COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1147

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

IRAN EVANS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Iran Evans appeals *pro se* from the order denying his WIS. STAT. § 974.06 postconviction motion. In 1996 he was found guilty by a jury of attempted first-degree intentional homicide while armed, and first-degree reckless injury while armed, contrary to WIS. STAT. §§ 940.01(1), 939.32, 939.05,

940.23(1), and 939.63.[1] Evans argues that he is entitled to a new trial because: (1) his attorney was ineffective for failing to impeach two of the State's witnesses with their criminal records; (2) the State withheld exculpatory evidence when it failed to provide the criminal records of two witnesses; and (3) the trial court committed numerous errors. We affirm.

I. BACKGROUND.

¶2 Iran Evans was originally charged in Children's Court with attempted first-degree intentional homicide while armed, as party to a crime. He was later waived to adult court. Once in the adult court, the State amended the information to include a charge of first-degree reckless injury while armed. A jury convicted Evans of both counts on June 26, 1996. He was sentenced to thirty-five years' imprisonment for count one, and a ten-year sentence, to be served concurrently, on count two. Evans did not bring a direct appeal.

¶3 On April 15, 1999, he filed a postconviction motion under WIS. STAT. § 974.06 seeking a new trial, contending that: his trial counsel was ineffective for failing to impeach the State's primary witnesses with evidence of their criminal records; the State withheld exculpatory information when it failed to provide the criminal records of the two citizen witnesses; and the trial court erroneously exercised its discretion by refusing to: (1) permit his alibi witnesses to testify; (2) suppress his confession; and (3) submit a lesser-included offense for the jury's consideration. A short time later, but after the trial court had denied his postconviction motion, he "supplemented" his postconviction motion and alleged

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

that the trial court erred by failing to instruct the jury on alibi witnesses. In its decision, the postconviction court found that Evans's motion failed to allege facts that, if proved, would entitle him to relief, and thus, that Evans was not entitled to a ***Machner*** hearing.[2] Consequently, his motion seeking relief based on the ineffectiveness of his attorney was denied without a hearing. With respect to Evans's claims of prosecutorial misconduct, the trial court determined that the failure to provide the criminal records of witnesses, if indeed in this instance they had not been provided, did not fall within the ambit of ***Brady v. Maryland***, 373 U.S. 83 (1963), because criminal records were not "exculpatory evidence." Finally, the reviewing court found that Evans's claims that the trial court committed prejudicial error were not supported by the record.

II. ANALYSIS.

A. *Evans's trial attorney was not ineffective.*

¶4 In order to prevail on a claim of ineffective assistance of counsel, Evans must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985) (A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient, and, as a result, the defendant suffered prejudice.). To prove deficient performance, Evans must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S at 690. To show prejudice, Evans must demonstrate that the result of the proceeding was

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

unreliable. *See* ***id.*** at 687. In other words, Evans must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If Evans fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. *See* ***id.*** at 697. On review, we strongly presume counsel has rendered adequate assistance. *See* ***id.*** at 690. Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***Pitsch***, 124 Wis. 2d at 633-34.

¶5 Finally, it is within the discretion of the trial court to deny a postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts to raise a question of fact, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). The trial court's decision to deny an evidentiary hearing will only be reversed if the trial court erroneously exercised its discretion. *See* ***id.*** at 311.

¶6 With respect to ***Strickland***'s first prong, Evans argues that his attorney failed to "offer impeaching evidence of the victim's prior convictions and probationary status" and failed to establish that another State's witness was scheduled to be sentenced on an unrelated conviction the day after testifying in Evans's trial. Evans posits that because of their criminal records, the witnesses were pawns of the State and biased against him. Evans contends that his attorney's failure to conduct a reasonable investigation to discover this impeaching evidence resulted in the jury's never knowing of the bias of these witnesses.

¶7 With respect to the second prong, Evans presents a novel argument. He asserts that he was not obligated to show prejudice because his claim of ineffective assistance of counsel was being brought under Article 1, § 7 of the

Wisconsin Constitution. He maintains that this distinguishes his case from cases requiring proof of both deficient performance and prejudice to sustain a claim for ineffective assistance of counsel, and, he argues "thus, the defendant need not prove any prejudice in order to prove deficiency." We are unpersuaded.

¶8 First, we note that it is unclear whether Evans's attorney was aware of the witnesses' criminal records because the record is silent as to whether the State provided Evans's trial attorney with the criminal records and probation status of the two witnesses. Even assuming that the criminal records and probation status of the two witnesses were not provided by the prosecutor, we are satisfied that the reviewing court properly denied Evans's postconviction motion because he was not prejudiced by the alleged deficient performance of his attorney.

¶9 Second, Evans has cited no cases to support his interesting theory that because he grounds his ineffective assistance of counsel argument on Article 1, § 7 of the Wisconsin Constitution, he is not required to prove prejudice.[3] Evans's argument that we need not follow ***Strickland***'s ineffective assistance of counsel analysis ignores the fact that our supreme court adopted the analysis in ***Pitsch***, 124 Wis. 2d at 633.

¶10 Finally, after applying the ***Strickland*** test, as we must, we are satisfied that Evans has failed to establish that he was prejudiced by his attorney's failure to impeach the State's witnesses. At trial it was undisputed that the victim

[3] All the cases cited by Evans are inapposite. As an example, Evans cites ***State v. Billings***, 110 Wis. 2d 661, 329 N.W.2d 192 (1983), as support for his contention that he is relieved from adhering to the mandate in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), that to prevail on a claim of ineffective assistance of counsel, both deficient performance and prejudice must be shown. However, the issue in ***Billings*** dealt with the admission of a confession taken in violation of the Fifth Amendment right to counsel, not an ineffective assistance of counsel allegation. *See* ***Billings***, 110 Wis. 2d at 662-63.

had been shot—the only question left for the jury was the identity of the shooter. Evans can point to no information that suggests either witness was pressured or induced by the State to testify against him. Evans presumes this is so. We disagree. The record reveals that the victim received no favors from the State. Deric Devine, the victim, was motivated to testify against Evans because Evans shot him five or six times at close range for no apparent reason, resulting in Devine suffering numerous injuries, some of which are permanent.[4] Derrick Johnson, the State's witness who was sentenced the day after giving testimony in Evans's case, also was not rewarded for his testimony. Moreover**,** he never actually witnessed the shooting—his only involvement was, as he testified, that he turned at the sound of gunfire and saw the victim "hobbling" down the street. He then recalled how when he reached Devine, Devine told him that "Macho" (who Johnson knew to be Evans) had shot him. Further, another independent witness corroborated the testimony of these two witnesses. Daniel Kelley, a bystander, testified that he observed two men walking down the street when one of the men pulled out a gun and shot at the other person about four or five times. He described the shooter's physical description, general build and clothing. Although he could not identify the shooter, his description basically corroborated that given by Devine and Johnson, who both identified Evans as the shooter. Finally, strong evidence of Evans's involvement came from Evans's confession, in which he admitted shooting Devine. Thus, there existed substantial evidence pointing to Evans's guilt, and consequently, independent evidence supported the jury verdict. We conclude that, had defense counsel elicited from the witnesses their criminal records during trial, the result would have been the same.

[4] The record contains several different spellings of Devine's first name. Deric is the spelling that the victim gave when testifying.

B. *No exculpatory evidence was withheld by the State.*

¶11 Evans argues that the prosecutor was obligated to give his attorney a copy of the criminal records of the State's witnesses because their criminal records were exculpatory evidence under ***Brady v. Maryland***. Evans also claims that the State violated the pretrial discovery demand because his motion sought evidence that "would tend to effect the weight of credibility of evidence used against the Defendant." He contends that the criminal records fell within the ambit of this request. Evans asserts that the State's failure to give the criminal records to his attorney violated his due process rights. Although the failure to give the State witnesses' criminal records (if true) may constitute a violation of the duty to disclose exculpatory evidence, here, under the totality of the circumstances, had the criminal records been exposed to the jury, we determine that the outcome would have been the same.

¶12 In the seminal case of ***Brady v. Maryland***, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. While under ***United States v. Bagley***, 473 U.S. 667, 674 (1985), the failure to give impeachment evidence relating to the credibility of the witnesses may constitute exculpatory evidence, here the failure of Evans's attorney to obtain the arrest records did not deny Evans a fair trial. In order to constitute a constitutional violation, the omission must be of sufficient significance to result in the denial of the defendant's right to a fair trial. *See* ***id.*** at 675-76. The test for determining whether the omission is sufficiently significant is for the reviewing court to assess the possibility of a different outcome as a result of the prosecution's failure to disclose evidence "in light of the totality of the

circumstances." ***Id.*** at 683. A reviewing court applies the constitutional standards to the facts of the case *de novo*. *See* ***State v. Woods***, 117 Wis. 2d 701, 715-16, 345 N.W.2d 457 (1984).

¶13 After considering the "totality of the circumstances," we conclude that there was sufficiently strong other evidence of guilt to make the failure of Evans's lawyer to impeach the two witnesses harmless beyond a reasonable doubt.

¶14 First, Evans misconstrues the importance of the criminal records of the victim and his friend by arguing that only the victim's testimony connected him with the crime. As noted, besides the victim, Johnson heard the shots and rushed to the victim's aid where he was told Evans was the shooter. An independent witness, Daniel Kelley, observed the shooting, but could not identify Evans as the shooter.[5] Most importantly, Evans's confession confirmed that he was the shooter. Thus, this court concludes that the disclosure of the criminal records of the victim and Derrick Johnson to the jury would not have resulted in a different verdict, even if a violation of ***Brady v. Maryland*** occurred.

¶15 With respect to Evans's argument that he is entitled to a new trial because the State violated the discovery motion, as noted, the record neither supports Evans's claim nor negates it. Nothing in the record definitively answers the question as to whether Evans's attorney received the information Evans now claims was vital to his defense. The record also does not explain when Evans became aware of the criminal records of Devine and Johnson. In any event, any

[5] Evans argues that the description given by Kelley did not match that given by others. Kelley testified that the shooter was wearing a blue and yellow jacket, and that the gun was silver. Devine said Evans was wearing a yellow jacket. Others described the gun as blue steel and black. These discrepancies were known to the jury.

error on the State's part with respect to the failure to supply the criminal records of the witnesses was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (An error is harmless if there is no reasonable possibility that the error contributed to the conviction.).

C. *The trial court committed no errors.*

¶16 Evans next contends that the trial court made numerous errors during his trial which require a new trial. He submits that the trial court violated his constitutional rights when it: refused to permit his alibi witnesses to testify; failed to suppress his confession; and improperly instructed the jury.

1. Notice of Alibi

¶17 Two weeks before trial, Evans filed a Notice of Alibi pursuant to WIS. STAT. § 971.23(8). Section 971.23(8)(a), in pertinent part, provides:

> **Discovery and inspection.**
>
> **….**
>
> **(8)** NOTICE OF ALIBI. (a) If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 15 days before trial *stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known.*

(Emphasis added.) In his Notice of Alibi, Evans named four witnesses who would, according to his notice, "place the defendant at various locations on Milwaukee's near northside." On the date of trial, the prosecutor objected to the notice on a number of grounds, including that the Notice of Alibi never stated with particularity where Evans was at the time of the shooting. The trial court conducted a hearing and after Evans's counsel conceded that none of the named

witnesses could actually place Evans elsewhere at the time of the shooting, the trial court ruled that Evans had no alibi and it refused to allow Evans to call the named witnesses for that purpose. Evans argues that such a ruling violated his due process rights to present a defense. Evans is wrong.

¶18 The trial court possesses wide discretion in determining whether or not to admit evidence and this court will not reverse such a determination unless the trial court erroneously exercised its discretion. *See* ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). We will sustain an evidentiary ruling if the trial court examined the relevant facts, applied the pertinent law, and reached a rational conclusion. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶19 WISCONSIN STAT. § 971.23(8) sets out the procedure to be followed when a defendant intends to defend against a criminal charge by way of an alibi. The statute's purpose is to notify the State that the defendant intends to defend against the criminal charges by showing that it was physically impossible for the accused to have committed the crime because he or she was somewhere else at the time of the crime. *See, e.g.,* ***McClelland v. State***, 84 Wis. 2d 145, 151, 267 N.W.2d 843 (1978). While Evans's witnesses were prepared to testify that they saw or accompanied Evans at various times on the day of the shooting, none could state that Evans was someplace else at the time of the shooting. As WIS JI—CRIMINAL 775 notes, the word "alibi" is a Latin word meaning "elsewhere." Here, Evans's attorney conceded that he had no witnesses who could attest to Evans being "elsewhere" at the time of the crime. Thus, the trial court properly exercised its discretion in refusing to permit Evans's purported alibi witnesses to testify.

2. Confession

¶20 Evans submits that the trial court erred in admitting his confession. He contends that the detective fabricated his confession and he points to certain statements found in the police report that, he claims, support his belief. Further, he argues that the trial court never reached the issue as to whether he actually made the statements when the trial court denied his ***Miranda-Goodchild***[6] motion.

¶21 A trial court's factual findings surrounding the giving of the confession will not be disturbed unless clearly erroneous. *See* ***Woods***, 117 Wis. 2d at 714-15. Deciding whether a defendant's statement was voluntary poses a question of law that this court reviews *de novo*. *See* ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987).

¶22 Contrary to Evans's argument, the trial court found both that the detective properly advised Evans of his ***Miranda*** rights and that Evans gave the purported statement. The trial court, in referring to Evans's confession, remarked that the statement was "made freely, voluntarily and intelligently, and that it was the product of [Evans's] own free will and unconstrained will."

¶23 The record supports the trial court's findings. The detective testified to advising Evans of his ***Miranda*** rights and he related that he believed Evans understood those rights. Additionally, the detective discussed Evans's statements which implicated him in the shooting. Although Evans testified to an entirely different scenario, it is clear that the trial court found the detective's version of the events more credible than Evans's version. Because the trial court's findings are

[6] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

not clearly erroneous, we determine that the trial court properly admitted the confession into evidence.

D. *Jury Instructions*

¶24 Evans claims that the trial court erred both in its failure to submit a lesser-included offense instruction and in failing to give an alibi witness instruction. We do not reach these issues because Evans's claims are not properly before us.

¶25 Evans has appealed the denial of his postconviction motion seeking relief under WIS. STAT. § 974.06(1). Section 974.06 permits only constitutional and jurisdictional claims to be brought in postconviction motions under that statute. *See* ***State v. Nicholson***, 148 Wis. 2d 353, 360, 435 N.W.2d 298 (Ct. App. 1988) ("[Section 974.06] cannot reach procedural errors which fail to reach constitutional or jurisdictional status."). In pertinent part, the statute reads:

> **Postconviction procedure.** (1) After the time for appeal or postconviction remedy provided in [WIS. STAT. § 974.02] has expired, a prisoner in custody under sentence of a court … claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Evans's first complaint is that the trial court should have instructed the jury on a lesser-included offense. Such a claim, however, is not one involving a constitutional or jurisdictional right. In ***Nicholson***, the court held that the trial court's failure to give a lesser-included instruction does not raise a constitutional issue. *See* ***id.*** at 365 ("When, as here, the death penalty cannot be imposed, failure

to instruct the jury on a lesser-included offense does not violate due process."). Thus, Evans's claim concerning the lack of a lesser-included offense instruction could not be properly raised in his § 974.06 motion.

¶26 Second, Evans's contention that the trial court erred in failing to give an instruction regarding his alibi witnesses suffers from a similar fate for several reasons. First, Evans had no alibi. Second, Evans never requested an alibi instruction during the jury instruction conference. WISCONSIN STAT. § 805.13(3) states: "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." Finally, Evans raised the issue for the first time in a motion entitled a "supplemental" WIS. STAT. § 974.06 motion which was filed after the trial court had already denied his first § 974.06 motion. Section 974.06(4) provides that all grounds for relief must be contained in the first motion unless the prisoner can show a "sufficient reason" why they were not. The statute reads:

> **(4)** All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

Here, while Evans entitled his second motion a "supplemental" motion, it was actually his second postconviction motion because the first one had already been denied. Evans gave no reason why this particular claim was not included in his previous motion. Consequently, it is deemed waived under § 805.13(3).

¶27 For all the reasons stated, the trial court's decision is affirmed.

By the Court.—Order affirmed.

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