COURT OF APPEALS DECISION DATED AND RELEASED

July 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos.94-0526-CR
94-1361-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID W. STOKES,

Defendant-Appellant.

APPEALS from judgments and an order of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. David W. Stokes appeals from judgments convicting him of first-degree intentional homicide by use of a dangerous weapon, endangering safety by discharging a firearm into a vehicle, attempted first-degree intentional homicide by use of a dangerous weapon, first-degree recklessly endangering safety, and two counts of possession of a firearm by a felon, and from an order denying his motion for a new trial. We affirm the trial court's refusal to grant Stokes a new trial and its decision to exclude expert testimony about posttraumatic stress disorder.

It is undisputed that after a day of drinking, Stokes shot and killed Kevin Parr and seriously wounded Vicki Parr. Stokes did not get along with the Parrs, who were his next-door neighbors. Stokes contended that he shot the Parrs in self-defense and that his difficult childhood and traumatic prison experience were factors in the shooting. The jury convicted Stokes.

Postconviction, Stokes sought a new trial in the interest of justice because evidence should have been introduced regarding his intoxication on the night of the shootings. Officers attempted to test Stokes on the night of the shootings but the intoxilyzer reportedly was not working. Posttrial, Stokes claimed the machine probably was functioning and that evidence to that effect would have supported the following defense theory (as described in Stokes's reply brief): "If the machine had been proven up as in working condition, combined with evidence that the Defendant was not tested, a strong inference could have been raised and argued that the deputies did not want to use it to create a record of substantial intoxication, which would have assisted the Defendant's defense as to reduced capacity."[1]

The trial court denied Stokes's request for a new trial on several grounds. First, the defense was aware that Stokes had been asked to take an intoxilyzer test on the night of the shootings but the test was not conducted because an officer said the machine was not functioning. Whether the machine could have been made to function could have been explored before trial. Second, "at no time did the defense attempt to establish that the defendant was not aware of what he was doing" by reason of intoxication.[2] Rather, Stokes claimed that he acted in self-defense and that the shootings were partially motivated by posttraumatic stress disorder due to a difficult childhood and later prison experience. Finally, the court observed that "the defendant cannot choose one strategy for purposes of the trial and when that strategy proves to be unsuccessful have a new trial so a new strategy can be attempted, especially when that second strategy could also or was also available to the defense at the time of the first trial."

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[1] Intoxication can be a defense if it "[n]egatives the existence of a state of mind essential to the crime ...." Section 939.42(2), STATS.

[2] Notwithstanding Stokes's selection of a different strategy at trial, the jury was informed on numerous occasions that Stokes had been drinking on the day of the shooting.

On appeal, Stokes seeks a new trial because the jury was not presented with what he characterizes as newly-discovered evidence about the condition of the intoxilyzer. Newly-discovered evidence must meet five requirements, two of which are dispositive here: it must be evidence which comes to light after trial and the defendant must not have been negligent in seeking to discover it. *See* ***State v. Boyce,*** 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977). Here, defense counsel was aware that the intoxilyzer was not used on the night of the shootings because the testing officer said it was disabled. In fact, over five months before trial, at a November 19, 1992, hearing to suppress statements and other evidence, sheriff's officers testified that they attempted to use an intoxilyzer to measure Stokes's blood alcohol content but it was not working. The defense could have further explored the condition of the machine to produce the evidence ultimately elicited at the postconviction motion hearing that the machine likely was working.[3] A defendant will not receive a new trial on the basis of evidence which is not newly discovered.

We agree with the trial court that Stokes is attempting to pursue a new theory of defense on appeal. At numerous points in his appellate briefs Stokes argues that evidence of intoxication would have aided the jury in evaluating his ability to form the requisite intent. However, the record indicates Stokes did not pursue that defense. In opening statements, defense counsel mentioned that Stokes had "a few drinks" before the shooting but emphasized that Stokes felt threatened by Kevin Parr before the shooting. At the jury instruction conference, counsel explicitly stated that he and his client had conferred and would not request the "voluntary intoxication" jury instruction. *See* WIS J I—CRIMINAL 765 (1985).[4] Shortly thereafter, when asked by the trial

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[3] At the postconviction motion hearing, Stokes presented evidence that the intoxilyzer might have worked if it had been reset, and that it may not have been completely disabled as the officers believed.

[4] WIS J I—CRIMINAL 765 (1985) states:

> In deciding whether the defendant acted with the [requisite mental state], you must consider the evidence that he was intoxicated at the time of the alleged offense. If the defendant was so intoxicated that he did not [have the requisite mental state], you must find him not guilty of (charged crime). Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

court whether the instructions were proper, Stokes stated they were. We agree with the trial court's apt observation that Stokes pursued one line of defense at trial and attempts to pursue another on appeal.

Stokes also claims that the lack of evidence of his blood alcohol content at or near the time of the shootings forced him to abandon an intoxication-based defense. We cannot review this claim because it implicates strategic choices presumably made by trial counsel in the course of defending the case. Such inquiries must be raised in the trial court before being raised on appeal. *See* ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). In the absence of a trial court record regarding the decisions made by trial counsel, we will not address this issue. ***State v. Krieger,*** 163 Wis.2d 241, 254, 471 N.W.2d 599, 603 (Ct. App. 1991).

We conclude that the trial court did not misuse its discretion in denying Stokes's motion for a new trial. *See* ***State v. Kimpel,*** 153 Wis.2d 697, 702, 451 N.W.2d 790, 792 (Ct. App. 1989).

We turn to Stokes's second appellate issue: whether the trial court erroneously excluded testimony from Dr. James Bray, a counseling psychologist and therapist. In an offer of proof, Bray testified that he interviewed Stokes, spoke with Stokes's wife and received information from Stokes's attorneys.[5] In Bray's opinion, Stokes suffered from posttraumatic stress disorder caused by his traumatic prison experience many years before. Stokes argued that Bray's testimony would assist the jury in determining whether, as a result of this disorder, Stokes believed he was in imminent danger of death or great bodily harm at the time of the shootings.

The trial court declined to permit Bray to testify at trial because it was for the jury to decide the significance of Stokes's childhood and prison experiences and that evidence of these experiences had already been presented to the jury via Stokes's testimony. The trial court found that the probative value of Bray's testimony would be substantially outweighed by the danger of unfair

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[5] Bray was unable to do any psychological testing of Stokes, although he stated that such tests are unnecessary in order to evaluate a patient.

prejudice and confusion of the issues and that the jury might be misled. Furthermore, the trial court found that Bray's testimony was not based on scientific knowledge and his conclusions were based upon the same factors which the jury would be free to use in assessing the significance of Stokes's prison and childhood experiences.

Whether expert testimony is relevant and would assist the jury is within the trial court's discretion. *See* ***State v. Pittman,*** 174 Wis.2d 255, 267-68, 496 N.W.2d 74, 79, *cert. denied,* 114 S. Ct. 137 (1993). We will uphold a discretionary decision if the trial court examined the facts of record, applied a proper legal standard and reached a reasonable conclusion using a rational process. *See* ***id.*** at 268, 496 N.W.2d at 79-80. Stokes specifically challenges the trial court's determination that Bray's testimony was not based on scientific knowledge. However, our review of evidentiary rulings is not limited to a particular ground for the decision.

We conclude that the trial court properly exercised its discretion in excluding Bray's testimony because it was not necessary to assist the jury in determining a fact in issue—Stokes's beliefs and perceptions at the time of the shootings. The jury had already heard testimony from Stokes and his wife regarding his beliefs when the shootings occurred, his difficult childhood and his experiences in a threatening prison environment which allegedly shaped his view of events involving the Parrs. Bray's testimony was not necessary for the jury to decide whether Stokes believed that when he killed Kevin Parr and shot Vicki Parr he was in imminent danger of death or great bodily harm.[6]

Finally, any suggestion that Bray's testimony would have assisted the jury in understanding the effects of alcohol on Stokes is not well-founded. The trial court found that Bray was not qualified to testify to the effects of

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[6] Stokes testified about violence in his childhood and his traumatic experience during a prison term he began serving at age nineteen. He also told the jury about the difficulties in his relationship with the Parrs and what he believed to have been Kevin Parr's threatening behavior.

intoxication or alcohol, and Stokes does not challenge this determination on appeal.[7]

By the Court.—Judgments and order affirmed.

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

[7] At the conclusion of his argument regarding the trial court's refusal to permit Bray to testify, Stokes states, without citation to authority, that the trial court's ruling denied him his constitutional right to present witnesses and a valid defense. This issue is inadequately briefed and we will not address it. *See* ***State v. Pettit,*** 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).