COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2774 **Cir. Ct. No. 2008CF3168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMONE ALEXANDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Demone Alexander appeals from a trial court order denying his postconviction motion, which had sought: (1) a ***Machner***[1]

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

hearing on Alexander's allegations that his postconviction counsel and trial counsel provided ineffective assistance; or (2) a new trial based on newly discovered evidence. In addition to arguing that the trial court wrongly decided those issues, Alexander argues in the alternative that this court should exercise its power of discretionary reversal. We reject Alexander's arguments and affirm the order.

BACKGROUND

¶2 In 2008, a jury found Alexander guilty of one count of first-degree intentional homicide while armed. Alexander waived his right to a jury trial on a charge of being a felon in possession of a firearm and the trial court found Alexander guilty of that charge.

¶3 The two charges stemmed from the shooting death of Kelvin Griffin. The State presented evidence that a man named Stephen Jones and his brother, James Winston, went to Griffin's home to talk with him about a fight Griffin had with their sister. Jones testified that after the men had angry words, he privately spoke with Griffin and things had "calmed down," although Winston continued to yell.

¶4 Griffin went back into his home. Soon afterward, Jones's sisters showed up and started yelling for Griffin. Jones said he also saw Alexander, a man he had known since the 1990s, walking twenty feet away. Griffin came out of his home holding an assault rifle, which he waived around, causing people to run away. Next, Jones heard multiple gunshots and turned to see Alexander shooting a gun at Griffin. Griffin ran from the gunfire but was fatally shot. Most of the witnesses, including Jones, fled the scene.

¶5 Jones testified that later that day, he went to the home of one of his sisters and her husband, Getharia Smith. Jones said Alexander was there and that when Alexander learned the reason for the fight between Griffin and Jones's sister, Alexander expressed frustration that he had "killed this dude over this bullshit."

¶6 Another man, Lester Rasberry, who was living with Alexander at the time of the shooting, testified that earlier in the day, at Alexander's request, he retrieved a gun from the basement and gave it to Alexander. Rasberry said that Alexander told him he needed the gun "[t]o aid and assist a friend." Rasberry said that Alexander later admitted shooting Griffin, explaining that he fired after Griffin pointed a gun at the people Alexander was assisting. Rasberry also testified that he helped Alexander dispose of the gun by giving it to another man.

¶7 The jury also heard testimony from Detective Jeffrey Norman who interviewed Smith, the brother-in-law of Jones. Norman said that Smith told him that shortly after Smith's wife and two other women returned home after the shooting, Alexander drove over and spoke about the shooting. Norman testified that Smith told him: "[Alexander] spoke up and said, 'Man, I had to shoot dude. Dude was fixin' to kill your wife.'" When Smith testified at trial, he denied saying that to Norman, but he acknowledged talking with Norman and said that Alexander had come to Smith's house, albeit a couple of hours after the shooting rather than shortly afterward.

¶8 Another man testified that he saw a man who looked like Alexander holding a gun in the alley near where Griffin was shot.[2] He testified that the day after the shooting, he viewed a photo array provided by the police and identified Alexander as the man he saw with a gun.

¶9 Alexander's defense at trial was that the State did not prove he shot Griffin and that Jones and Rasberry were lying in order to get favorable treatment in unrelated criminal cases against them. The defense also presented the testimony of David Benson, who said that he was near the shooting location and saw Alexander, whom he recognized, walking a dog with his children. Benson said that when he heard gunshots, he saw Alexander and Alexander's kids running away. Benson said he did not see who did the shooting, but he never saw Alexander with a gun in his hand.

¶10 The jury found Alexander guilty of first-degree intentional homicide while armed. After Alexander was sentenced, postconviction counsel was appointed to represent him. Alexander filed two postconviction motions seeking a new trial, based on allegations that: (1) the trial court erred when it examined two jurors in Alexander's absence and removed those jurors over his objection; (2) trial counsel provided ineffective assistance with respect to the examination of Benson; and (3) Alexander should receive a new trial based on newly discovered evidence: an affidavit from a witness named Bicannon Harris and an affidavit from Rasberry's ex-girlfriend, Sheena McFarland. The trial court denied the

[2] Other witnesses testified as well; we will not attempt to summarize all of the trial testimony.

motions.[3] Alexander appealed and we affirmed. *See* ***State v. Alexander***, No. 2011AP394-CR, unpublished slip. op. (WI App May 8, 2012). The Wisconsin Supreme Court granted Alexander's petition for review to address the juror issue, and it ultimately affirmed Alexander's conviction. *See* ***State v. Alexander***, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126.

¶11 In 2014, with the assistance of counsel, Alexander filed the postconviction motion that is the subject of this appeal. The trial court rejected Alexander's ineffective-assistance-of-counsel claims in a written decision, and it ordered briefing on Alexander's request for a new trial based on newly discovered evidence. The trial court subsequently denied the motion in a written order, without a hearing.[4] This appeal follows.

DISCUSSION

¶12 Alexander presents three main arguments on appeal: (1) his WIS. STAT. § 974.06 (2013-14)[5] motion alleging ineffective assistance of trial counsel and postconviction counsel is not procedurally barred and he is entitled to a ***Machner*** hearing on his motion; (2) newly discovered evidence justifies a new trial; and (3) this court should exercise its power of discretionary reversal. We consider each issue in turn.

[3] The Honorable Carl Ashley presided over the trial and denied the postconviction motions Alexander filed prior to his direct appeal.

[4] The Honorable Stephanie G. Rothstein denied the postconviction motion at issue in this appeal.

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

I. Alexander's WIS. STAT. § 974.06 motion.

¶13 To be entitled to a hearing on a WIS. STAT. § 974.06 motion, a movant must allege sufficient material facts which, if true, would entitle him or her to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. However, if the record conclusively demonstrates that the movant is not entitled to relief, the trial court may deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To meet the ***Bentley*** standard, litigants should "allege … who, what, where, when, why, and how." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. The sufficiency of a postconviction motion is question of law. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

¶14 "[A]ny claim that could have been raised on direct appeal" or in a prior postconviction motion is barred from being raised in a WIS. STAT. § 974.06 motion absent a sufficient reason for not raising it earlier. *See* ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether a procedural bar applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). In some instances, ineffective assistance of postconviction counsel may constitute a "sufficient reason." *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶15 A defendant claiming postconviction counsel was ineffective for not challenging trial counsel's effectiveness must establish that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Demonstrating ineffectiveness requires a showing that counsel performed deficiently and that the deficiency was prejudicial. *See* ***Allen***, 274

Wis. 2d 568, ¶26. These are also questions of law. *See* ***Ziebart***, 268 Wis. 2d 468, ¶17. To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To satisfy the prejudice prong, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

¶16 With those legal standards in mind, we consider whether Alexander was entitled to a ***Machner*** hearing on his WIS. STAT. § 974.06 motion alleging ineffective assistance of trial and postconviction counsel. Alexander's motion argued that his *postconviction* counsel should have alleged that his *trial* counsel provided ineffective assistance by not calling five witnesses at trial after listing them on the defense's pretrial witness list. Alexander's motion concerning ineffective assistance did not contain affidavits from any of the witnesses or from trial counsel, so it is not clear whether trial counsel attempted to contact the witnesses, what they told trial counsel, and why trial counsel may have chosen not to call them. Instead of providing affidavits, Alexander attached police reports about police interviews with three of the witnesses, a signed statement from one witness, and Alexander's own affidavit about what he believes a fifth man would have testified.

¶17 The first witness Alexander claims trial counsel should have called was Chetona Eubanks. The police report Alexander provided indicates that Eubanks viewed a photo array and identified James Winston as someone she saw arguing with Griffin. The report states that Eubanks also told the officer that before the shooting, she saw a man outside her apartment building who was

wearing black clothing and holding a gun near his leg. The report does not indicate that Eubanks saw anyone shoot a gun. The postconviction motion implies that the man Eubanks saw wearing black clothes was Winston, and it asserts that trial counsel "failed to call Chetona Eubanks as a witness without explanation." We conclude that Alexander's allegations concerning this witness are insufficient to warrant a ***Machner*** hearing. Contrary to Alexander's assertion, it is not clear from the police report whether Eubanks thought the man wearing black clothes was Winston. Further, the motion does not adequately explain Alexander's theory that Winston was the shooter and how Eubanks's testimony would have affected the outcome of the trial, given the other trial testimony.

¶18 The second witness Alexander identifies is Oliver Jones, Stephen Jones's brother. Alexander's motion attached a police report concerning an interview with Oliver Jones. The report states that Oliver Jones told the officer that a few days after the shooting, Stephen Jones told him that Alexander was the shooter. The report continues: "Oliver Jones states he can't recall the full conversation, but does believe that [Stephen Jones] was saying that [Jones's sister] was saying that [Alexander] did it, but he was not able to observe [Alexander] actually doing the shooting." (Some capitalization omitted.) Alexander's motion argues that trial counsel should have called Oliver Jones to impeach Stephen Jones's testimony that he personally saw Alexander shooting the gun. We conclude that Alexander's allegations concerning Oliver Jones are insufficient to warrant a ***Machner*** hearing. Contrary to Alexander's assertion, it is not clear from the police report what Oliver Jones told the police officer. Further, the motion does not address the fact that Stephen Jones said at trial that because he feared Alexander, he waited months to tell anyone that he personally saw Alexander shoot Griffin. The motion has not adequately explained how trial counsel's

allegedly deficient performance prejudiced Alexander. Further, it is not sufficient to simply assert that "casting doubt on the legitimacy of the testimony of Stephen Jones is important to the defense." *See* ***Allen***, 274 Wis. 2d 568, ¶9 (where conclusory allegations are presented, trial court has discretion to grant or deny a hearing).

¶19 The third witness Alexander claims trial counsel should have called is Bobby Sullivan. In a signed statement attached to the motion, Sullivan stated that in 2007, while he was in jail with Stephen Jones, Jones said: "'I'm glad they charged [Alexander] … and his ass is going to prison and not mine. I'm the one who pulled the trigger. [Griffin] … took a run and I lit his back up.'" The motion asserts that "[t]he testimony of Bobby Sullivan would have given any jury reason to doubt the testimony of Stephen Jones." This conclusory argument does not warrant a ***Machner*** hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. The motion does not adequately explain Alexander's theory that Jones was the shooter and how that theory would have fit with the other evidence in the case. Further, the motion is inherently contradictory, as Alexander claims trial counsel should have called this witness to testify that Stephen Jones admitted being the shooter, but Alexander also claims trial counsel acted deficiently by not calling Eubanks to say Winston was the shooter.

¶20 The fourth witness Alexander argues should have been called to testify is Jerrold Ezell. The only information about Ezell in the motion comes from Alexander's affidavit stating what he claims Ezell would have said: that he saw Alexander walking his dog with his children and when the gunfire started, Alexander shielded his children to protect them. Alexander's affidavit does not indicate how he knows Ezell, how he came to learn what Ezell claims to have witnessed, how Ezell recognized Alexander, or other details about Ezell's claim.

This lack of specificity, plus Alexander's conclusory statement that "[n]ot producing Jerrold Ezell amounts to ineffective assistance of trial counsel," are not sufficient to warrant a ***Machner*** hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶21 The final witness Alexander asserts should have been called by trial counsel is Zanetta Felts, who told police that she saw the shooter and provided a description, but could not make a positive identification of anyone when shown photographs. Alexander argues that "Felts would have been a good witness for the defense," but he fails to explain how her inability to recognize anyone would have been so helpful that the failure to call her was constitutionally prejudicial. The postconviction motion also fails to explain how the defense would have addressed the report's statement that when Felts was shown a photograph of Alexander, she said the shooter "looks like him because of the build and head shape, but was not for certain."

¶22 In summary, we have concluded with respect to each of the five witnesses that Alexander's motion was insufficient to warrant a ***Machner*** hearing on Alexander's claims concerning trial counsel ineffectiveness. Therefore, the trial court did not erroneously exercise its discretion when it denied Alexander's WIS. STAT. § 974.06 motion without a hearing. *See* ***Bentley***, 201 Wis. 2d at 309-10.

¶23 Alexander's motion also fails for another reason: he has not demonstrated that trial counsel's failure to call these five witnesses was an issue that was "clearly stronger" than the issues postconviction counsel chose to pursue. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668 ("[A] defendant who alleges in a [WIS. STAT.] § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims

must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought."). Alexander asserts that "[t]he issues raised on direct appeal were not strong," but he does not present a compelling case. At a minimum, the Wisconsin Supreme Court's decision to accept Alexander's petition for review and its lengthy opinion concerning the juror issue demonstrate that postconviction counsel identified a viable issue to pursue on appeal. Further, for the reasons noted above, Alexander has not presented sufficient information and argument to warrant a ***Machner*** hearing on trial counsel's alleged ineffectiveness; that same information likewise does not support Alexander's assertion that this issue was "clearly stronger" than the issues postconviction counsel chose to pursue. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4.

II. Alexander's motion for a new trial based on newly discovered evidence.

¶24 Alexander seeks a new trial based on newly discovered evidence. A defendant seeking a new trial on the basis of newly discovered evidence must show by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (one set of quotation marks and citation omitted). "If the defendant is able to make this showing, then 'the [trial] court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted).

¶25 To be entitled to a new trial, the newly discovered evidence must be sufficient to establish that a defendant's conviction was a "'manifest injustice.'"

State v. Plude, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). A motion for a new trial is addressed to the sound discretion of the trial court, and the trial court will be reversed on appeal only for an erroneous exercise of this discretion. ***Id.***, ¶31. Whether the new evidence would have a sufficient impact on the other evidence such that a jury would have a reasonable doubt about the defendant's guilt is a question of law. ***Id.***, ¶33.

¶26 Alexander's postconviction motion asserted that affidavits from five witnesses constituted newly discovered evidence.[6] On appeal, he has conceded that an affidavit from David Benson—who testified at trial—is not newly discovered evidence, but he continues to argue that the other four affidavits are newly discovered evidence that justifies a new trial.

¶27 We begin with the affidavits from Sheena McFarland, the former girlfriend of Lester Rasberry, and Eric Coleman, a cousin of Stephen Jones. McFarland's affidavit claims that Rasberry told her he planned to, and later did, give the authorities false information about Alexander "in hopes of securing a deal on his federal criminal case." Coleman's affidavit claims that Stephen Jones told him that a man named Rodney—the boyfriend of a member of Jones's family—was the man who shot Griffin. The affidavit also states that Jones told the police that Alexander was the shooter in order to protect Rodney and because Jones thought Alexander had named Winston as the shooter. The State's trial court brief presented several arguments on these two affidavits; the trial court adopted the State's arguments as its decision on these two potential witnesses. On review, this court agrees with the State's argument that evidence "which merely impeaches the

[6] The fifth affidavit was submitted after the original motion was filed.

credibility of a witness does not warrant a new trial." *See* ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968); *see also* ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972) ("Discovery of new evidence which merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone."). Further, the fact that Alexander's postconviction motion did not state a consistent theory of defense also explains why Alexander failed to demonstrate that if these two witnesses were called to testify, "'a reasonable probability exists that a different result would be reached in a trial.'" *See* ***Avery***, 345 Wis. 2d 407, ¶25 (citation omitted). We conclude that the trial court did not erroneously exercise its discretion when it denied Alexander relief based on these two affidavits.[7]

¶28 The next two affidavits we consider were signed by David Trotter and Damon Brown. Both men claim to have seen a shooter who was not Alexander. Both acknowledged that they did not contact the police. Trotter said he later learned that Alexander had been convicted and spoke with Alexander in prison in March 2012 about what he had seen, and thereafter contacted Alexander's attorney with the information. Brown said that while he was serving time in prison, another man showed Brown a picture of Alexander and said that Alexander was imprisoned for Griffin's murder. Brown indicates that he thereafter contacted Alexander and "let him know … [Brown is] willing to identify the person who committed the murder."

[7] In addition, we note that there is another reason to reject McFarland's affidavit, which was dated January 7, 2011: it was submitted and considered as part of Alexander's 2011 postconviction motion, which was denied. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

¶29 The trial court in its written decision discussed the information in each affidavit, noting that "the affidavits are suspect and simply too lacking in credibility to warrant a hearing." The trial court also observed that "[b]oth men have substantial criminal records" and that "[b]oth men did not come forward until years later, *after* they were incarcerated *after* they spoke with other inmates about the shooting or with the defendant directly." The trial court continued:

> Given their vague identifications of the shooter, the inconsistency in their physical descriptions, the timing and circumstances under which their statements were made and their substantial prior records, the court finds that their affidavits are significantly lacking in credibility.
>
> Consequently, even if their testimony were presented at a new trial, there is not a reasonable probability of a different outcome. The jury heard evidence in the first trial about a third-party shooter and rejected it…. [That trial witness's] testimony about a different shooter … was simply no match for the testimony of Stephen Jones, Lester [Rasberry and] Detective Jeffery Norman regarding his interview of Getharia Smith, to whom the defendant admitted killing the victim, and … [the] impartial witness … who made an identification of the defendant from a photo array following the shooting and in court.
>
> ….
>
> Here, the court is presented with additional "I don't know who did it but I know he didn't do it" affidavits. Such claims without more, are simply not enough to warrant a new trial…. [T]here is no reasonably probability that a jury would acquit the defendant based upon the statements offered by David Trotter and Damon Brown.

¶30 On appeal, Alexander disputes the trial court's conclusion that there is no reasonable probability of a different result at a new trial. He argues that "[t]he old evidence is not strong" and that the testimony of Trotter and Brown that Alexander was not the shooter, as well as Jones's family's motive to shoot Griffin based on Griffin's fight with a Jones family member, creates a reasonable

probability that a different result would be reached at a new trial. We are not persuaded. As the State and the trial court note, when the trial court that presided over the trial rejected Alexander's first postconviction motion, it noted that the trial included "overwhelming evidence of [Alexander's] guilt" that "was both compelling and overwhelming."

¶31 Also, other than providing the two affidavits and arguing that they suggest there was a different shooter, Alexander's motion did not adequately explain how the facts in the affidavits can be reconciled with the other evidence produced at trial, including testimony that Alexander admitted being the shooter to Jones, Smith, and Rasberry. Further, the fact that the postconviction motion asserted at various times that the shooter was Jones, Winston, a man named Rodney, or an unidentified man, does not suggest there is a consistent defense theory, based on these two affidavits or otherwise, that would demonstrate "'a reasonable probability exists that a different result would be reached in a trial.'" *See* ***Avery***, 345 Wis. 2d 407, ¶25 (citation omitted). We are not convinced that the trial court erroneously exercised its discretion when it denied the postconviction motion.

III. Alexander's request for discretionary reversal.

¶32 Alexander urges this court to "exercise its power of discretionary reversal because the real controversy has not been fully tried and because justice has miscarried." (Capitalization omitted.) He asserts that trial counsel's failure to call five witnesses and the evidence he claims was newly discovered justify a new trial. He explains: "[T]he cumulative effect of evidence the jury did not hear but should have leads to the conclusion that the real controversy was not tried."

¶33 To secure a discretionary reversal under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried, Alexander must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶34 Our review of the files and proceedings in this case convinces us that the central controversy in this case—the identity of the shooter—was fully vetted at trial. Nothing Alexander has presented in this appeal persuades us that a new trial in the interest of justice is warranted.

By the Court.—Order affirmed.

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