COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2913-CR **Cir. Ct. No. 2010CF5685**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN LAMAR TAYLOR,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Glenn Lamar Taylor appeals from a judgment of conviction entered on jury verdicts for first-degree recklessly endangering safety and endangering safety/reckless use of a firearm. *See* WIS. STAT. §§ 941.30(1),

941.20(2)(a) (2009-10).[1] He also appeals from an order denying his postconviction motion.[2] Taylor asserts that the jury's verdict finding him guilty of first-degree recklessly endangering safety was not supported by sufficient evidence. Additionally, Taylor argues he is entitled to postconviction discovery, his trial counsel was ineffective, and the interests of justice require this court to exercise its discretionary authority to reverse under WIS. STAT. § 752.35. We affirm.

BACKGROUND

¶2 According to the criminal complaint, Taylor fired a gun at a house that was occupied by people. At the time of the shooting, LT and her family were in the process of moving out of the house.

¶3 At the jury trial, LT testified that her four children, two brothers, and landlord were helping her move. As she was standing on the porch, her son, MT, signaled for her to go into the house. As she, her daughter, and another son, KS, stood in the doorway of the house, LT saw a man with a gun wearing a red hooded

[1] Prior to the jury trial on the gun offenses, Taylor pled guilty to the charge of possession of a controlled substance (heroin) as a second and subsequent offense. His plea is not at issue on appeal.

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

[2] The Honorable Rebecca F. Dallet accepted Taylor's guilty plea to the charge of possession of a controlled substance, presided over the jury trial on the remaining charges, and entered the judgment of conviction. The Honorable J. D. Watts issued the decision and order denying Taylor's interim motion for postconviction discovery. Judge Dallet subsequently issued the decision and order denying Taylor's postconviction motion seeking dismissal of the charge of first-degree recklessly endangering safety and requesting a new trial due to ineffective assistance of counsel.

sweatshirt. When LT saw the man raise his arm while holding the gun, she and her daughter ran for cover in the back of the house.

¶4 MT and KS specifically testified that Taylor was the shooter. MT said that on the day of the shooting, he was helping his mother move. Prior to the shooting, MT saw a man named Sam wearing a black T-shirt and talking on a cell phone while walking down the block. MT also saw a man known as Man Man who was wearing a blue hoodie and walking through an alley across the street from the house. MT testified that he and Sam were enemies. After seeing Man Man walk past, MT told his family to go in the house because he anticipated there would be trouble.

¶5 MT then got into his car, heard shots, and saw a man in red shooting a gun in the direction of the house. At trial, MT testified that Taylor was the man in red. MT said that he was approximately five feet away from Taylor at the time of the shooting and that he observed him for five to ten seconds. When asked whether he had a chance to look at Taylor's face, MT said: "Little bit. Like when I[] drive past, I seen him; but I didn't get a long time good look likes it's all in a person's face, but I knew who it was." MT explained that he had seen Taylor around the neighborhood. MT further testified that at the time of the shooting, Taylor had gold tips on his dreadlocks.

¶6 KS was also helping his mother move on the day of the shooting. He testified that he saw Sam wearing a black hoodie and talking on a phone. Sam left, and Man Man, who was an enemy, then appeared. KS testified that Man Man was wearing all black. Upon seeing Man Man, KS testified that he thought there would be trouble due to a rumor that someone in KS's family had been involved in a shooting. After Man Man left, KS saw someone with a red hooded sweatshirt

across the street. KS said he knew the person in red as "Nook" and went on to identify Taylor as the person in the red hooded sweatshirt. When KS first saw Taylor, KS was on the front porch with his mother and sister. MT then ran up to the three and told them to go in the house.

¶7 KS saw Taylor pull out a chrome object from his waistband and start shooting. KS observed that the tips of Taylor's dreadlocks were gold. Upon hearing gunshots, KS shut the door.

¶8 KS testified that less than one minute lapsed between when he first saw Taylor and when he ran into the house. He saw Taylor for "four or five seconds" before Taylor started shooting. However, KS had seen Taylor before in the neighborhood. When asked whether he could see Taylor's face, KS said, "A little bit, not really, but a little bit." He said he knew the shooter was Taylor because "I know the dreads. That's the only man in the hood with gold tipped dreads."

¶9 A jury found Taylor guilty of first-degree recklessly endangering safety and endangering safety/reckless use of a firearm.

¶10 Taylor filed a motion for postconviction discovery asking for the addresses and phone numbers of three witnesses, LT, and her two children, MLT and TT (at the time of the shooting, both MLT and TT were minors).[3] This information was blacked out in the police reports. The circuit court denied the motion, concluding that Taylor had failed to show a reasonable probability that a

[3] MLT was sixteen years old and TT was about to turn twelve.

different outcome would occur based on what he believed MLT and TT would have said at trial.

¶11 Next, Taylor filed a motion to dismiss the charge of first-degree recklessly endangering safety and a motion for a new trial based on the ineffective assistance of trial counsel for failing to call MLT and TT as witnesses. The circuit court denied these motions as well.

DISCUSSION

I. *Sufficiency of the evidence*

¶12 Taylor argues that the jury's verdict finding him guilty of first-degree recklessly endangering safety was not supported by sufficient evidence. Taylor's argument is premised on his belief that he could not be guilty of endangering the safety of KS if he could not see KS. According to Taylor, the testimony suggests KS was inside the house while the shooting was underway.

¶13 To show that Taylor violated the statute, the State had to prove: (1) that he endangered the safety of another human being; (2) by criminally reckless conduct; (3) that showed utter disregard for human life. *See* WIS JI—CRIMINAL 1345. "Criminally reckless conduct" means conduct that Taylor was aware created an unreasonable and substantial risk of death or great bodily harm to another person. ***Id.*** "Utter disregard for human life" requires considering Taylor's conduct, its dangerousness, the obviousness of the danger, and whether it showed any regard for life. ***Id.***

¶14 As the State points out, there is nothing to suggest that the defendant must visually observe the person whose safety he endangers.[4] Rather, the defendant needs only to be aware of the unreasonable and substantial risk he creates.

¶15 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "'unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force'" that it can be said as a matter of law "'that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted).

¶16 Here, the evidence showed that LT and two of her children, MLT and KS, were standing in the doorway to their house when Taylor pointed a gun at the door and the people standing there. The people fled into the house and slammed the door behind them. Taylor started firing gunshots at the house as KS was shutting the door. KS testified that once he was inside the house, he stayed by the door as Taylor continued to fire multiple gunshots.

¶17 When we inquire into the sufficiency of the evidence, we must consider the totality of the evidence. ***State v. Smith***, 2012 WI 91, ¶36, 342 Wis. 2d 710, 817 N.W.2d 410. Viewing the evidence collectively and most favorably

[4] Because Taylor does not develop or support his argument with legal authority, we could conclude that no further consideration is warranted. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may "decline to review issues inadequately briefed").

to the State and the conviction, we have no trouble affirming the jury's finding that Taylor was guilty of first-degree recklessly endangering the safety of KS.

II. *Postconviction discovery*

¶18 Next, Taylor argues that he is entitled to the addresses and phone numbers of MLT and TT, who would have corroborated that Taylor was not the shooter. He claims that the eyewitness testimony against him was weak and directs us to the statements of MT and KS that the shooter was wearing red. MT further testified that he did not get a good look at the shooter's face, and KS testified that he could only see the shooter's face a little bit.

¶19 Taylor argues that if MLT had been called to the witness stand, she would have testified, consistent with her statement to police, that she saw two males approximately thirty minutes before the shots were fired, one of whom was wearing a red hooded sweatshirt. MLT identified the men as Man Man and Sam. In the police report, MLT stated that she did not remember which person was wearing the red sweatshirt. According to Taylor, MLT would have further testified that she knew the men from the neighborhood and feared they would cause trouble because her family had had previous issues with them.

¶20 According to Taylor, TT would have testified that prior to the shots being fired, he saw Sam wearing a red hooded sweatshirt and walking near his home. TT also would have testified that he was suspicious of Sam because TT's family had had previous issues with him.

¶21 Taylor argues that if the jury had heard the testimony of MLT and TT—that another person was seen wearing red in the vicinity and that person had

a motive to shoot at their house—it would have created reasonable doubt in the minds of the jurors.

¶22 To support his argument, Taylor relies on ***State v. O'Brien***, 223 Wis. 2d 303, 558 N.W.2d 8 (1999), for its discussion of a defendant's right to postconviction discovery. That court explained: "Historically, the right to discovery in criminal cases has been limited to that which is provided by statute. WISCONSIN STAT. § 971.23 governs the rights to and procedures for discovery in criminal cases." ***O'Brien***, 223 Wis. 2d at 319 (internal citation omitted).

¶23 First, we take note of what appears to be the ***O'Brien*** court's suggestion that postconviction discovery be limited to no more than the discovery provided by statute before trial. WISCONSIN STAT. § 971.23 does not require the State to disclose the telephone numbers of any witnesses. *See* § 971.23(1)(d). Furthermore, the statute specifies that the State is to disclose only the addresses of the witnesses the State intends to call at trial. ***Id.*** Neither party asserts that the State intended to call MLT or TT at trial. Consequently, we agree with the State's assessment: "Because the addresses and telephone numbers of MLT and TT were not subject to discovery prior to the trial, they should not be subject to discovery after the trial."

¶24 Second, the ***O'Brien*** court held that "a party who seeks post[]conviction discovery must first show that the evidence is consequential to an issue in the case and had the evidence been discovered, the result of the proceeding would have been different." ***Id.***, 223 Wis. 2d at 323. Although Taylor believes the testimony of MLT and TT would have changed the result of his trial, we are not convinced. Neither MLT nor TT actually saw the shooter. As such, it is difficult to believe that a jury would have accepted the statements of MLT and

TT rather than the testimony of MT and KS regarding the color of "Sam's" clothing. But, even if the jury had believed that Sam was wearing a red hooded sweatshirt, as summed up by the State:

> [I]t would have been nothing more than baseless speculation that a person who was simply wearing a red hoodie in the vicinity a half hour before the shooting was the person who did the shooting when nobody identified him as the shooter, and there was no other evidence to connect him to the shooting.
>
> ….
>
> Perhaps "Sam" had something to do with the shooting. Maybe he was casing the place for Taylor. Maybe he gave Taylor his hoodie so Taylor could veil his face when he shot at the house. But that is all just speculation.

¶25 We conclude that the postconviction discovery is not warranted in this case where the evidence sought would not create a reasonable probability of a different outcome.

III. *Ineffective assistance of counsel*

¶26 Next, Taylor claims he is entitled to a new trial because his trial counsel was ineffective for not calling MLT and TT as witnesses for the defense. He believes their combined testimony would have resulted in a reasonable probability of a different result at trial.

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

defendant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, there must be a showing "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. We need not address both aspects of the ***Strickland*** test if the defendant fails to make a sufficient showing on either one. *See* ***id.*** at 697.

¶28 Taylor has not satisfied the prejudice prong of the test for ineffective assistance of counsel for the same reasons he failed to satisfy the test for postconviction discovery. He has not shown a reasonable probability that if his trial counsel had obtained the address and phone numbers of MLT and TT and had called them as witnesses, the result of his trial would have been different. Consequently, we need not discuss whether his trial counsel's performance was deficient.

IV. *Real controversy was not tried*

¶29 Finally, in a related issue, Taylor argues that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried given that the jury did not hear testimony that another person was seen wearing red in the vicinity and that person had a motive to shoot at LT's house. He submits that the testimony of MLT and TT is relevant evidence as to the identity of the shooter.

¶30 We may order a new trial under WIS. STAT. § 752.35 if we conclude that the real controversy has not been fully tried, but 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). Taylor must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue.'" *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted).

¶31 Taylor's request for a new trial is akin to his meritless claims that he was prejudiced by trial counsel's failure to call MLT and TT as witnesses. One problem with this argument, as previously pointed out, is that neither MLT nor TT actually saw the shooter. Taylor's theory that someone else was the shooter because that person may have been wearing a red hooded sweatshirt in the vicinity of the house prior to the shooting, without additional evidentiary support, is not enough to convince us that this is an exceptional case that warrants the exercise of our discretionary authority to grant a new trial.

By the Court.—Judgment and order affirmed.

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