COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2974 **Cir. Ct. No. 1992CF921180**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLARENCE C. JOSEPH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Clarence Christopher Joseph, *pro se*, appeals an order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06

(2013-14).[1] He argues that: (1) he should be granted a new trial based on the statement of a witness who has just come forward; (2) his trial counsel ineffectively represented him by failing to interview Albert Morrow and call him as a defense witness at trial; and (3) he should be given a new trial in the interests of justice. *See* WIS. STAT. § 752.35.[2] We affirm.

¶2 This is the third time Joseph's case is before this court. Joseph was convicted of first-degree intentional homicide twenty years ago after a jury trial. Joseph argued at trial that he did not intend to kill the victim, D.T., but shot D.T. to defend himself and his friend Michael Sullivan, whom D.T. was attempting to rob at gunpoint. We affirmed the conviction on direct appeal. In 2013, Joseph collaterally attacked his conviction, arguing that he received ineffective assistance of counsel because his trial lawyer did not call Karl Thiel at trial and did not object to the prosecutor's closing arguments. The circuit court rejected these arguments and we affirmed on appeal. Joseph then filed the current postconviction motion, which the circuit court denied.

¶3 Joseph first argues that he should be given a new trial because a witness has come forward, Anthony Oliver, who corroborates Joseph's assertion that he acted in self-defense when he killed D.T. A defendant seeking a new trial on the basis of newly discovered evidence must prove that: (1) the evidence was discovered after the defendant was convicted; (2) the defendant was not negligent

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

[2] Joseph also argues that his claims should not be procedurally barred because he had a sufficient reason for not previously raising them. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We need not address this issue because we decide the merits of Joseph's arguments in this opinion.

in failing to discover the evidence earlier; (3) the evidence is material to an issue in the case; and (4) the evidence is not cumulative to other evidence adduced at trial. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***

¶4 Joseph explains that he recently met Oliver in prison. Oliver told him that Oliver was present when Joseph shot and killed D.T. Oliver has submitted an affidavit in which he describes what he observed when Joseph shot D.T.

> [O]ne of the black males on the side of the tavern … whom I now know as Clarence Joseph … had his hands in the air as he was being confronted by [D.T.] on the side of the tavern who was pointing a black revolver type handgun at him. I then immediately went back inside the tavern to get out of the way. Once back in the tavern, I curiously peered through the window by the door … and observed that [D.T.] was now confronting a different light skinned black male at gunpoint who was wearing several gold chains around his neck that [D.T.] began to grab. I then observed [D.T.] turn toward someone on the corner when I then saw Joseph, who was standing next to the guy with the gold chains, turn behind the guy real fast and fire 3 or 4 quick shots at [D.T.'s] back with some type of gun that sounded like an automatic.

(Numbering and parenthesis omitted.) Joseph contends that Oliver's affidavit corroborates his claim of self-defense because Oliver saw D.T. attempting to rob Joseph and Sullivan at gunpoint immediately before Joseph shot D.T., and is thus consistent with Joseph's argument that he shot D.T. in self-defense because D.T. posed an imminent threat.

¶5 Joseph's claim is unavailing for two reasons. First, Oliver's statement that he saw D.T. robbing Sullivan at gunpoint when Joseph shot D.T. is cumulative of other testimony at trial. The jury heard nearly identical testimony from four witnesses, Robert Cashaw, Derrick Everett, Michael Sullivan, and Joseph. We summarized this testimony in our prior decision, so we do not repeat it here. ***State v. Joseph***, No. 2013AP1703, unpublished slip op. ¶¶6-11 (WI App June 24, 2014). Second, Joseph has not shown that there is a reasonable probability that a different result would be reached in a trial if a jury heard Oliver's testimony. The jury rejected Joseph's argument that he was justified in killing D.T. because he was defending himself and his friend, despite testimony from multiple witnesses that D.T. was holding a gun to the men and attempted to take Sullivan's jewelry. There is no reason to believe that the jury would have concluded otherwise had it also heard testimony from Oliver.

¶6 Joseph next argues that his trial counsel ineffectively represented him by failing to call Albert Morrow, who had been interviewed by police, as a defense witness at trial. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the 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.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

¶7 Joseph contends that Morrow, who was a customer at a bar near the shooting, would have testified that he saw D.T. lying on his back after being shot near a Journal-Sentinel newspaper box. Joseph contends that this testimony would have supported his claim of self-defense because it corroborates his testimony that D.T. was standing near him presenting an ongoing threat, rather than walking back to the bar, when Joseph shot him.

¶8 Four trial witnesses placed D.T. near Joseph when Joseph shot him. Only one witnesses, Edward Lawson, D.T.'s cousin, testified that D.T. was walking away when he was shot. Joseph cannot show that he was prejudiced by his lawyer's failure to call Morrow as a witness because Morrow's testimony would have been similar to the testimony of other witnesses. Therefore, we reject Joseph's claim that he received ineffective assistance of counsel.

¶9 Joseph next argues that we should exercise our discretionary power under WIS. STAT. § 752.35 to order a new trial in the interests of justice on the grounds that the real controversy was not fully tried. We decline to do so because the record establishes that the real controversy—whether Joseph was justified in killing D.T.—*was* fully tried.[3]

[3] Joseph moved to supplement the appellate record after this appeal was submitted to the court for decision. He sought to include the affidavit of Charles Hennings, a third-party witness Joseph states he became acquainted with in prison. Hennings avers that Lawson, who was the primary prosecution witness at trial, told him shortly after D.T.'s murder that "he was initially going to handle matters in the street, but when his friend … told him that he had talked to the police and told them that [D.T.] … was walking back to the bar when [Joseph] shot him, that he … decided to kill two birds with one stone by saying the same thing to send the dude to prison and avoid prison himself for some drugs cases he had pending." According to Hennings' affidavit, Lawson did not admit to Hennings that he lied at trial. Lawson told Hennings that he decided to tell the police the same thing that his friend told police. As presented, this information is not sufficiently material to the case to meet the test for newly discovered evidence. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Therefore, we deny the motion to supplement.

By the Court.—Order affirmed.

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