COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1008 **Cir. Ct. No. 1996CF962289**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE EDWARD REED,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. A*ffirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. George Edward Reed appeals an order of the circuit court denying his postconviction motion for either a new trial or an evidentiary hearing. We affirm.

BACKGROUND

Procedural History

¶2 This is not the first time this case has been before us. In 1996, Reed and Maurice Johnson were each charged with one count of first-degree intentional homicide, as parties to the crime, for the shooting death of Omar Hooper. Reed was also charged with one count of being a felon in possession of a firearm. In exchange for an amended charge, Johnson pled guilty and testified against Reed at Reed's trial. The relevant facts were laid out by our previous decision, ***State v. Reed***, No. 1997AP2830-CR, unpublished slip op. (WI App March 2, 1999):

> On April 21, 1996, Omar Hooper was fatally shot at 3200 North 34th Street in Milwaukee. It was not disputed that Reed was at the scene of the shooting. Co-defendant Maurice Johnson pled guilty and testified against Reed at Reed's trial. Johnson told the jury that he and Reed had gone to confront Hooper because Hooper had threatened Reed's brother (Dannyell) and his friend, Kinah Anderson. Johnson testified that both he and Reed had guns and they pulled their guns on Hooper. Johnson said that he shot Hooper in the leg, but Reed did not fire his gun. Anderson was with them and Johnson testified that Anderson also shot Hooper.
>
> Reed testified in his own defense. He told the jury that when he saw his brother, Michael, talking to "a dude" (later identified as Hooper) on the corner, he went to get Michael. Reed said he was unarmed. Reed asked Hooper if he knew who had pulled a gun on his other brother, Dannyell, and Hooper said it was some people from 33rd and Auer. Reed testified that Johnson and Anderson approached them, and Anderson said Hooper was the one who had shot at him earlier. At this point, according to Reed, Johnson opened fire and Anderson shot Hooper in the back of the head.
>
> The State also introduced the testimony of eyewitness Floyd Figures, a friend of Dannyell. Figures testified that when Dannyell told Johnson and Reed that Hooper had pulled a gun on him, Reed said: "They made a mistake. They shouldn't never mess with my brother.

> Now I'm going to have to do him in." Subsequently, Johnson, Anderson, Dannyell and he approached Hooper on the corner. Figures said both Reed and Johnson were armed. When the group confronted Hooper, Figures stated that both Reed and Johnson opened fire.
>
> The State produced another eyewitness, Patrick Evans, who was talking to another friend on the street when he saw four people approach Hooper. He testified that two came up close and two stayed further back. Evans said it sounded as if there was an argument occurring and then he heard "June" tell his companions to shoot Hooper. "June" is Reed's nickname. Evans also identified Johnson. He said that both Johnson and Reed had guns and he saw Johnson fire at Hooper.

Id. at 1.

¶3 The jury found Reed guilty as to both charges. ***Id.*** at 2. Reed filed a postconviction motion arguing that he was entitled to a new trial on the basis of newly discovered evidence. ***Id.*** at 1. As relevant to this appeal, the newly discovered evidence was an affidavit from Johnson, recanting the parts of his trial testimony discussing Reed's involvement in the shooting. ***Id.*** at 2. The circuit court denied the motion. ***Id.*** Reed then filed a motion for remand, alleging that he could corroborate his newly discovered evidence claim. ***Id.*** We ordered the case remanded to allow Reed to supplement his postconviction motion and to seek reconsideration of his request for a new trial. ***Id.***

¶4 Reed filed a motion for reconsideration, which included an affidavit from his brother Michael, stating that Reed did not pull out a gun during the shooting and that Michael did not see Reed shoot Hooper. ***Id.*** Reed also argued that his trial counsel was ineffective for failing to call Michael as a witness. ***Id.*** The postconviction court denied the motion. ***Id.*** We affirmed the postconviction court on appeal. ***Id.*** at 3-4.

Current Appeal

¶5 In 2016, nearly twenty years after his trial, Reed, *pro se*, filed another postconviction motion arguing that he was entitled to a new trial. Reed argued that he was deprived of the effective assistance of counsel because counsel failed to call three potential witnesses—Eboneshia Shropshire, Mary E. White, and Michael Reed—all of whom would have testified to Reed's innocence. Reed also argued that his appellate counsel was ineffective for failing to appropriately handle his first appeal. Reed's motion also argued that newly discovered evidence, in the form of nine affidavits from nine people, proved that Reed did not engage in any acts leading to the shooting, but rather, Johnson and Kinah Anderson were responsible for Hooper's death.

¶6 The postconviction court denied Reed's motion. This appeal follows. Additional facts are included as relevant to the discussion.

DISCUSSION

¶7 On appeal, Reed argues that he is entitled to a new trial or an evidentiary hearing for several reasons. First, he argues that his trial counsel was ineffective for not investigating and calling several potential witnesses-specifically, Shropshire, White, and Michael.[1] Second, Reed argues that his trial counsel and postconviction counsel were ineffective for not arguing that Reed's mere presence at the crime scene was insufficient to establish his criminal liability. Third, he argues that he has newly discovered evidence in the form of numerous affidavits, all of which suggest that Reed either did not have a gun at the time of

[1] To avoid confusion, we refer to the defendant as "Reed" and to the siblings by their first names.

Hooper's shooting, or that Reed did not shoot Hooper. Finally, Reed argues that he is entitled to a new trial in the interest of justice.

¶8 We conclude that all of Reed's present claims are either barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), or fail to meet the criteria for newly discovered evidence.

Ineffective assistance of counsel

¶9 To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's actions or omissions were "professionally unreasonable." *See* ***id.*** at 691. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A court may start its review by examining either of the two ***Strickland*** prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. *See* ***id.***, 466 U.S. at 697. A circuit court must grant a hearing on the ineffective assistance of counsel claim only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the allegations require a hearing is a question of law for our independent review. *See* ***id.***

¶10 Reed argues that his trial counsel was ineffective for failing to investigate and call three witnesses—Shropshire, Michael, and Dannyell (Reed's other brother). We disagree.

¶11 Both of the affidavits from Reed's brothers are dated from the late 1990s—Dannyell's affidavit is dated May 1997 and Michael's is dated February 1998. Dannyell's affidavit states that he saw two black men run from the crime scene but he did not know who they were, nor did he know who shot Hooper. Dannyell stated that he lied to police when he said Reed was involved in the shooting. Michael's affidavit stated that he witnessed Johnson and Anderson shoot Hooper and that Reed did not produce any guns. Shropshire's affidavit, dated November 2013, stated that she was at her cousin Venturia Daniels's home with Reed and Johnson when Kinah Anderson and Dannyell entered and said that someone pulled a gun on them. It stated that Reed then said he was going home and he left by himself without saying anything else.

¶12 We conclude that the affidavits are procedurally barred by ***Escalona-Naranjo***, which requires that a defendant raise all grounds for postconviction relief in his or her first postconviction motion or in the defendant's direct appeal. *See* ***id.***, 185 Wis. 2d at 185. A defendant may not pursue claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "'sufficient reason'" for not raising the claims previously. ***Id.*** at 181-82 (citation omitted). Whether a defendant's successive appeal is procedurally barred is a question of law that we review *de novo*. *See* ***State v. Fortier***, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893.

¶13 First, we considered, and rejected, Michael's affidavit during Reed's first appeal to this court, nearly twenty years ago. We concluded that Michael's affidavit would not have altered the outcome of Reed's trial. Dannyell's affidavit, dated May 1997—eight months *before* the date of Michael's affidavit—is also procedurally barred because Reed presents no reason for not offering this affidavit at the time of his first appeal. As to Shropshire, Reed does not explain why her 2013 affidavit was obtained years after his trial and not prior to his previous appeal. Moreover, Shropshire was actually interviewed in 1996 by Reed's counsel's investigator, but Reed provides no evidence as to what Shropshire said to the interviewing investigator, whether her affidavit matches what she said in her interview, or whether the statements in Shropshire's affidavit would have been consistent with her trial testimony had she been called as a witness. In short, Reed does not explain why Shropshire's testimony would have been relevant to his defense. Trial counsel was therefore not ineffective for failing to investigate and call these three witnesses. Consequently, postconviction counsel was not ineffective for failing to raise trial counsel's alleged shortcomings in failing to investigate and call these witnesses. *See* ***Strickland***, 466 U.S. at 687; *see also* ***Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).[2]

[2] Reed also argues that this trial counsel was ineffective for failing to raise a "mere presence" defense during trial. Reed did not raise this issue before the circuit court in his WIS. STAT. § 974.06 (2015-16) motion. Consequently, he has forfeited it and may not raise that issue here. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995). We do not consider this issue further.

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

Newly Discovered Evidence

¶14 Reed also argues that newly discovered evidence, in the form of affidavits from multiple people, entitles him either to a new trial or to an evidentiary hearing. We have already discussed three of the affidavits—those of Michael, Dannyell, and Shropshire—and have concluded that they are procedurally barred. The remaining affidavits can be summarized as follows:

- Phyllis Reed's affidavit (dated October 2013) stated that she was with her friend Jerusha Bohannon on the day of the shooting. They were out walking when they saw Anderson and Johnson shoot Hooper. Anderson and Johnson were the only people they saw with guns. They did not see Reed with a gun. Phyllis is Reed's sister.

- Jerusha Bohannon's affidavit (dated October 2013) essentially mirrored Phyllis's affidavit.

- Jarvis Garrett's affidavit (dated November 2013) stated said he was smoking a cigarette on an upstairs porch in the neighborhood. He watched the conversations preceding Hooper's murder unfold. Garrett described Johnson and Anderson as having different types of handguns. Garrett said he saw Johnson shoot Hooper twice, and after Hooper fell to the ground, Anderson shot Hooper once in the back of the head. At no time during the incident did he see Reed with a gun or fire shots.

- Patrick Evans's affidavit (dated December 2013) stated that he "was instructed by the police officers to help convict George Reed" and further explains "I only testified against Reed because I want somebody to pay for what happen (sic) to Omar Hooper and I knew that Reed knew Kinah Anderson the guy who actually committed the homicide, and that's why I put the homicide off on Reed. I only testified against Reed because the policers (sic) told me to[.]" Evans further averred: "I never saw Reed place his hands under his shirt, nor saw him with a gun during any time of this incident. Nor did Reed make the statement, 'shoot that bitch ass mother fucker.'"

¶15 "'Motions for a new trial based on newly discovered evidence are entertained with great caution.'" ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). "The decision to grant or deny a motion for a new trial based on newly[]discovered evidence is committed to the circuit court's discretion." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. We review the circuit court's determination for an erroneous exercise of that discretion. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A circuit court erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record. *See* ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756. Thus, we will not overturn a discretionary determination merely because we would have reached a different result. *See* ***id.*** Rather, "'[b]ecause the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary decisions.'"

Burkes v. Hales, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted; first set of brackets in ***Burkes***).

¶16 To obtain a new trial based on newly discovered evidence, Reed must establish, by clear and convincing evidence, that: "'(1) the evidence was discovered after conviction; (2) [he] was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). If those four criteria have been established, we then determine "'whether a reasonable probability exists that a different result would be reached in a trial.'" *See* ***id.*** (citation omitted). "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Id.***

¶17 In determining the reasonable probability of a different result on retrial, the circuit court may determine the credibility of the new testimony proffered by the moving party. *See* ***State v. Carnemolla***, 229 Wis. 2d 648, 660–61, 600 N.W.2d 236 (Ct. App. 1999); *see also* ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (Ct. App. 1996). If the circuit court finds the newly discovered evidence credible, the court determines whether a jury, after hearing all of the evidence, would have a reasonable doubt as to the defendant's guilt. ***Edmunds***, 308 Wis. 2d 374, ¶18. In making this latter determination, the circuit court does not weigh the evidence. ***Id.*** We review the circuit court's credibility finding for clear error. *See* ***Terrance J.W.***, 202 Wis. 2d at 501.

¶18 We conclude that these remaining affidavits fail to meet the criteria necessary to constitute newly discovered evidence. As to the first three affidavits—those of Phyllis, Bohannon, and Garrett—Reed has not established

that he discovered the contents of these affidavits after his trial. All of the affiants knew Reed and claimed to be eyewitnesses to the shooting. Reed, who was present at the shooting, has not produced any evidence showing that he was unaware Phyllis, Bohannon, and Garrett also witnessed the shooting until nearly twenty years after his trial. Nor has Reed shown that he was diligent in seeking the alleged newly discovered evidence. The fact that these affidavits surfaced so long after the trial belies any claim by Reed that he diligently sought new evidence.

¶19 As to Evans's affidavit, we conclude that the affidavit fails to meet the newly discovered evidence standard for the same reasons we rejected the other affidavits, but we also conclude that Evans's affidavit fails to meet the requirements for recantation evidence. In addition to meeting the requirements for newly discovered evidence, a recantation must be corroborated by other newly discovered evidence. ***State v. Ferguson***, 2014 WI App 48, ¶25, 354 Wis. 2d 253, 847 N.W.2d 900. Reed contends that Evans's affidavit, along with the other affidavits, supports Johnson's recantation. However, Evans's claim of coercion is not supported by any other newly discovered evidence, nor are his statements about the events surrounding Hooper's death new information. Reed cannot use the other affidavits he discusses as corroborating evidence, as we have already rejected his claim that they are newly discovered.

¶20 Finally, and perhaps most importantly, none of Reed's asserted newly discovered evidence provides a reason to believe that Reed was not a *party to the crime* of first-degree intentional homicide. While the affidavits claim that none of the witnesses saw Reed with a gun, there is insufficient evidence to suggest that Reed did not participate in the commission of the homicide either by confronting Hooper, or by encouraging others to shoot Hooper. Reed also does

not explain why he did not advise counsel of these potential witnesses at the time of his trial.[3] Consequently, none of the affidavits Reed presents constitute newly discovered evidence.

Interest of Justice

¶21 Lastly, Reed urges us to use our discretionary reversal authority, pursuant to WIS. STAT. § 752.35, to grant him a new trial in the interest of justice. Reed has not satisfied the requirements of § 752.35.[4] Our supreme court has "consistently held that the discretionary reversal statute should be used only in *exceptional* cases." ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258; *see also* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60; ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). We see no exceptional circumstances here which warrant a discretionary reversal.

By the Court—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(5). This opinion may not be cited except at provided under RULE 809.23(3).

[3] As discussed earlier, Shropshire was investigated and interviewed at the time of trial; however, there is no evidence as to what she said in her interview and why she was not called as a witness.

[4] WISCONSIN STAT. § 752.35 provides: "In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from[.]"