COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2793

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD LEE HENNINGS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edward Lee Hennings appeals *pro se* from an order summarily denying his WIS. STAT. § 974.06 (1997-98) motion.[1] He claims

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

that he was not provided with the effective assistance of trial counsel, newly discovered evidence requires a new trial, and the conviction should be reversed in the interest of justice. Because Hennings received effective assistance of counsel, because the newly discovered evidence was not material under the facts, and because there is no basis for reversing in the interest of justice, we affirm.

I. BACKGROUND

¶2 The State charged Hennings with first-degree intentional homicide for the shooting death of Michael Bailey. At trial, the court agreed to submit to the jury the lesser-included instructions of second-degree intentional homicide and first-degree reckless homicide. It refused to submit an instruction on second-degree reckless homicide. On October 31, 1996, a Milwaukee County jury convicted Hennings of the lesser-included charge of first-degree reckless homicide. The trial court sentenced him to forty years of incarceration.

¶3 Hennings's trial counsel filed postconviction motions, which were denied. On direct appeal, we affirmed the judgment and the order denying the postconviction motions. Our supreme court denied Hennings's petition for review. He then filed a *pro se* WIS. STAT. § 974.06 motion, alleging ineffective assistance of trial counsel, proffering newly discovered evidence, and requesting reversal of the conviction in the interest of justice. The trial court denied the motion without conducting an evidentiary hearing. Hennings now appeals.

II. ANALYSIS

A. Ineffective Assistance.

¶4 Hennings's first claim of error is that the trial court erroneously exercised its discretion when it denied his WIS. STAT. § 974.06 motion alleging

ineffective assistance of counsel without conducting an evidentiary hearing. We conclude that the trial court did not err when it summarily denied his ineffective assistance of counsel claim.

¶5 A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing on that claim. To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the defendant's motion must allege, with specificity, both that counsel provided deficient performance and that the deficiency was prejudicial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). If the claim is conclusory in nature, or if the record conclusively shows that the defendant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *See* ***id.*** at 310-11. Whether the motion sufficiently alleges facts which, if true, would entitle the defendant to relief is a question of law to be reviewed independently by this court. *See* ***id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record, as a whole, conclusively demonstrates that the defendant is not entitled to relief, this court's review is limited to whether the court erroneously exercised its discretion. *See* ***id.*** at 318.

¶6 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

¶7 With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *See* ***id.*** at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. Rather, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶8 Although not stated in so many words, the trial court denied Hennings's motion without a hearing and rejected his claim of ineffective assistance of counsel because the record conclusively demonstrated that he was not prejudiced and therefore not entitled to relief. The trial court based its judgment upon the conclusion that the evidence, including that the victim was armed at the time he was shot, would not have resulted in a different verdict. As we shall set forth, the record amply supports this conclusion.

¶9 Hennings contends that his trial counsel was ineffective for: (1) failing to investigate witnesses known to have been at the crime scene; and (2) failing to request that the jury be presented with a special fact question regarding whether the victim, Bailey, was armed at the time of the shooting. We shall consider each claim in turn.

¶10 Hennings argues that if his trial counsel had properly investigated the case, counsel would have discovered a witness named Valerie Sanford, who observed a gun being removed from the waistband of the victim's pants. This would have supported his theory of self-defense and "probably" would have caused the jury to render a different verdict. The record belies this assertion.

¶11 The facts demonstrate that there was an exchange of heated words between Bailey and Hennings's uncle, who was with Hennings; however, no threats were made to shoot Hennings or his uncle. Although Hennings claimed he observed Bailey using a gun in the past, Hennings conceded that he did not see Bailey with a gun during the confrontation that is the subject of this case. Hennings testified that he "didn't want to give [Bailey] a chance to use whatever weapon … he had." Hennings stated that he pulled his gun out from his left pants pocket and attempted to shoot, but the gun misfired. In some way, he quickly fixed the gun, and fired two shots. Bailey turned. Hennings testified that he ran after Bailey and fired two more shots. He further testified that his purpose in pursuing Bailey and firing during pursuit was to scare him. Hennings claimed he was tired of his family being harassed.

¶12 Even if we assume, for the purposes of argument, that Sanford's presence at the trial would have verified Hennings's claim that Bailey was carrying a gun in his waistband, we cannot conclude there is a reasonable probability that the result of the trial would have been different. There is no evidence demonstrating that Hennings was aware that Bailey possessed a gun just prior to the moment Hennings fired the first two shots from his gun. Then, when Bailey turned and fled, there was no reason for Hennings to be in a defensive mode of any sort. He merely had to leave the scene of the confrontation. From this review, we conclude that Hennings's trial counsel was not ineffective because there was no prejudice shown.

¶13 Next, Hennings claims that his trial counsel was ineffective for failing to request a special fact question to be placed on the verdict form to allow the jurors "to assess the real controversy to be fully tried on whether the victim

was armed at the time of the shooting incident." We reject this claim because it is based upon a false premise.

¶14 Under the facts of this case, self-defense or defense of others does not depend upon the possession of a gun by the victim for two reasons. First, if the jury concluded that Hennings reasonably believed he was preventing an unlawful interference with his person or his uncle to prevent imminent death of great bodily harm, it should have acquitted him even if it concluded that Bailey was armed. Second, even if the jury concluded that Bailey was unarmed, yet concluded that Hennings's belief that he was preventing imminent death or great bodily harm was reasonable, it should have acquitted him. Regardless of the presence of a gun, the real issue that was tried was whether or not Hennings reasonably believed that shooting at Bailey was necessary to prevent imminent death or great bodily harm to himself or his uncle. Thus, trial counsel's performance cannot be deemed deficient when there is no legal basis requiring him to perform the action that Hennings complains was required.

B. Newly Discovered Evidence.

¶15 Next, Hennings claims that the trial court erroneously exercised its discretion by denying his motion for a new trial based on newly discovered evidence. We are not persuaded.

¶16 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See*

State v. Coogan, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). A defendant must prove each of these factors by clear and convincing evidence. *See* ***id.*** at 395. If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). A motion for a new trial is addressed to the sound discretion of the trial court and we will not reverse unless the trial court erroneously exercised its discretion. *See* ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

¶17 Because Hennings has failed to demonstrate that the "newly discovered evidence" is material, he is not entitled to a new trial. The "newly discovered evidence" presented to the trial court was an affidavit from Sanford stating that after the shooting, she witnessed Randy Harrison remove a gun from the waistband of Bailey's pants as Bailey lay on the ground. Hennings argues that this evidence was relevant to prove self-defense and, without it, the real issue was never fully tried.

¶18 "Relevancy" obviously is an important evidentiary characteristic, but in the context of a motion for a new trial based upon newly discovered evidence, "materiality" is essential. To successfully demonstrate "materiality," a defendant must demonstrate a reasonable probability that the newly discovered evidence, if admitted at trial, would produce a different result. *See* ***State v. Truman***, 187 Wis. 2d 622, 625-26, 523 N.W.2d 177 (Ct. App. 1994).

¶19 As our earlier review of the record revealed, Hennings did not wait to see if Bailey had a gun. Instead, he pulled out his gun from his left pants pocket and immediately started shooting. To exacerbate the situation, he then ran after a fleeing Bailey, and fired two more shots. Under the circumstances, common sense

requires us to conclude that there is no reasonable probability that a jury could conclude Hennings's actions were taken in defense of himself or his uncle. Thus, the proffered evidence was not material and his claim for a new trial based upon "newly discovered" evidence must fail.

C. Interest of Justice.

¶20 Lastly, Hennings claims he should be granted a new trial in the interest of justice. We disagree.

¶21 When the real controversy has not been fully tried, this court may, in the interest of justice, exercise our discretionary power to reverse the judgment and order a new trial. *See* WIS. STAT. § 752.35; ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990). To such an action, "the information placed before a court … must be substantially convincing—and convincing in light of the circumstances of the particular case." ***State v. McConnohie***, 113 Wis. 2d 362, 372, 334 N.W.2d 903 (1983). Here, the trial court did not erroneously exercise its discretion in denying a new trial in the interest of justice.

¶22 Hennings's defense was based upon the self-defense of himself and his uncle. Because of the circumstances of the shooting incident, the trial court agreed to submit to the jury the lesser-included charges of second-degree intentional homicide and first-degree reckless homicide, in addition to the charged offense of first-degree intentional homicide. The jury was properly instructed on self-defense, defense of others, and the burden of proof that the State had to satisfy. Such being the case, Sanford's affidavit lacks that quality of proof that the result of a new trial probably would be different. For these reasons, we conclude the real controversy was tried and there is no cause to warrant a new trial in the interest of justice.

By the Court.—Order affirmed.

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