COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2295 **Cir. Ct. No. 2005CF770**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY Q. WALLACE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Anthony Q. Wallace appeals from an order denying his motion for a new trial pursuant to WIS. STAT. §§ 974.06 and 974.07

(2015-16),[1] based on the results of postconviction DNA testing. We affirm the order.

¶2 In 2007, a jury found Wallace guilty of three counts of second-degree sexual assault, two counts of false imprisonment, and one count each of child abuse-intentionally causing harm, intimidating a victim, and misdemeanor battery, all as a repeater. The charges arose after he locked two females, SR and CB, a minor, in his apartment and barricaded the door. Over a period of hours for SR and several days for CB, he beat and sodomized them because he believed one of them had stolen some of his crack cocaine. He also whipped CB with a cord and poured salt and rubbing alcohol on the open lash marks.

¶3 At trial, CB testified that she was so brutally assaulted that blood ran down her legs. SR similarly testified that she saw Wallace anally assault CB on the bed with a glass vase or candle holder and a forty-ounce beer bottle and that there was "blood and shit everywhere," "running down [CB's] legs like she had her period." The prosecutor displayed stained bedding and argued that the stains were "consistent with blood" and thus corroborated the victims' claims. The stains had not been tested for blood or DNA.

¶4 The attorney appointed to represent Wallace postconviction filed a direct appeal alleging insufficiency of the evidence on several counts. ***State v. Wallace***, No. 2008AP949-CR, unpublished slip op. ¶1 (WI App. Mar. 24, 2009). This court rejected the insufficiency-of-the-evidence claims but, due to a jury instruction error on the victim-intimidation count, affirmed in part and reversed in

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

part and remanded for the trial court to correct the judgment and resentence Wallace on that conviction.

¶5 Wallace filed a pro se motion under WIS. STAT. § 974.07(6) to conduct DNA testing on the candle holder and beer bottle used to sodomize CB, a condom, and the stained bedding items. The trial court denied the motion; Wallace appealed. This court summarily affirmed the denial of the motion to test the condom, candle holder, and beer bottle, as the request was barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and further, the evidence did not fall under § 974.07(2)(c), as they had been tested for DNA pretrial. ***State v. Wallace***, No. 2011AP225-CR, unpublished slip op. and order (WI App. Dec. 7, 2011). We reversed and remanded for forensic testing of the bedding, however, pursuant to § 974.07(2)(c). ***Wallace***, No. 2011AP225-CR. The testing showed the stains were not blood and so were not tested for DNA. A State Crime Laboratory DNA analyst testified that the lab does not test for fecal matter.

¶6 Wallace moved for a new trial under WIS. STAT. § 974.07(10). He also brought his motion under WIS. STAT. § 974.06 alleging that, if viewed as newly discovered evidence, there was a "reasonable probability" that the outcome of his trial would have been different had the forensic results been available at trial, as SR's and CB's credibility was central to the State's case. *See* ***State v. Armstrong***, 2005 WI 119, ¶161-62, 283 Wis. 2d 639, 700 N.W.2d 98. He also argued he was deprived of his constitutional rights to a unanimous jury and the effective assistance of trial and postconviction counsel and that a new trial was warranted in the interest of justice because the real controversy was not fully tried.

¶7 The court granted a hearing under WIS. STAT. § 974.07 but declined to order a new trial under either that statute or WIS. STAT. § 974.06. It did not rule

on Wallace's claim of ineffective assistance of postconviction counsel who filed a direct appeal, concluding that it was not competent to rule on that issue by virtue of ***State v. Starks***, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146.[2] The court also denied his request for a new trial on his claim of a denial of his due process right to a unanimous jury or in the interests of justice. Wallace appeals.

¶8 WISCONSIN STAT. § 974.07(10) provides in relevant part:

> **(10)**(a) If the results of forensic deoxyribonucleic acid testing ordered under this section support the movant's claim, the court shall schedule a hearing to determine the appropriate relief to be granted to the movant. After the hearing, and based on the results of the testing and any evidence or other matter presented at the hearing, the court shall enter any order that serves the interests of justice, including any of the following:
>
> ….
>
> 2. An order granting the movant a new trial or fact-finding hearing.
>
> ….
>
> 5. An order specifying the disposition of any evidence that remains after the completion of the testing, subject to sub. (9)(a) and (b).
>
> (b) A court may order a new trial under par. (a) without making the findings specified in s. 805.15(3)(a) and (b).

WISCONSIN STAT. § 805.15(3) provides:

> **(3)** Newly-discovered evidence. Except as provided in [WIS. STAT. §§] 974.07(10)(b) and 980.101(2)(b), a new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

[2] Further, Wallace's postconviction attorney had passed away.

> (a) The evidence has come to the moving party's notice after trial; and
>
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
>
> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

¶9 "Statutory interpretation and the application of a statute to specific facts are questions of law that we review de novo." ***State v. Moran***, 2005 WI 115, ¶26, 284 Wis. 2d 24, 700 N.W.2d 884. Wallace argued that the lab finding of no blood on the bedding supported his claim because it undermined CB's and SR's credibility. The trial court then scheduled a hearing, as WIS. STAT. § 974.07(10)(a) directs.

¶10 The court observed that the negative finding of no blood did not exonerate Wallace in the way that a positive finding—someone else's DNA, for example—might point to a different perpetrator. It also noted that, while the prosecutor had argued that the stains were "consistent with" blood, the jury had the opportunity to weigh the evidence because "[e]verybody knew [the bedding] wasn't tested." Commenting that the evidence against Wallace was overwhelming, the court concluded that serving the interests of justice means considering both sides' interests, not only the defendant's.

¶11 We read WIS. STAT. § 974.07(10)(a) the same way. We conclude it envisions that serving the interests of justice and determining appropriate relief are matters within the trial court's sound discretion. The court applied the appropriate facts and the correct law, explained its rationale, and reached a reasonable decision. We agree that the "negative DNA" evidence probably would not have changed the result. *See* WIS. STAT. § 805.15(3)(d).

¶12 We turn to Wallace's WIS. STAT. § 974.06 claim that he merits a new trial because the forensic test results comprise newly discovered evidence. We review a decision on a motion for a new trial based on newly discovered evidence for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590.

¶13 Although the bedding always was available for testing, we will accept that Wallace could establish by clear and convincing evidence that the forensic evidence was discovered after conviction, he was not negligent in failing to discover it, it is highly material to an issue in the case, and it is not merely cumulative. *See* ***id.***, ¶13. His claim founders on whether there is a reasonable probability of a different outcome—that is, a reasonable probability that a jury looking at the old and new evidence would have a reasonable doubt as to his guilt. *See* ***id.***, ¶¶14, 17.

¶14 Wallace asserts that the absence of blood on the bedding would have seriously undercut CB's and SR's credibility on their claims that they were held captive and the sex was nonconsensual. He contends that the new evidence showing that the stains were not blood, coupled with inconsistencies between CB's and SR's versions and CB's admission that she had lied several times in her accounts to police, would cause a reasonable jury to have a reasonable doubt as to his guilt of the sexual assaults and false imprisonment. We disagree.

¶15 Each victim's testimony corroborated the other's in substantial measure. For example, both victims testified that when Wallace brought SR into the apartment where CB was staying, he punched SR in the face so hard she urinated on herself; that Wallace ordered CB to gag SR with a shirt while he attempted to have anal sex with SR; that Wallace inserted a vase into CB's anus;

that Wallace whipped CB with a cord then poured salt and alcohol onto her wounds; that Wallace made them eat or attempt to eat cat food; that he ordered CB to perform oral sex on him as he sat on the living room couch; that he burned CB with a crack pipe; and that he barricaded the door to prevent them from leaving.

¶16 Other evidence corroborated parts of their testimony as well. The State introduced photographs of their physical injuries. A detective read a statement from Wallace's father in which he said Wallace had called him to come over. Saying, "[D]addy, you got to see this," Wallace summoned CB from the bedroom and made her strip. His father told the detective that "[h]er back was whipped like back in the days when the slaves got beat for running," and that Wallace told him he beat her because she "stole two bags" from him.

¶17 A police officer testified that SR told him that she and another female were anally sexually assaulted. The DNA analyst testified that a red-brown stain on the edge of the top of the candle holder tested presumptively positive for blood and a mixture of DNA, the major component of which was CB's profile. She also testified that testing of the beer bottle showed a DNA mixture of Wallace's, CB's, and a third female's, and that a swabbing of the inside and outside of a condom revealed that Wallace and CB, respectively, were the major contributors. SR's sexual assault kit tested negative for sperm, but both CB and SR testified that Wallace forced them to shower.

¶18 SR testified that Wallace inserted the bottle into CB's anus and "poked" CB with a screwdriver, and that there was "shit … on the vase, on the bottle, running down [CB's] legs like she had her period." The jury reasonably could have inferred that the bedding was stained with fecal matter, which the state lab does not test for. The trial court said that, having sat through the trial, it was

"absolutely convinced that there would be no different result here" even had the jury been told there was no blood on the bedding. We conclude that the court's decision not to grant a new trial based on newly discovered evidence reflects a proper exercise of discretion.

¶19 We turn next to Wallace's claim that the standard jury unanimity instructions and verdict forms deprived him of his due process right to a unanimous jury.[3] Because Wallace did not object to the instructions and verdict forms, we may not review whether the trial court erred. ***State v. Marcum***, 166 Wis. 2d 908, 915, 480 N.W.2d 545 (Ct. App. 1992).[4]

¶20 We address his claim as one of ineffective assistance of counsel. *See* ***id.*** at 916. Wallace argues that trial counsel was ineffective for failing to object, that his postconviction counsel was ineffective for failing to challenge trial counsel's error, and that appellate counsel was ineffective for failing to raise the issue on his direct appeal.[5]

¶21 As noted, Wallace's postconviction counsel filed a direct appeal. A criminal defendant must raise all available claims in the direct appeal or

[3] Contrary to his assertion, Wallace does not have a federal due process right to a unanimous jury. *See* ***Johnson v. Louisiana***, 406 U.S. 356, 359 (1972); ***Apodaca v. Oregon***, 406 U.S. 404, 411 (1972).

[4] Wallace contends the right to jury unanimity is so fundamental it cannot be waived and asks that we "resolve the nonwaivable question" reserved in ***State v. Marcum***, 166 Wis. 2d 908, 916 n.2, 480 N.W.2d 545 (Ct. App. 1992). The court of appeals is an error-correcting court. ***State v. Schumacher***, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988). As noted in ***Marcum***, answering that question is better left to the supreme court. ***Marcum***, 166 Wis. 2d at 916 n.2.

[5] We agree with the State and Wallace that, to the extent he raised ineffective assistance of postconviction counsel, the circuit court was competent to address it. *See* ***State v. Starks***, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146. We will address Wallace's entire ineffectiveness claim because it can be decided on legal principles without further fact-finding.

postconviction motion. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). While constitutional claims may be brought pursuant to WIS. STAT. § 974.06(1) after the time for an appeal has passed, a defendant may not pursue subsequent claims that could have been raised in the direct appeal or earlier motion absent a "sufficient reason" for not raising it earlier. Sec. 974.06(4); *see also* ***State v. Lo***, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756, and ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Ineffective assistance of postconviction counsel may constitute a sufficient reason as to why an issue that could have been raised on direct appeal was not. ***State v. Balliette***, 2011 WI 79, ¶¶37, 62, 336 Wis. 2d 358, 805 N.W.2d 334.

¶22 To prevail on an ineffectiveness claim, a defendant must show deficient performance that prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). That is, he or she must show both that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment," and the errors "deprive[d] the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. The defendant bears the burden of overcoming a strong presumption that counsel acted reasonably within professional norms. ***Id.*** To prevail on his ineffectiveness claim as to appellate counsel, Wallace must demonstrate that his jury-unanimity claim was "clearly stronger" than the sufficiency-of-the-evidence claim his appellate counsel did advance on appeal. *See* ***Starks***, 349 Wis. 2d 274, ¶60.

¶23 The Wisconsin Constitution guarantees the right to a jury trial. WIS. CONST. art. I, §§ 5, 7; ***State v. Tulley***, 2001 WI App 236, ¶14, 248 Wis. 2d 505, 635 N.W.2d 807. "In criminal cases, the right to a jury trial implies the right to a unanimous verdict on the ultimate issue of guilt or innocence." ***Tulley***, 248 Wis. 2d 505, ¶14. The unanimity requirement is linked to the due process

requirement that the prosecution prove each essential element of the offense beyond a reasonable doubt. ***Holland v. State***, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979).

¶24 The first step in a unanimity challenge is to examine the language of the statute to determine the elements of the crime and whether the legislature has created a single offense with multiple or alternate modes of commission. ***State v. Johnson***, 2001 WI 52, ¶12, 243 Wis. 2d 365, 627 N.W.2d 455. The second step is to evaluate whether the lack of jury unanimity on the alternate modes of commission violates due process. ***Id.***, ¶13.

¶25 Wallace was charged with second-degree sexual assault of CB and SR. The jury was instructed that it had to find that Wallace had sexual intercourse with them without their consent by use or threat of force or violence. It also was instructed that sexual intercourse means "any … intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening …. The emission of semen is not required." WIS. STAT. § 940.225(2)(a), (5)(c); *see also* WIS JI—CRIMINAL 1208 and 1200B.

¶26 Wallace complains that the jury instructions and verdict forms relating to counts 1, 4, and 6 were "so generically worded as to make it impossible to know what verdicts related to what charges or acts and evidence presented at trial, thereby depriving [him] of due process and a unanimous jury." Count 1 specified "having sexual intercourse, namely anal intercourse with [CB], by use of force"; count 4 specified "having sexual intercourse, namely inserting an object in the anus of [CB], by threat of violence"; and count 6 specified "having sexual intercourse [with SR], by threat of violence." He specifically protests that there was testimony that he anally assaulted CB with multiple objects—the vase or

candle holder, a beer bottle, perhaps a screwdriver—but the court did not tell the jury that it must be unanimous as to the particular object used. The court did not have to.

¶27 Jury unanimity on the particular alternative means of committing the crime is not required if the acts are conceptually similar. ***State v. Lomagro***, 113 Wis. 2d 582, 592, 335 N.W.2d 583 (1983). "By specifically defining what acts constitute sexual intercourse in [§] 940.225(5)[(c)], the legislature has in effect performed the conceptual grouping as a matter of public policy." ***Lomagro***, 113 Wis. 2d at 593. "[U]nanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged." ***State v. Badzinski***, 2014 WI 6, ¶28, 352 Wis. 2d 329, 843 N.W.2d 29 (citation omitted).

¶28 Wallace's ineffective-assistance-of-trial-counsel claim based on unanimity is not clearly stronger than the sufficiency-of-the-evidence claim his appellate attorney did advance. He thus fails to establish a sufficient reason for not raising the claim on direct appeal.

¶29 Finally, Wallace asserts that we should order a new trial in the interest of justice. This court may exercise its discretion to reverse a conviction if we conclude either that the real controversy has not been tried or it is probable that justice has miscarried. WIS. STAT. § 752.35; ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998).

¶30 Wallace argues that the real controversy—consent—was not fully tried. He therefore must convince us either that the jury was precluded from considering important testimony that bore on an important issue or that improperly received evidence clouded a crucial issue in the case. ***State v. Chu***, 2002 WI App 98, ¶55, 253 Wis. 2d 666, 643 N.W.2d 878. For the reasons discussed above, we

reject Wallace's challenges to his convictions. We see no reason to exercise our discretionary reversal authority under WIS. STAT. § 752.35.

By the Court.—Order affirmed.

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