COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2424 **Cir. Ct. No. 1997CF831**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAI J. MINOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Tai J. Minor appeals from an order denying his WIS. STAT. § 974.06 (2011-12)[1] postconviction motion for a new trial or, in the

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

alternative, a sentence modification. We conclude that Minor has failed to establish the ineffective assistance of either trial or postconviction/appellate counsel, and that the trial court properly exercised its discretion in determining that Minor did not demonstrate a new factor warranting sentence modification. We also decline to order a new trial in the interest of justice. We affirm.

¶2 In 1998, a jury found Minor guilty of attempted first-degree intentional homicide, first-degree reckless injury, seven counts of first-degree reckless endangerment and one count of second-degree reckless endangerment, all as a party to the crime, for a total of eleven convictions. The evidence presented was that Minor and two coconspirators approached the home of Robert White and opened fire on the house. White and two other males, Markey and Harry Canady, were on or near the porch, and a number of their family members were inside the house. Minor's codefendant, Cory Baker, went onto the porch with a gun and while White wrestled with Baker for his weapon, Minor stood below the porch and intentionally shot White and accidentally shot Baker. Baker's gun also discharged during the struggle with White. The Canadys ran away but soon returned. The State's theory was that a third uncharged coconspirator fired numerous shots at the occupied house, including one that penetrated a window and lodged in an interior wall.[2] These shots formed the basis for the recklessly endangering safety charges. Both Baker and Minor testified at trial. Baker testified that he was an innocent bystander shot in the crossfire. Minor testified that he was not present at the location during the incident, and was not in any way involved in the shooting. The

[2] The State named the third alleged coconspirator as Anton House and informed the jury that he was never charged in connection with this incident because the State did not believe it possessed sufficient evidence to prove his guilt beyond a reasonable doubt.

trial court imposed an aggregate indeterminate sentence of fifty-one years. The judgment of conviction was affirmed on direct appeal. ***State v. Minor***, No. 1998AP3238-CR, unpublished slip op. and order (WI App August 11, 1999).

¶3 In 2013, Minor filed a WIS. STAT. § 974.06 postconviction motion in the trial court alleging the ineffective assistance of appellate counsel, and requesting a sentence modification. In his motion, Minor asserted that he testified falsely at trial and stated that he did fire the two shots that hit White and Baker. His central claim was that trial counsel failed to introduce potentially exculpatory evidence that would have demonstrated that he did not fire the shots aimed at the house, and that appellate counsel was ineffective for failing to raise this claim in a postconviction motion as part of Minor's direct appeal. The trial court denied the postconviction motion without an evidentiary hearing on the ground that Minor had failed to establish the existence of ineffective assistance of postconviction/appellate counsel as a sufficient reason for not raising this issue on direct appeal. *See* WIS. STAT. § 974.06(4); ***State v. Balliette***, 2011 WI 79, ¶¶37, 62, 336 Wis. 2d 358, 805 N.W.2d 334; ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 184-86, 517 N.W.2d 157 (1994). Minor appeals.[3]

[3] The parties acknowledge that after Minor filed his WIS. STAT. § 974.06 postconviction motion, the Wisconsin Supreme Court issued ***State v. Starks***, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146, *reconsideration denied*, 2014 WI 91, ___Wis. 2d ___, 849 N.W.2d 724, which called into question whether Minor's motion was filed in the proper forum. We conclude that Minor properly filed his postconviction motion in the trial court pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996), and will therefore address his claims in lieu of dismissing the appeal. *See* ***State v. Romero-Georgana***, 2014 WI 83, ___ Wis. 2d ___, 849 N.W.2d 668; ***State ex rel. Kyles v. Pollard***, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805; *accord* ***State v. Starks***, 2014 WI 91, ___ Wis. 2d ___, 849 N.W.2d 724, Prosser, J., concurring, ¶¶45, 49.

¶4 Minor argues that the trial court erred in denying his motion without an evidentiary hearing because he presented facts which, if true, entitle him to relief. Minor asserts that trial counsel's theory of defense, that Minor was misidentified as one of the assailants, was foisted upon him and that trial counsel should have instead used the statements of Tanesha Nesbitt and Baltazar Ruiz to try and establish that even if Minor was guilty of some of the charges, he was not involved in the firing of the bullet that entered White's residence through a window. In support, he cites to a statement made by Ruiz, a bystander, who stated that while in his backyard adjacent to Tenth Street:

> He observed three male blacks in the street, just south of 1004 Pearl [which is the White residence]. He heard several gunshots and observed two different guns firing. He could not tell which male blacks were firing the guns. Then two male blacks ran southbound, and the third ran toward 10th St. The third male black, wearing a light colored t-shirt and dark pants, stood in the yard of 1000 Pearl, northeast corner, and fired three to four shots back towards the two male blacks fleeing southbound. The third male black then ran to the west end of 10th St and ran through the trees.

¶5 According to Minor, this statement demonstrates that someone other than Minor or his coconspirators, perhaps one of occupants of the White house, fired the bullet that entered through the window of White's house. Minor argues that certain statements made by Nesbitt, who was Cory Baker's cousin and actually testified at trial, can be construed as supporting the notion that Markey Canady stood on the northeast corner and fired the shot that entered through the window.

¶6 A trial court has the discretion to deny a motion without an evidentiary hearing if the motion is insufficient on its face or the record conclusively demonstrates that the movant is not entitled to relief. ***Balliette***, 336

Wis. 2d 358, ¶50. In this case, Minor's motion needed to establish that trial counsel was ineffective for failing to call Ruiz as a witness and insufficiently cross-examining Nesbitt, and that appellate counsel was ineffective for failing to file a postconviction motion challenging trial counsel's performance. To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate both that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice, or, a reasonable probability that but for counsel's error, the results of the proceeding would have been different. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). Because he had a direct appeal, in addition to the procedural hurdle of ***Escalona-Naranjo***, Minor must also establish that the issues now asserted are clearly stronger than those raised on appeal.[4]

¶7 We conclude that the trial court properly denied Minor's WIS. STAT. § 974.06 motion without a hearing because the record conclusively demonstrates that he is not entitled to relief. To start with, Minor has failed to establish that trial counsel performed deficiently in not pursuing the theory he now advances. At trial, Minor testified that he was not present at the location of the shooting. The decision whether to testify is left to the defendant, and the record establishes that Minor's decision to testify was knowing and voluntary. Trial counsel pursued a strategy that was consistent with Minor's own testimony, and that, if successful, would have led to an acquittal on all the charges, including the more serious ones Minor now apparently admits. It was not deficient for trial counsel to fail to

[4] In reality, our decision does not actually apply these procedural bars, but instead reaches the merits of Minor's claim.

discover or call a witness completely irrelevant to Minor's theory of defense, or to pursue questioning that might have undermined Minor's trial strategy.

¶8 Additionally, Minor has not established prejudice. The State's theory that there were three conspirators was supported by the evidence and accepted by the jury. Nothing in Ruiz's one-paragraph statement to police undermines this theory. It is not clear from Ruiz's account what his visual perspective was and whether the shooter he saw toward the northeast was aiming at the two fleeing shooters or at the house on Pearl Street.[5] Further, the State's theory as explained in its closing argument was that the entire incident, including the shots that failed to penetrate the home's exterior and not just the one that penetrated the window, endangered the occupants' safety.[6] In fact, the evidence presented was that only one person was in the room where the bullet entered through the window, and only one of the reckless endangerment charges stems primarily from that shot.

[5] Minor's theory of materiality appears to be that if Ruiz saw a man run to the north and then shoot in the direction of the shooters running southbound, the man must have been one of the victims, and it must have been his bullet that entered the window. Minor cites to officer testimony that the bullet penetrating the window came from the northeast direction. The police also found a spent casing to the northeast of the White residence, and found a similar unfired cartridge inside the White residence. Minor's speculative argument attributes too much relevance to this evidence. First, no one testified that the spent casing found on the northeast corner came from the window-penetrating bullet. Officer Larrabee testified that the bullet came from the northeast but that he could not tell how close the shooter was standing to the house, and that police were unable to recover the bullet for comparison because it fell behind the interior wall. Second, contrary to Minor's paraphrasing of the officer's testimony, Larrabee did not testify that the casing was extremely rare. Third, Cory Baker gave a statement placing House, the alleged third coconspirator, on the northeast corner at the time of the incident.

[6] Aside from the shots fired at the house, which were evidenced by several fresh bullet indentations on its exterior, the State argued that Minor and Baker recklessly endangered the safety of Harry and Markey Canady by discharging weapons at or on the porch.

¶9 Similarly, contrary to Minor's contention, neither Nesbitt's trial testimony nor the statement she gave to police a month after the incident undermines the jury's finding that a third coconspirator shot at White's house.[7] Nesbitt testified that she heard shots as she was heading upstairs to her apartment which was located across the street from the White residence. She stated that she entered her apartment and looked out her front window where she saw "two dudes" shooting at the White house. She testified that the shooters were wearing black hooded sweatshirts and that she saw another large black male in the area wearing what appeared to be a white shirt underneath a blue short-sleeved shirt. She testified that one of the shooters was in the front yard and the other was standing next to and shooting up at the porch. She testified that Markey Canady ran north out of the yard and was chased by the shooter in the front yard. She testified that after chasing Canady, the shooter returned and fired shots toward the front of the house. She then saw the shooters run south on Pearl and saw White shooting at them from his porch. Aside from her credibility issues and even with her statement that White was also firing shots, Nesbitt does not further Minor's postconviction claims.

¶10 We also conclude that the trial court did not err in denying Minor's sentence modification motion. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28,

[7] At trial, Nesbitt testified that Cory Baker was her cousin, that the two were very close, and that he generally stayed at her apartment. To the extent she tried to shade her story at trial, she was impeached with her earlier statement made to police, including her failure to mention that Baker was her cousin.

¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A defendant seeking modification of his or her sentence based on a new factor must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. ***Id.***, ¶38. Though the existence of a new factor presents a question of law we review de novo, whether and to what degree a sentence should be modified is a discretionary determination for the trial court. ***Id.***, ¶¶36-37. Here, the trial court determined that Minor had not established a new factor and further determined that he was not entitled to sentence modification. We agree that neither Ruiz's pretrial statement, nor Nesbitt's trial testimony, of which Minor was previously aware, constitutes a new factor. We further conclude that the trial court properly exercised its discretion in determining that given the trial evidence concerning Minor's participation, a modification of his sentence was not warranted. *See* ***Gaugert v. Duve***, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861 (a trial court's discretionary determination will be sustained if it examined the proper facts, applied the correct standard of law, and reached a reasonable conclusion using a rational process).

¶11 Finally, Minor requests that we use our discretionary reversal authority to order a new trial in the interest of justice. We will exercise our discretionary reversal power to set aside a conviction only in exceptional cases. ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60. Minor has not established that either trial or postconviction/appellate counsel was ineffective. Under these circumstances, we decline to grant this extraordinary remedy.

By the Court.—Order affirmed.

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