a neighborhood that I grew up in that is predominantly Gangster Disciple, which I am.
>
> On a few occasions, myself and others got into it with him and made it known that he was disrespecting our territory and that his presence was not wanted especially since he rotates with some Vice Lords that are on 32nd and St[.] Paul.
>
> I never wanted to testify on Washington because he did nothing wrong but the DA knew good and well that I was going to lie. So I gave him what he wanted.
>
> After testifying I knew that I was wrong for lying on an innocent man and taking him away from his kids and family. So I feel to correct my wrong, I must come forward and confess that I gave a false statement about Washington to the detectives and at trial by saying he committed the crimes on July 4th[,] 2008.

¶24 We explained in ***Terrance J.W.*** that "[b]y its nature, a recantation will generally meet the first four criteria." ***Terrance J.W.***, 202 Wis. 2d at 501. As in ***Terrance J.W.***, the first four criteria are not in dispute in the present case. Thus, the determinative factor is whether it is reasonably probable that a different result would be reached at a new trial. We agree with the circuit court that Washington failed to establish this factor.

¶25 The circuit court determined that Fuentez's recantation was not credible. The court based this finding on the following facts: Fuentez had previously expressed fear about naming the individuals involved in the shooting; prior to executing the affidavit, Fuentez had stopped going to meals for fear that something would happen to him if he went to eat; Fuentez executed the affidavit at the request of a third party, who "would stare at [Fuentez] in a threatening manner"; Detective James Henseley had testified at the hearing that Fuentez had informed him that everything Fuentez testified to at trial was the truth and the averments contained in the affidavit were lies; Fuentez's demeanor at the evidentiary hearing compared to his demeanor at trial; and Fuentez's failure to answer questions at the evidentiary hearing, opting instead to invoke the Fifth Amendment or to answer "if that's what's in there, if that's what the affidavit says, you got the letters, the affidavit, it's in my handwriting, I ain't going to say no more."

¶26 When a circuit court makes a finding as to a witness's credibility, an appellate court will not overturn that finding unless the finding is shown to be clearly erroneous. ***Id.*** at 501. The circuit court's finding that Fuentez's recantation was not credible is supported by the evidence and is, therefore, not clearly erroneous. "A determination that [a] recantation is not credible is sufficient to conclude that it is not reasonably probable that a different result would be reached at a new trial." ***Id.*** Accordingly, we affirm the circuit court's determination that Washington is not entitled to a new trial in light of Fuentez's recantation.

4. Real Controversy

¶27 Finally, Washington argues that we should reverse under WIS. STAT. § 752.35 (2013-14) on the ground that the real controversy was not fully tried, due to Fuentez's alleged perjury at trial. As explained above, the circuit court found that Fuentez's recantation was not credible, and Washington fails to show that this finding was clearly erroneous. We conclude that the real controversy was fully tried, and we decline to exercise our discretion to reverse on that ground.

CONCLUSION

¶28 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2013-14).