COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2987 **Cir. Ct. No. 2003CF352**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. ALEXANDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Michael Alexander, pro se, appeals an order denying postconviction relief under WIS. STAT. § 974.06.[1] Alexander argues that

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

the admission into evidence of recorded statements of two witnesses violated his right of confrontation; the trial transcript was inadequate, thereby resulting in the loss of the opportunity to appeal; and trial counsel was ineffective for failing to object to a portion of the State's closing argument. We reject his arguments, and affirm.

¶2 This matter arose out of an altercation at a nightclub during which Alexander shot and killed Therrick Roberts, shot and wounded Brian Childress, shot and wounded Calvin Thomas, and fired other shots that missed the club patrons. Alexander fled to Minnesota after the incident, and threw the gun in the garbage. The next morning the police contacted Alexander, and Alexander told police that he was not involved in a fight and "I don't know nothin' about nothin'." Alexander was subsequently extradited back to Wisconsin.

¶3 At trial, a number of individuals testified regarding the incident. For example, Antwane Harrington testified that Alexander was involved in an argument near the dee-jay stand and left the nightclub in anger. Harrington observed Alexander through the club's window go to the trunk of a car and put "something in his belt line." Alexander then came back into the nightclub and, after some "punches was passed," Alexander "reached in his beltline and pulled out a gun." Shots were fired. Alexander fled the scene in the same car, and Harrington reported the license plate number to police.

¶4 Alexander testified in his own defense that the gun was not his. Alexander contended that he took the gun from Childress, who Alexander claimed had confronted him with it on the dance floor, and that he fired at Roberts and Childress in self-defense.

¶5 A jury convicted Alexander on all four counts as charged: first-degree intentional homicide, attempted first-degree intentional homicide, and two counts of first-degree recklessly endangering safety, all while armed with a dangerous weapon and as a repeat offender.

¶6 Alexander sought postconviction relief under WIS. STAT. RULE 809.30, alleging various instances of ineffectiveness of counsel and circuit court error. The circuit court denied the motion. We affirmed Alexander's conviction on direct appeal in ***State v. Alexander***, No. 2007AP1270-CR, unpublished slip op. (WI App May 1, 2008).

¶7 More than three years later, Alexander filed the present motion for postconviction relief under WIS. STAT. § 974.06. The circuit court summarily denied the motion in a written decision. The court concluded that Alexander's confrontation-based challenge to the admission of the recorded statements of the two witnesses had been rejected on direct appeal. The court also concluded that Alexander had offered no proof that the trial transcript was incomplete or inaccurate. The court further ruled that Alexander's conclusory claim of ineffective assistance did not provide a sufficient reason why his challenge to the ineffectiveness of his trial counsel for failing to object to the State's closing argument was not raised in his prior postconviction motion. Alexander now appeals.

¶8 Alexander's first argument on appeal is that the circuit court erred by allowing into evidence the recorded statements of two witnesses to the shooting, Jasmine Tucker and Latoya Lockett, who were unavailable because of military service in Afghanistan. Tucker's statement was that she saw Alexander get punched on the dance floor, Alexander then began to shoot, he ran out of the bar

still shooting, and he made a motion with his arm as if he were emptying bullets from the gun. Lockett's statement was that Alexander was involved in a fight, left the club, returned to the club, and was involved in a second fight, after which he pulled out a gun that might have been from his waist; and she heard a shot after she saw the gun.

¶9 Alexander argues that "the most damaging evidence to the defense were allegations that Mr. Alexander pulled a firearm from his waistline," since it would be "pretty difficult to argue self-defense if Mr. Alexander went out and got a gun." Alexander contends that his trial attorney "knew the devastation such allegations would [have] on Mr. Alexander's credibility," but nevertheless counsel introduced Lockett's statement.

¶10 On direct appeal, we concluded that Tucker's statement that Alexander was punched before the shooting was helpful to Alexander's claim of self-defense. We also found reasonable trial counsel's assessment that the prosecutor would not agree to the admission of one statement without the other, because the statements were taken under the same circumstances and there was no apparent reason that one statement would be admissible and the other would not be. We concluded that counsel sought the admission of the recorded statements as part of a rational strategic decision that the better course was to have the jury hear both statements rather than neither.

¶11 A defendant's subsequent postconviction effort to litigate the same issue is barred. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Given our previous decision rejecting Alexander's challenge to the admission of the recorded statements, it is apparent that his current challenge is a repackaged version of the same challenge and may not be relitigated.

¶12 Nevertheless, Alexander insists that, pursuant to ***Crawford v. Washington***, 541 U.S. 36 (2004), testimonial statements of witnesses absent from trial can be admitted only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine those witnesses. We acknowledge that the Sixth Amendment guarantees a defendant's right to be confronted with the witnesses against him. However, as the circuit court correctly recognized in its decision denying Alexander's present motion:

> As these tapes were admitted by Mr. Alexander's own counsel, any right to confrontation, provided by the Sixth Amendment, was waived by Mr. Alexander and as previously discussed, that waiver was a strategic decision and did not constitute ineffective assistance of counsel.

¶13 Here, the recorded statements of the two witnesses who did not testify at trial were introduced by the defense as part of the defense case. Thus, the recorded statements of the witnesses were introduced in support of the defendant, not against him. Accordingly, there was no violation of the Sixth Amendment right to confront witnesses against him.

¶14 Alexander's second argument on appeal was also properly rejected by the circuit court. He insists a court reporter failed to transcribe some trial testimony, resulting in his loss of the opportunity to appeal. The purported "missing" transcript involved Alexander's claim of self-defense and his testimony that he was hit in the face with a glass bottle just prior to the shooting. The transcript reveals that Alexander testified that his friend, Crystal Carpenter, pulled pieces of glass out of his face when they returned home. During cross-examination, the prosecutor asked Alexander about Carpenter's whereabouts and why she had not testified at trial.

¶15 In Alexander's circuit court motion, he specifically pointed to the following portion of the transcript as purportedly depriving him of the right to appeal:

> Q Where is Crystal today?
>
> A Uhm, I believe she's, uhm, in Minneapolis, if I'm not mistaken.
>
> Q Did you ask her to come down and, uhm –
>
> **MR. ARNESON**: Objection, Your Honor. This is –
>
> **MR. HORNE**: Tell the jury why she's not here. I think I can inquire as to –
>
> **THE COURT**: You can. Overruled.

¶16 Alexander insisted in his motion that "[t]he transcript's truncation of defense counsel's ground for objecting deprived Mr. Alexander of the right to appeal." He contends on appeal that this allegedly "missing" portion of the transcript, if available, might support a claim of prejudicial error. Alexander requests that a court "explore the possibility of correcting the record" and suggests a "hearing to call trial counsel … as a witness and ascertain his recollection of the specific ground for objecting." According to Alexander, he "retains the right to request a new trial depending upon the results of the hearing."

¶17 The circuit court rejected Alexander's claim on the most fundamental of grounds: that Alexander had failed to allege any facts supporting his conclusory assertion that testimony was not properly recorded. The circuit court also noted that, during Alexander's direct appeal, Alexander alleged his trial counsel was ineffective for failing to articulate a reason for his objection. However, in his WIS. STAT. § 974.06 motion, Alexander alleged that counsel made

an argument as to why the objection should be sustained, but that argument was not preserved in the record.

¶18 In any event, we agree with the circuit court that Alexander cited no evidence in the record indicating that the "–" in the transcript was anything other than an indication that Attorney Horne cut off Attorney Arneson, and Attorney Arneson was then cut off by the court.

¶19 Moreover, on direct appeal we rejected Alexander's contention that counsel was deficient for failing to object to this line of questioning. We concluded that "the prosecutor's questions on the whereabouts of and lack of testimony from Carpenter were permissible and therefore defense counsel was not deficient for failure to object to it." Accordingly, Alexander has no basis to claim that an error occurred that deprived him of his ability to pursue an appeal.

¶20 Finally, Alexander argues that his trial counsel was ineffective for failing to object to a portion of the State's closing argument in which the State referenced Alexander tailoring his defense to the evidence against him. Specifically, Alexander's motion in the circuit court took issue with the following portion of the State's closing argument:

> But then he sees, over the last several months, what the officers have told him. He sees the photo arrays with the witness's signatures. He sees the execution photographs, the autopsy photographs. He listens to Antwane Harrington at the preliminary hearing, realizes the accuracy of Antwane Harrington's observations. He sees the crime lab report with his blood or with Therrick Roberts' blood on his pants and comes to the realization I don't know nothin' about nothin' just isn't going to cut it because there are too many people who have identified him and there's physical evidence that connects him.
>
> What else is he gonna do, claim I didn't intend to kill?

¶21 As a general principle, an attorney is allowed considerable latitude during closing argument, with discretion to be given to the circuit court in determining the propriety of the argument. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). One line is crossed when the prosecutor suggests that the jury should arrive at a verdict by considering factors other than the evidence. *See* ***id.*** However, even when particular remarks cross the line, a new trial is not warranted unless the remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted). Accordingly, the prosecutor's remarks must be examined in the context of the entire trial. ***Id.***

¶22 Moreover, a defendant must affirmatively prove prejudice. ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). Here, Alexander merely asserts without specificity that the prosecutor's remarks were prejudicial. Indeed, his motion to the circuit court in this regard was little more than a conclusory statement that the prosecutor "'poisoned the entire atmosphere of the trial.'" Alexander argued that the prosecutor presented the premise that a defendant who knows the evidence can orchestrate a fabricated defense, and contended that "[t]his conclusion caused the jury to disregard Mr. Alexander's testimony of snatching a firearm from Childress and firing it out of fear."

¶23 Even if we assume for the sake of argument that the cited comments crossed the line into impermissible argument, we reject the notion that any error rose to the level of a due process violation that deprived Alexander of a fair trial. First of all, the court instructed the jury that the remarks of the attorneys are not evidence, and, if the remarks suggested certain facts not in evidence, the jury was to disregard the suggestion. The jury is presumed to have followed the court's

instructions. *See* ***Staehler v. Beuthin***, 206 Wis. 2d 610, 621, 557 N.W.2d 487 (Ct. App. 1996).

¶24 In addition, the context of this trial was credibility. The prosecutor's argument emphasized that Alexander did not respond out of fear but, rather, out of anger:

> [H]e and another member of his family, as Tena Carpenter described it, was threatened on the dee-jay stand and he went out of the bar, got the gun, was angry and returned on a mission. That's what I think the evidence shows. And if you agree he's responding to anger, not fear, then we have no self-defense.

¶25 The prosecutor noted that Alexander's claim of self-defense was based on two propositions. First, that Alexander was hit on the head with a bottle and, second, that Childress brought a gun into the bar and Alexander took it from him during the altercation on the dance floor.

¶26 The prosecutor emphasized the lack of evidence of any bottle or fragments of a bottle on the dance floor. Alexander testified at trial that he was hit with a bottle prior to the shooting which caused his eye to bleed to the point that he couldn't see that Roberts was running away from him before he shot him in the back, but the prosecutor argued:

> [W]hen given the opportunity hours later to explain what had happened, to explain the terrifying incident where he had been hit over the head with a bottle, and disarmed an angry Brian Childress who was going to shoot him, he says: I wasn't in no fight. I don't know nothin' about nothin'.

¶27 The prosecutor highlighted Alexander's contradictory and uncorroborated testimony. Conversely, the prosecutor stressed the corroborative evidence demonstrating that Alexander left the bar in anger and later pulled a gun

from his waistband. The prosecutor also referenced Alexander's own admission that, after he left the club, "I put the gun on my waist," to which the prosecutor commented, "where I submit it was when he came into the Club."

¶28 The prosecutor also argued that, despite hearing gunshots and fleeing the bar, "not once in that 30-minute trip back to Winona did anybody ever say to Mike, what happened, or talked about the gunshots that just endangered them all." The prosecutor commented:

> Isn't that a little bit much to swallow? None, four people in that car, a 30-minute drive. Gunshots, an injury, nobody sought to connect dots? No one asked questions? Michael Alexander didn't say to any of his family members in the car, that dude tried to hit me over the head. That dude had a gun. He was gonna shoot me. I got the gun. He didn't say that once on the trip back to … Winona? There was no discussion?

¶29 The prosecutor further argued:

> You can see the lie developing with Michael Alexander. I mean, his first story, his first attempt is to disassociate himself from this crime. He goes back to Winona. He flees the scene, probably doesn't expect that the police are going to be there or anywhere near as quickly as they are, and he separates himself.

¶30 But once Alexander was confronted with the evidence against him, the prosecutor argued, Alexander created a defense, because, in the prosecutor's words, "I don't know nothin' about nothin' just isn't going to cut it because there are too many people who have identified him and there's physical evidence that connects him." The prosecutor noted both the evidence that Alexander shot Childress in a vital part of the body and the photographic evidence that he shot Therrick Roberts in the back:

> So is he going to expect you, the jury, to believe he didn't intend to kill? What does that leave him? So now we see

> self-defense. We see the development of a lie that Michael Alexander hopes will get him out of this predicament.

¶31 Quite simply, the prosecutor's remarks cited by Alexander, viewed in the entirety of the approximately thirty-eight pages of the State's closing argument, much less the entire trial, fail to prove prejudice. Alexander was not denied a fair trial.

By the Court.—Order affirmed.

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