COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1534-CR **Cir. Ct. No. 2010CF5245**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TWANA M. BURRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Twana A. Burris appeals from a judgment of conviction for one count of attempted bribery of a witness, contrary to WIS. STAT.

§§ 946.61(1)(a) and 939.32 (2011–12).[1] She also appeals from an order denying her postconviction motion for relief. She argues that she is entitled to a new trial based on newly discovered evidence, her lawyer's constitutionally deficient performance, and in the interest of justice. She also argues that she should be released on bond pending the outcome of this appeal. We reject her arguments and affirm.

BACKGROUND

¶2 Burris's cousin, Michael King, told the police that Burris's two adult sons, Dytanial Burris and Harrison Smith, beat him and threw his wheelchair in a dumpster. The alleged motive for the attack was King's expected testimony against another relative in a criminal case. Dytanial Burris was arrested the day after the attack, but Smith was not immediately arrested. Both were charged in connection with the beating.

¶3 It is undisputed that on September 18, 2010, five days after King was attacked, Burris and her daughter, Kamilah Nicole Burris, went to King's home and spoke with him for about thirty minutes. After they left, King called the police and told them that Burris had tried to bribe him with a plastic bag full of money so that he would not testify against Burris's sons. Burris was charged with one count of attempted bribery of a witness.

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

¶4 At trial, King testified that he was resting in his bedroom when Burris and her daughter came to his home.[2] His girlfriend, Wanda Carlson, answered the door and then went to the bedroom and told King that Burris and her daughter wanted to talk with him. King agreed to let Burris and Kamilah Burris into the home to discuss "the situation that had went on." Carlson remained in the bedroom.

¶5 King said that he told Burris and her daughter what Burris's sons had done to him. When Burris questioned whether her son had actually kicked King in the face, King told her that she could watch the video of the assault. King testified that during the visit, Burris attempted to bribe him not to testify against her sons. He said that Burris "pulled … a moneybag out of her purse, a clear hefty bag with some bank rolls in it" and told King that he could have "any part of that money if [he] left until the case was over with." King said he responded: "[N]o, you can put your money back in your purse. I don't want no part of your money. I am pressing charges."

¶6 King said that the conversation ended when he told Burris that he did not want to talk with her anymore. After Burris and her daughter left, King returned to his bedroom and asked Carlson if she heard what Burris had said; Carlson indicated that she had. King called the police and was interviewed by an officer within an hour. The officer who interviewed King testified that King told her that Burris had attempted to bribe him with a plastic bag of money that King said contained "thousands of dollars."

[2] We do not attempt to summarize all of the trial testimony from King and the other witnesses. Additional testimony will be addressed in the discussion section as necessary.

¶7 Carlson testified that while she was in the bedroom, she did not hear the entire conversation, but she heard Burris say, "I just lost my brother. Please, don't take my boys away." Carlson testified that she also heard Kamilah say, "There's video?" Carlson said that after Burris left, King told her that Burris tried to give him $5000. Carlson was present when King called the police to report the attempted bribery and she also gave a statement to a police officer.

¶8 Kamilah Burris testified that during the conversation with King, neither she nor Burris offered King money, threatened him, or asked him not to go to court. She denied that the subject of the beating came up during the visit. She said they talked about how King was feeling generally and she said that King "was complaining about his life and being miserable and being in that wheelchair."

¶9 Burris testified that she went to King's home "to check on his well-being" and "to make peace amongst the family because I believe family is very important and families should stick together." She said that she, Kamilah, and King "discussed the family," but did not talk about the beating or her sons. She testified: "[T]he conversation regarding the beating did not occur at all." Instead, she said, King talked about how miserable he was because he had been in a wheelchair for over fifteen years. Burris denied having a plastic bag of money in her purse and said she never offered King money or told him not to go to court.

¶10 On both direct examination and cross-examination, Burris was asked about her contacts with Dytanial Burris on the day she visited King. Burris acknowledged participating in a three-way phone call with Dytanial Burris and another woman shortly before Burris went to visit King. Burris said Dytanial Burris, who was in jail at the time of the call, asked Burris to take some t-shirts

that he got in Las Vegas to a friend of his.[3] The telephone call was recorded by jail personnel.

¶11 The State also asked Burris whether she and a woman named Latoya Funches went to visit Dytanial Burris at 6:31 p.m. on the same day that she met with King. Burris denied that she did so. After the defense rested, the State introduced rebuttal testimony from a Milwaukee County Sheriff's Department detective, Warren Spottek, concerning jail visitation logs from September 18, 2010. The log showed that Burris and Funches visited Dytanial Burris at 6:31 p.m. Spottek said that jail visitors had to identify themselves, but he was not sure whether photo identification was required. Kamilah, however, testified that she was required to show a photo identification when she visited her brother in jail.

¶12 In closing, the State asserted that Burris lied to the jury. It argued, among other things, that it would not make sense for Burris to visit King and not discuss the recent attack or for Dytanial Burris to ask his mother to deliver t-shirts for him when he was in jail facing criminal charges. The State also argued that Burris lied about whether she visited Dytanial Burris in jail on September 18, 2010.

¶13 Although there was no on-the-record discussion of jury questions during deliberations, it is undisputed that the jury submitted a question in writing related to Burris's alleged visit to the jail. The jury asked whether the trial court could confirm whether a person has to show identification to visit someone in jail.

[3] In closing, the State suggested that Dytanial Burris's conversation with his mother about t-shirts was actually about bribing King, while Burris's attorney argued that the conversation was "not code for bringing a zip lock bag of money over to Michael King to get him not to show up to court."

The trial court wrote a note back to the jurors indicating that they would have to rely on their recollection of the testimony.

¶14 The jury found Burris guilty. Prior to sentencing, Burris retained a new lawyer who filed a postconviction motion that focused on Burris's alleged visit to Dytanial Burris at 6:31 p.m. on the same day she visited King. The postconviction motion argued that the defense had newly discovered evidence that Burris did not visit Dytanial Burris, including: phone records indicating that calls were placed from Burris's home phone to the phone of her friend at 5:31 p.m. and 6:25 p.m.; affidavits from Burris and that same friend stating that they were talking by phone at the time of the alleged visit; and affidavits from Kamilah Burris and Funches stating that they were the two women who visited Dytanial Burris on September 18, 2010. Burris argued that she was entitled to a new trial based on this newly discovered evidence.

¶15 Burris also argued that her trial lawyer provided constitutionally deficient representation by failing to "investigate and challenge" the facts related to Burris's alleged visit to Dytanial Burris. This too, Burris asserted, entitled her to a new trial.

¶16 The State filed a written response. First, it argued that the postconviction motion was premature because sentencing had not yet occurred and not all transcripts had been prepared. Second, the State asserted that Burris was not entitled to a new trial based on newly discovered evidence because she was aware of the evidence before trial and there was no reasonable probability of a different outcome if the additional testimony had been offered. In support of its argument, the State submitted an affidavit from Spottek indicating that while he was unsure at trial whether visitors to the jail had to show photo identification, he

had since learned that visitors must do so. Finally, the State argued that Burris could not prove that her trial attorney provided constitutionally deficient representation.

¶17 After a hearing, the trial court denied the motion as premature, noting that no transcripts had been prepared. The trial court set a sentencing date. Prior to sentencing, Burris filed a renewed motion for a new trial. At sentencing, the parties and the trial court briefly discussed Burris's motion. The trial court again concluded that the motion was premature and proceeded to sentencing.

¶18 The trial court sentenced Burris to one year of initial confinement and one year of extended supervision. It stayed the sentence and placed Burris on probation for two years, imposing a year in the House of Correction as a condition of probation.

¶19 After sentencing, Burris moved the trial court to release her pending appeal. The trial court held a hearing on the motion at which it also discussed the merits of Burris's previously filed postconviction motion. The trial court denied the stay and Burris's postconviction motion.

DISCUSSION

¶20 Burris argues that she is entitled to a new trial based on newly discovered evidence, her lawyer's constitutionally deficient performance, and in the interest of justice. She also argues that she should be released on bond pending the outcome of this appeal. We consider each issue in turn.

I. Newly discovered evidence.

¶21 To obtain a new trial on the basis of newly discovered evidence, a defendant is required to prove, 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. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52 (citation omitted); ***State v. Brunton***, 203 Wis. 2d 195, 208, 552 N.W.2d 452, 458 (Ct. App. 1996) (standard of proof is clear and convincing evidence). A new witness may constitute newly discovered evidence, *see* ***State v. Love***, 2005 WI 116, ¶¶47–50, 284 Wis. 2d 111, 140–141, 700 N.W.2d 62, 76–77, but newly discovered evidence does not include the "new appreciation of the importance of evidence previously known but not used," ***State v. Bembenek***, 140 Wis. 2d 248, 256, 409 N.W.2d 432, 435 (Ct. App. 1987); *accord* ***State v. Fosnow***, 2001 WI App 2, ¶9, 240 Wis. 2d 699, 706, 624 N.W.2d 883, 886. If a defendant proves the first four criteria, then the trial court must determine "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." *See* ***Plude***, 2008 WI 58, ¶32, 310 Wis. 2d at 48, 750 N.W.2d at 52.

¶22 Burris argues that "[t]he telephone records and affidavits secured after her conviction were secured diligently by the defendant after her trial counsel" did not secure them. She contends that the evidence shows she did not visit Dytanial Burris at 6:31 p.m. on September 18, 2010.

¶23 In response, the State argues that Burris did not prove that this evidence was discovered after Burris's conviction, the first criterion of the newly discovered evidence test. The State explains:

> If Burris was in fact talking to [her friend] on the telephone at the time the jail visitation logs said she was visiting Dytanial, that was evidence Burris had before the conviction. She knew what her own actions were, and she knew the identity of the witness [that] … she needed to back up her story. Similarly, if in fact [Kamilah Harris] visited Dytanial that evening with Funches, that was information that [Kamilah Harris]—the only defense witness besides Burris herself—had before the conviction. Of course, Burris could plausibly argue that, although she had this information prior to trial, she didn't appreciate its significance until afterwards. Unfortunately for Burris, that argument is foreclosed by ***Bembenek*** and ***Fosnow***.

We agree with the State's analysis. Burris knew whether she visited her son prior to trial and, when the subject arose at trial, she stated multiple times that she did not. She knew whether she was on the phone with her friend that evening. Further, she admits in her brief that she was aware of the jail's visitation log prior to trial, because it was produced during a Milwaukee Sheriff's Department internal affairs investigation of the attempted bribe.[4]

¶24 Burris has not shown, by clear and convincing evidence, that the evidence was discovered after her conviction. Because she has not satisfied the first criterion for a new trial based on newly discovered evidence, *see* ***Plude***, 2008 WI 58, ¶32, 310 Wis. 2d at 48, 750 N.W.2d at 52, we need not consider whether the other ***Plude*** criteria were satisfied, *see* ***State v. Blalock***, 150 Wis. 2d 688, 703,

[4] At the time Burris committed the crime, she was a Milwaukee County Sheriff's Department guard at a correctional facility in Franklin, Wisconsin.

442 N.W.2d 514, 520 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground."). Burris is not entitled to a new trial.

II. Performance of Burris's trial lawyer.

¶25 Burris argues that she is entitled to a new trial because her trial lawyer provided constitutionally deficient representation. To succeed on her claim, she must prove: (1) deficient performance; and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not consider both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697. In order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶26 A postconviction "***Machner*** hearing" is a prerequisite to appellate review of a claim that a defendant's lawyer provided constitutionally deficient representation.[5] ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409, 410 (Ct. App. 1998). A trial court may deny a postconviction motion without granting a request for a ***Machner*** hearing if "'the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Hoppe***, 2009 WI 41, ¶59 n.36, 317 Wis. 2d 161, 192 n.36, 765 N.W.2d 794, 809 n.36 (citation omitted).

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

¶27 In both of her postconviction motions, Burris alleged that her trial lawyer provided deficient representation by not investigating and challenging the allegation that Burris visited her son at the jail on September 18, 2010. On appeal, she reiterates that argument. She also raises several new allegations concerning her trial lawyer's effectiveness, such as asserting that her trial lawyer did not "forcefully challenge the testimony of the State's two key witnesses." Because Burris did not raise those additional arguments in her postconviction motions, the trial court was not provided an opportunity to address those issues, and we conclude that they were forfeited. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) (arguments raised for the first time on appeal are generally deemed forfeited).

¶28 We turn to the allegation that was preserved for appeal: Burris's assertion that her trial lawyer did not properly investigate and challenge the State's assertion that Burris visited her son in the jail on September 18, 2010. We conclude that Burris was not entitled to a ***Machner*** hearing on this issue because the Record conclusively demonstrated that she was not prejudiced by her lawyer's alleged deficiencies and, therefore, she was not entitled to relief. *See* ***Hoppe***, 2009 WI 41, ¶59 n.36, 317 Wis. 2d at 192 n.36, 765 N.W.2d at 809 n.36; ***Strickland***, 466 U.S. at 687, 694, 697.

¶29 Specifically, Burris's postconviction motion included affidavits indicating that she was on the telephone at the time someone visited her son at the jail, as well as phone records showing that calls were placed from her home to a friend's home at the time someone visited Dytanial Burris. Burris implies that her trial lawyer should have presented this information at trial. For several reasons, we are unconvinced that "the result of the proceeding would have been different"

even if Burris's lawyer had more fully investigated the jail visitation issue and had presented the evidence Burris has now proffered. *See* ***Strickland***, 466 U.S. at 694.

¶30 First, the proffered evidence does not prove that Burris did not visit the jail. The phone records only prove that someone used her phone to place a call at the time of the jail visit, not that she placed the call. We also note that even though Burris argues that her trial lawyer should have investigated the availability of jail personnel who might have witnessed the visit or the existence of video that would establish who visited Dytanial Burris, Burris's postconviction motions did not include evidence that such witnesses are available or that such recordings exist. Further, the State's affidavit submitted in response to Burris's postconviction motion supported Kamilah Burris's testimony that photo identification is required when one visits the jail. Thus, if Burris's proffered evidence were submitted at a new trial, the jurors could choose to believe Burris did not visit her son only if they accepted Burris's assertion that the jail log system—which requires all visitors to log in and show photo identification—failed to properly record Dytanial Burris's visitors on September 18, 2010.

¶31 Furthermore, even if Burris's evidence convinced a jury that she did not, in fact, visit her son on the evening of September 18, 2010, it does not follow that "the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. Whether Burris visited the jail was a collateral issue that was relevant to her credibility. The State presented only a jail log showing that Burris visited the jail; it did not present the testimony of witnesses with personal knowledge of the people who visited Dytanial Burris that night. Therefore, if the jury believed Burris about the visit, it would only prove that the jail log was wrong, not that some other witness was untruthful. The State's witnesses would be no less believable and the State would still be able to impeach Burris's credibility by

pointing out the implausibility of her testimony that she spoke with her son about delivering t-shirts and that she never discussed the beating with King when she visited him.

¶32 For the foregoing reasons, we conclude that Burris was not entitled to a ***Machner*** hearing on her assertion that her trial lawyer provided deficient representation by not investigating and challenging the allegation that Burris visited her son at the jail on September 18, 2010. The Record conclusively demonstrated that she was not prejudiced by her lawyer's alleged deficiencies with respect to the jail visit and, therefore, she was not entitled to relief.

¶33 Finally, we address Burris's concern about professional discipline imposed against Burris's trial lawyer by the Seventh Circuit and the Wisconsin Supreme Court for that lawyer's work in unrelated cases. Burris first mentioned her lawyer's discipline in her renewed postconviction motion. In a single paragraph, she asked the trial court to take judicial notice of the fact that her lawyer's performance in another case had been "severe enough for that counsel to be banned from the Seventh Circuit Courts." Burris also noted that her own disciplinary complaint against her trial lawyer had been dismissed, although she indicated that she planned to appeal that dismissal. Burris concluded: "The point is that Defendant's assertion of ineffective assistance of counsel may be part of a pattern."

¶34 On appeal, Burris has included in her appendix copies of disciplinary decisions concerning her trial lawyer, as well as copies of newspaper stories about the disciplinary cases. Burris implies that because her lawyer was disciplined in other cases, her lawyer provided deficient representation here. Burris also asserts that she "did not know the pressure [her trial lawyer] was under" and therefore

Burris "could not evaluate if she needed new counsel." We are not convinced that Burris is entitled to relief based on the fact that her trial lawyer was disciplined in other cases. The fact that discipline was imposed in other cases does not constitute *per se* ineffective assistance in this case. We also reject Burris's attempt to raise new allegations for the first time on appeal, such as her suggestion that her trial lawyer's performance was affected by the pressure the lawyer felt from the ongoing disciplinary proceedings. *See* ***Van Camp***, 213 Wis. 2d at 144, 569 N.W.2d at 584.

III. New trial in the interest of justice.

¶35 Burris seeks a new trial in the interest of justice. WISCONSIN STAT. § 752.35 provides that the court of appeals may grant a new trial in the interest of justice where "the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Burris appears to seek a new trial on both bases, although she does not discuss the legal differences between the two bases or case law applying § 752.35. Instead, Burris provides eight pages of critical analysis of her trial lawyer's examination of witnesses and also questions why certain witnesses were not called. In doing so, Burris implies that the real controversy was not fully tried because certain evidence was not presented or was not presented well. Burris also asserts that in order "to prevent a miscarriage of justice," she needs a new trial "with adequate representation."

¶36 In effect, Burris is basing her request for a new trial in the interest of justice on allegations that her trial lawyer's performance was constitutionally deficient. Where a defendant seeks a new trial in the interest of justice based on allegations that his or her trial lawyer was ineffective, the proper analysis to apply is the ***Strickland*** test. ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 674, 660, 734

N.W.2d 115, 130. We have already concluded that Burris failed to prove that her trial lawyer provided constitutionally deficient representation by not investigating and challenging the allegation that Burris visited her son at the jail on September 18, 2010. We reject Burris's attempt to raise new allegations about her trial lawyer's performance for the first time on appeal by raising them in the WIS. STAT. § 752.35 context. *See* ***Van Camp***, 213 Wis. 2d at 144, 569 N.W.2d at 584.

¶37 We are unconvinced that a new trial in the interest of justice is warranted on grounds that the real controversy was not fully tried or that justice miscarried. *See* WIS. STAT. § 752.35. The jury had before it testimony from four witnesses concerning what was said and done during Burris's visit to King's home, which was the crucial factual determination for the jury to make. It was the jury's role to weigh the witnesses' credibility and determine what happened. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752, 757 (1990). We decline to grant a new trial in the interest of justice.

IV. Request for release on bond pending appeal.

¶38 Burris previously moved this court to release her on bond pending the outcome of her appeal. We denied the motion. In her appellate brief, she asked this court to reconsider its order. We decline to reverse our earlier order denying her motion for release pending appeal.

By the Court.—Judgment and order affirmed.

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