COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1901 **Cir. Ct. No. 2010CF1732**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONNELL FARR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. A jury found Ronnell Farr guilty of first-degree intentional homicide in the shooting of Michael Bender outside of a bar called Quarters. Farr did not dispute that he shot Bender but claimed it was not intentional. This court affirmed the judgment of conviction and the order denying

his motion for postconviction relief. *See* ***State v. Farr***, No. 2013AP504-CR, unpublished slip op. (WI App Feb. 18, 2014) (***Farr I***). Farr's pro se WIS. STAT. § 974.06 (2013-14)[1] motion for postconviction relief that underlies this appeal was denied without a hearing. Farr seeks either a hearing on his claims of ineffective assistance of trial and postconviction counsel or a new trial. We affirm the order.

¶2 Farr's postconviction motion alleged that trial counsel, Attorney Steven Kohn, was ineffective for failing to investigate Farr's custodial statements to Detectives James Hensley and Rodolfo Gomez; an unrecorded portion of the interrogation by Hensley; Gomez's police report summarizing Farr's confession; Quarters' surveillance equipment that captured the shooting on videotape; and the State's witness, Henry Pringle, who was with Farr the night of the shooting. The motion alleged that postconviction counsel was ineffective for failing to challenge Kohn's ineffective performance; argue that the prosecutor's improper questions and closing argument tainted the trial; and assert that the trial court erred in allowing the State to publish to the jury the surveillance video, a still image from the video, and autopsy photographs.

¶3 A defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); WIS. STAT. § 974.06. He or she is procedurally barred from using § 974.06 to raise new issues absent a sufficient reason for not raising the issues earlier. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184-85; § 974.06(4). Ineffective assistance of postconviction counsel

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

may constitute a sufficient reason. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶4 We must decide whether Farr's postconviction motion is sufficient on its face to entitle him to an evidentiary hearing. A hearing is required "only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts is a question of law. ***Id.***, ¶9. If it does, the trial court must hold a hearing. ***Id.*** If it does not, or if it presents only conclusory allegations, or if the record conclusively shows the defendant is not entitled to relief, the decision to grant or deny a hearing is left to the trial court's discretion. ***Id.*** "We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard." ***Id.***

¶5 A defendant claiming ineffective assistance of counsel must establish both deficient performance and prejudice. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62; ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that counsel's conduct fell below an objective standard of reasonableness. ***Love***, 284 Wis. 2d 111, ¶30. To prove prejudice, he or she must show "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." ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). Whether counsel's performance was deficient or prejudicial is a question of law. *See* ***id.***, ¶21.

¶6 To demonstrate ineffective assistance of postconviction counsel, a defendant first must show that trial counsel's performance was deficient and

prejudicial. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant must assert more than counsel's failure to raise a particular issue. ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334. He or she must show that, rather than sound strategy, failing to raise the issue or issues fell below an objective standard of reasonableness; how he or she intends to establish deficient performance if granted a hearing, ***id.***, ¶¶67-68; and that the issues raised in the current motion are "clearly stronger" than the ones postconviction counsel presented, ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668; *see* ***Balliette***, 336 Wis. 2d 358, ¶69.

Trial Counsel's Failure to Investigate

¶7 Farr alleges that Kohn was ineffective for failing to investigate his custodial statement to Hensley during an unrecorded portion of the interrogation, as it "possibly" could have aided the court in evaluating the admissibility of his later statement to Gomez and "certainly" would have "undermined the State's theory that Farr was afraid after the line-up and had to 'make something up.'"[2] He also complains that Kohn "settled for a stipulation that Farr asked for an attorney" during the Hensley interrogation, whereas if Hensley had testified, it "would have made the record more clear[] as to what occurred."

¶8 Strategic decisions made after less than complete investigation of law and facts still may be found reasonable. ***State v. Carter***, 2010 WI 40, ¶23, 324

[2] Farr filed a ***Miranda-Goodchild*** motion for a hearing to determine the admissibility of his statements to police. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). After the hearing, the trial court found his fifth statement, the one to Gomez, admissible. Farr's first postconviction motion challenged the denial of his ***Miranda-Goodchild*** motion.

Wis. 2d 640, 782 N.W.2d 695. A defendant alleging counsel's failure to investigate "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶9 Farr does not tell us what his statement was, and "possibly" and "more clear[]" do not allege with specificity what an investigation of the statement or Hensley's testimony would have shown. Simply asserting that the statement "certainly" would have been useful does not save it from being speculative and conclusory. Further, his claim is a repackaged effort to relitigate his ***Miranda-Goodchild*** motion and thus is procedurally barred. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Finally, judicial estoppel forecloses any challenge to the suppression of his confession. *See* ***Farr I***, No. 2013AP504-CR, unpublished slip op. ¶¶4-7. Failure to raise a meritless claim is not ineffective assistance. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996).

¶10 Gomez testified for the defense to the effect that Farr confessed that he unintentionally shot Bender. Farr contends that had Kohn investigated Gomez's report summarizing his confession, he would have discovered that Gomez's testimony would conflict with, and thereby discredit, Farr's testimony.

¶11 Farr testified to the following. He saw Bender in the bar,[3] left for a brief time to buy some marijuana, decided on his return to bring his gun from the

[3] Farr did not know Bender or know his name. He testified that he recognized Bender as his assailant from an incident eight months earlier when he had been held up at gunpoint, robbed of money, jewelry, and a $1500 pair of nonprescription designer eyeglasses, and shot. Farr said he recognized Bender in part because Bender was wearing the glasses Farr believed were his.

car into Quarters as a precaution against Bender, cocked it and chambered a round while still in his car, then went inside. When Farr went out again to get Pringle, who was in Farr's car, to come in for "last call," he saw Bender on the sidewalk, although he had not seen Bender exit the bar. Farr decided to "rob him back" and retrieve his glasses. Farr put the gun to Bender's head. He did not intend to shoot but "it fired" and "fired again." He did not know how many times.[4]

¶12 Gomez testified that Farr told him that he went out to his car to get his gun upon noticing Bender in Quarters, saw Bender exit when he re-entered the bar, left to get Pringle to come inside, saw Bender outside, put the gun to Bender's head, not to shoot him but to scare him and to "make him feel what it was like to have a gun in his face," cocked the gun, "touche[d] the trigger and while pointing it to the victim's head the gun [went] off."

¶13 Farr argues that an investigation would have revealed that Gomez's testimony was a "direct contradiction" of Farr's as to when he cocked the gun and why he left Quarters and that Gomez wrote in his report that Farr said he did not see Bender leave the bar, yet testified that Farr did see Bender leave. These discrepancies do not necessarily undermine the defense theory that Farr never intended to kill Bender.

¶14 In any event, Farr could not have prevented the impeachment evidence from coming in. His own testimony opened the door for the State to undermine his credibility with the inconsistent custodial statements he admittedly made. Police interviewed Farr five times. He told police in the first two he was

[4] The medical examiner testified that Bender was shot once through the back of the head and three times in the torso.

not the shooter and that he saw someone else shoot Bender, drop the gun, and run away. In at least the fourth and fifth interviews, he said he accidentally shot Bender. The evidence just would have come in in a different way.

¶15 Farr does not tell us how foreknowledge of these contradictions would have altered the outcome. The State introduced surveillance video showing Farr leave Quarters ten seconds after Bender, run up behind him, point the gun to the back of his head, and fire. It also introduced a still image from the video that showed Farr holding a handgun with his arm extended toward Bender, a muzzle flash, and "something continuing along the flight path of where the bullet would travel and it appears to have been exiting from Mr. Bender's head."

¶16 Farr also alleges that the State edited the video to show only incriminating portions, so Kohn should have investigated it and the surveillance equipment. He contends an inspection would have revealed "evidence" that "would have undermined the State's theory that Farr saw the victim leave the bar, and followed him out intending to kill him."

¶17 The State provided the defense with the surveillance video. Farr fails to allege, let alone establish, that Kohn did not examine it, nor does he describe the anticipated evidence or how the video or the equipment could establish his intent. We agree with the trial court that Farr's "bald assertion" that a physical inspection of the equipment itself would have undermined the State's case was "wholly conclusory and speculative."

¶18 Farr's last claim of failure to investigate is that Kohn did not investigate Pringle, who testified for the State that he saw Farr shoot Bender. Farr asserts Kohn should have explored Pringle's account of leaving Quarters with Farr, driving to a house on Buffum Street, waiting in the car while Farr went

inside briefly, then returning to Quarters. Pringle testified that he did not know the purpose of the errand until en route. The State did not ask Pringle what that purpose was.[5] Farr contends Kohn's failure to investigate allowed Pringle's testimony to further the State's theory that Farr "left to get a gun and came back with the mental purpose to kill." He adds that "[e]ven if Kohn couldn't have solicited any additional information from Pringle, [h]e never gave the investigation a chance."

¶19 Farr testified that he went to Buffum Street to purchase marijuana, which the jury may or may not have accepted. That does not conclusively answer, of course, why he would return to Quarters where the man he "knew" to be his assailant was, a man who Farr felt he needed the "precaution" of a gun against. Farr essentially concedes that he also does not know what an investigation might have yielded. As with the other failure-to-investigate claims, this one, too, is conclusory and speculative.

Failure to Challenge Alleged Prosecutorial Misconduct

1. During Cross-Examination

¶20 We will overturn a conviction for prosecutorial misconduct only if the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Neuser***, 191 Wis. 2d 131,

[5] A juror tendered a note asking why they left the bar to go to Buffum Street, why they returned to Quarters, and whether they discussed what Farr was doing. Kohn objected to having the questions asked and, as he did not know the answers himself, had not asked Farr when he testified. The prosecutor, who also did not know the answers, wanted the questions asked. The court did not allow the questions to be asked because it did not want to "interfere[] with either party's ability to put on what they believe should be their case."

136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted). The defendant must prove that the prosecutor's conduct constituted intentional overreaching. *See* ***State v. Harrell***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978). We review such allegations in light of the entire record of the case. ***State v. Lettice***, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996).

¶21 Farr asserts that the prosecutor, Assistant District Attorney Denis Stingl, asked questions of him on cross-examination that were "designed to inflame the jury and lay [the] foundation for later misconduct" in closing arguments. After Farr affirmed that he thought Bender was wearing the glasses that were stolen from him, Stingl published a picture of a pair of glasses lying next to a pool of blood. Farr confirmed that they were the glasses he believed to be his. Stingl then asked, "Are you still interested in having those glasses?" Soon after, Stingl commented on the cost of Farr's stolen glasses and that "they're really a piece of jewelry." He asked Farr, "So not only was Michael Bender killed over glasses; he was killed over vanity glasses?" In each instance, the court sustained Kohn's immediate objection and instructed the jury to disregard the question.[6] Before closing argument, the court again instructed the jury to entirely disregard any question the court did not allow to be answered.

[6] Kohn moved for a mistrial after the "vanity glasses" question. The court denied the motion on grounds that, while argumentative, the impropriety was not "egregious enough to grant [the] remedy" of a mistrial. This was a proper exercise of discretion, as a curative instruction was an available, practical, and far less drastic alternative. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 512, 529 N.W.2d 923 (Ct. App. 1995). A jury is presumed to follow a court's instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (1989). Farr does not attempt to refute the basis of the trial court's mistrial ruling, thereby conceding its validity. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶22 Farr also challenges Stingl's cross-examination regarding his belief that Bender was the man who robbed and shot him. Farr testified that he reported the crime to police, that he recalled telling police that the assailant "had bumps on his face," that the man in the bar likewise had "bumps" on his face, that he was certain the glasses the man wore were his, and that he "knew" that the man in Quarters was the one who had robbed him.

¶23 The State attempted to show, via postmortem photographs of Bender's face, that Farr misidentified the victim. Stingl told Farr to point out on the photos the bumps on Bender's face. When Farr could not, Stingl commented, "Because they don't exist, do they?" Kohn objected at a sidebar. Farr contends the cross-examination was "an attempt to inflame the jury" and induce it to "draw [the] false inference" that he misidentified Bender as the man who robbed him and killed an innocent man.

¶24 Trial courts have "great latitude" regarding the admission of photographs. ***Simpson v. State***, 83 Wis. 2d 494, 505, 266 N.W.2d 270 (1978). The court ruled that Stingl was trying to rebut Farr's assertion that he "knew" Bender was the man who robbed and shot him. It allowed Farr to view and testify to all three photographs, but limited the State to publishing just one to the jury. It was not "wholly unreasonable" for the court to allow publication of the photograph, as there was a purpose besides "to inflame and prejudice the jury." *See* ***State v. Lindvig***, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996) (citation omitted). The court properly exercised its discretion.

¶25 The trial court already ruled—correctly, we conclude—on the above-described incidents. That counsel did not assign error in the postconviction motion is not ineffective assistance. *See* ***Reynolds***, 206 Wis. 2d at 369.

2. During Closing Argument

¶26 Farr complains about various statements Stingl made in closing argument. As he did not contemporaneously object by moving for a mistrial, he has forfeited the right to appellate review. *See* ***Haskins v. State***, 97 Wis. 2d 408, 424, 294 N.W.2d 25 (1980). The absence of objection, however, "warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel." ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (citation omitted).

¶27 Farr challenges five statements: (1) "I don't care if Michael Bender robbed and shot Ron[n]ell Farr …."; (2) "Look at the pictures there. Where's the bumps on his face?"; (3) "What did you see in that bar? The glasses that the person was wearing?"; (4) "If all it takes to get killed in this community is to wear a pair of glasses and to look like someone …."; and (5) "[T]he defense doesn't want to put it this way but I will because I can't make sense of it any other way—is that he was killed because he was wearing a certain type of glasses. That's all it took. He was killed because of the glasses."

¶28 "The test to be applied when a prosecutor is charged with misconduct for remarks made in argument to the jury is whether those remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted).

¶29 Farr contends statement (1) is improper as a statement of Stingl's personal opinion. *See* SCR 20:3.4. We cannot agree. It must be read in context. Stingl argued: "I don't care if Michael Bender robbed and shot Ron[n]ell Farr[,] as he seems to think. It's not a defense. It's not a reason to go up behind someone

and kill them by shooting them through the head." This is not opinion. It is a comment on the law. Even if it were opinion, it is permissible, as it is based on evidence in the record. ***State v. Cydzik***, 60 Wis. 2d 683, 694-95, 211 N.W.2d 421 (1973).

¶30 Farr contends argument (2), implying that Farr mistook Bender for his actual assailant, built on Stingl's misconduct during cross-examination, was made to gain sympathy for Bender, and was misleading because he "never stated nor testified that he recognized Bender, the night of the shooting, because he had bumps on his face." The statements were a comment on the substantial evidence, which included Farr's testimony that he "knew" Bender had robbed him, that the robber had bumps on his face, that Farr confirmed on cross-examination that "this person in the bar, Michael Bender, ha[d] bumps on his face," and pictorial evidence of Bender's face with no visible bumps and Farr shooting Bender in the back of the head.

¶31 Farr asserts that arguments (3) and (4) were "a cry for the jury" to find him guilty of killing an innocent man and thus that he would kill anyone wearing those kind of glasses. A prosecutor may not suggest that "the jury arrive at a verdict by considering factors other than the evidence." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

¶32 Farr claimed he did not intend to kill Bender, but wanted only to "make him feel what it was like to have a gun in his face" in retaliation for robbing him at gunpoint, taking his glasses, and shooting him. The State sought to discredit that testimony and to suggest that Bender was a victim of misidentification. Counsel is permitted to draw reasonable inferences from the evidence. ***State v. Burns***, 2011 WI 22, ¶48, 332 Wis. 2d 730, 798 N.W.2d 166.

Stingl's statements were well within the "considerable latitude" counsel is allowed in closing arguments. ***Id.***

¶33 Farr contends that argument (5), that Bender was killed "because of the glasses," was offensive because it went beyond a comment on the evidence to improperly telling the jury what Stingl believed was the truth of the case. *See* ***State v. Jackson***, 2007 WI App 145, ¶22, 302 Wis. 2d 766, 735 N.W.2d 178.

¶34 Stingl's comments were fairly based on the testimony and evidence admitted at trial. The surveillance video and still photo undermine Farr's claim that he only meant to scare Bender. Farr affirmed on cross-examination that when he saw Bender outside the bar, he saw a chance to get his glasses back, that he shot Bender in the back of the head, then several more times, and that he was thinking of taking the glasses when they fell off Bender. He testified that he did not take them because "I drew too much attention. It was just I had shot him."

¶35 None of Stingl's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Wolff***, 171 Wis. 2d at 167 (citations omitted). Not objecting to them thus was neither deficient performance nor prejudicial. In addition, the court instructed the jury that the lawyers' arguments, conclusions, and opinions are not evidence and that any of their remarks suggesting facts not in evidence must be disregarded. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (1989) (jury presumed to follow court's instructions).

Use of surveillance video, video still photo, and autopsy photos

¶36 Photographs are admissible if they are relevant. *See* ***Sage v. State***, 87 Wis. 2d 783, 787-88, 275 N.W.2d 705 (1979). Reasonable persons looking at

photographs as part of a record may have differing opinions as to whether they are cumulative, inflammatory, or prejudicial, but the trial court is in a better position than are we to determine whether, in light of all the evidence, the photographs will assist the jury. *See* ***Hayzes v. State***, 64 Wis. 2d 189, 200, 218 N.W.2d 717 (1974).

¶37 Besides the surveillance video, the court allowed the jury to see the still photograph from the video capturing the shooting and allowed autopsy photographs to be published. The State asked to be able to play the video for the jury three times in its case-in-chief; the defense lobbied for once. The court "cut the baby in half" and limited the State to twice in its case-in-chief and once at closing. Farr argues that the still photo, the autopsy photos, and the multiple showings of the video, all concededly admissible, were used to inflame the jury.

¶38 The video captured the time from when Farr exited Quarters through the shooting. The still photo showed Farr with his arm outstretched aiming the handgun at Bender, a flash, and what appeared to be the bullet exiting Bender's head. Three autopsy photos showed the wounds to Bender's torso; the other two showed the entrance and exit wounds to his head. In light of the parties' stipulation that Farr caused Bender's death and the medical examiner's anticipated testimony, Kohn objected to publishing the autopsy photos.

¶39 After doing a ***Sullivan*** analysis, *see* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), the court ruled that the still photo was "a fair depiction of what happened at the moment of the first shooting." It called the head wound photos "graphic" but found them and the still photo not unfairly prejudicial and relevant to intent. It ruled that the autopsy photos could be shown on the screen but not passed around to the jurors, and could not be published during the

testimony of Bender's lifelong friend who was at Quarters with him on the night Bender was killed.

¶40 The court articulated a sound rationale that included limitations on showing the video and photos. It was not "wholly unreasonable" for the court to rule as it did. ***Lindvig***, 205 Wis. 2d at 108 (citation omitted). The court properly exercised its discretion in managing this demonstrative evidence.

¶41 Farr has not shown either that postconviction counsel's acts or omissions were outside "the wide range of reasonable professional assistance," that there was a "reasonable probability" of a different outcome, or that his issues are "clearly stronger" than those counsel presented. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶4, 40-41 (citation omitted). He thus has not overcome the presumption of effective assistance of counsel, *see* ***id.***, ¶4, or the ***Escalona-Naranjo*** procedural bar.

¶42 Farr's allegations are conclusory, conclusively shown by the record to not warrant relief, or both. Whether to grant or deny a hearing on his postconviction motion thus was a matter for the trial court's discretion. We see no erroneous exercise of that discretion in denying the motion without a hearing.

By the Court.—Order affirmed.

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