COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1101 **Cir. Ct. No. 1997CF972937**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARQUIS OMAR GILLIAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Marquis Omar Gilliam appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2015-16)[1] motion for a new trial without a hearing. Gilliam claims his postconviction attorney was ineffective for failing to make a particular ineffective-assistance claim against trial counsel. We reject Gilliam's arguments and affirm the circuit court's order.

BACKGROUND

¶2 In the early morning hours of July 5, 1997, Gilliam shot and killed Dion Lucas at an after-hours party in an illegal club. Gilliam did not deny the shooting but maintained he acted in self-defense, claiming that Lucas and his cousin were neighborhood bullies who had specifically targeted and robbed Gilliam in the past. Because of Lucas's past contact with Gilliam, Gilliam said he was afraid of Lucas and began carrying a gun for protection.

¶3 When Gilliam arrived at the club, Lucas was there as the doorman. Gilliam claimed he did not know Lucas would be at the club and was surprised when he opened the door, but Gilliam did not opt to leave the club. Lucas patted down Gilliam for weapons, but did not find the gun Gilliam had concealed before arriving at the club.

¶4 A witness indicated that Gilliam first became upset with Lucas for "false flagging"—wearing a hat in a manner meant to convey a gang affiliation even though the person does not belong to the gang. According to police, Gilliam told them that Lucas was giving him dirty looks, so Gilliam complained to the

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

club owner, who told Lucas to leave Gilliam alone. Later, Lucas "began to get into Gilliam's face," and the two had a loud argument during which Gilliam pulled out a gun as the crowd of spectators grew. Lucas began taunting Gilliam, making Gilliam angrier. People tried to separate Gilliam and Lucas, but Gilliam raised his gun, stated he was sorry for what was about to happen, and began to shoot. There were four bullets in the gun; Lucas was struck four times. Gilliam fled the scene; a friend concealed the weapon. Gilliam told police he felt he had to "do it" before Lucas did it to him, though he admitted Lucas did not have a gun.

¶5 Gilliam was charged with one count of first-degree intentional homicide while armed with a dangerous weapon. The jury was instructed on perfect and imperfect self-defense, as well as the lesser-included offense of second-degree intentional homicide.[2] The jury convicted Gilliam on one count of first-degree intentional homicide while armed. He was sentenced to life imprisonment with parole eligibility beginning in 2037.

¶6 Gilliam filed two postconviction motions. One alleged ineffective assistance of trial counsel for failure to ensure all twelve jurors were individually polled; the other alleged insufficient evidence of record to show a unanimous verdict. The circuit court denied both motions. On appeal, Gilliam argued that the trial court erred in failing to remove a juror who displayed "manifest bias" against him. We affirmed Gilliam's conviction. *See* ***State v. Gilliam***, No. 1999AP1262-CR, unpublished slip op. (WI App June 15, 2000).

[2] A successful affirmative defense mitigates first-degree intentional homicide to second-degree intentional homicide. *See* WIS. STAT. §§ 940.01(2), 940.05(1)(a).

¶7 In April 2016, approximately eighteen years after his conviction, Gilliam filed the motion for a new trial that underlies this appeal. He claimed postconviction counsel had been ineffective for failing to argue ineffective assistance of trial counsel for failure to "present substantial evidence to corroborate" Gilliam's fear of Lucas and his claim of self-defense. Specifically, Gilliam believed trial counsel should have called three specific witnesses to offer evidence under ***State v. McMorris***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), regarding Lucas's reputation for violence. The motion claimed to have "the affidavits of three witnesses" attached.

¶8 The circuit court denied the motion without a hearing. First, Gilliam had not alleged that he told trial counsel about the witnesses, nor did he allege that there was any reason why trial counsel should have independently uncovered the witnesses. Second, the circuit court noted that there had already been evidence presented at trial that Lucas was an intimidator, as well as evidence of specific acts of violence. Third, the circuit court commented that the fact that three witnesses had spoken to an investigator nineteen years after trial was not particularly illuminating on trial counsel's conduct. Thus, because Gilliam had not alleged sufficient facts to show a reasonable attorney should have identified and called the three witnesses, the circuit court determined that any claim of deficient performance was conclusory.

¶9 The circuit court additionally determined that Gilliam had failed to show prejudice. First, the circuit court noted, Gilliam had not presented affidavits from the witnesses themselves but from the investigator who interviewed them. The circuit court therefore questioned the statements' reliability. Second, even based on those affidavits, the witnesses did not have any information "that would have significantly bolstered the defendant's self-defense claims." Two of the

witnesses knew Lucas as a bully who carried a gun, but could recall no specific instances of violence. The third witness had nothing to say about Lucas at all.

¶10 The circuit court also concluded that even if the three witnesses had testified, "there is no reasonable probability that the jury would have found that the defendant acted in self-defense when he shot the victim four times, *particularly when two of those shots were fired while the victim was lying face down on the ground*." The circuit court thus determined that trial counsel was not ineffective, the issue of the three witnesses was not clearly stronger than the jury issues postconviction counsel had raised, and postconviction counsel was not ineffective for failing to raise a claim of ineffective trial counsel related to possible ***McMorris*** evidence. Gilliam appeals.

PROCEDURAL POSTURE

¶11 Before we move to the substance of this appeal, it appears necessary for us to clarify the procedural posture of the underlying motion.

¶12 First, Gilliam's notice of appeal and the cover of his appellate brief both state that he is appealing his 1998 judgment of conviction. We have no jurisdiction over the 1998 judgment: not only was it previously appealed, but the time for any new appeal of a 1998 conviction is long expired. This appeal involves only the April 18, 2016 order denying Gilliam's motion for a new trial.

¶13 Second, the postconviction motion requests "an order granting this writ of habeas corpus" because of ineffective postconviction counsel and states that the petition is brought pursuant to WIS. STAT. § 974.06, ***State v. Starks***, 2013 WI 69, ¶4, 349 Wis. 2d 274, 833 N.W.2d 146, and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). In the

appellate brief, Gilliam then cites standards of review for claims of ineffective assistance of appellate counsel. *See, e.g.*, ***State v. Knight***, 168 Wis. 2d 509, 511-12, 484 N.W.2d 540 (1992). The State asserts that Gilliam's motion for a new trial was really a WIS. STAT. § 974.06 motion, not a petition for a writ of *habeas corpus*, because Gilliam is not relying on ***Knight*** to complain that appellate counsel was ineffective. Gilliam counters that under ***Starks***, a claim of ineffective postconviction counsel must be filed with the circuit court as either a § 974.06 motion or a *habeas* petition.

¶14 "The proper forum for challenging the effectiveness of appellate or postconviction counsel depends on the deficiency alleged." ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Ct. App. 1997), *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 719 N.W.2d 900. This is because "[w]hile postconviction counsel and appellate counsel are often the same person, their functions differ." ***Id.*** (citation omitted). Gilliam does not allege his appellate attorney was ineffective during the direct appeal, so the State is correct that his case does not fall under ***Knight***. *See* ***Smalley***, 211 Wis. 2d at 797; *see also* ***Knight***, 168 Wis. 2d at 512-13.

¶15 Rather, Gilliam claims postconviction counsel was ineffective. He is correct that such a claim "should be raised in the circuit court either by a petition for a writ of habeas corpus or a motion under [WIS. STAT.] § 974.06[.]" *See* ***Smalley***, 211 Wis. 2d at 798; *see also* ***Starks***, 349 Wis. 2d 274, ¶35. However, the two avenues of relief are not the same: § 974.06 was created to replace *habeas corpus* as the main method for challenging a conviction after the time for direct appeal has lapsed. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶32, 360 Wis. 2d

522, 849 N.W.2d 668. Thus, a petition for a writ of *habeas corpus* is not brought "pursuant to" § 974.06.

¶16 Here, the circuit court appears to have treated Gilliam's motion for a new trial as a WIS. STAT. § 974.06 motion. We believe that is the proper treatment of the motion—among other things, the motion fails to satisfy certain pleading requirements for a writ—so we review this appeal accordingly.[3]

STANDARDS OF REVIEW

¶17 WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. *See* ***State v. Henley***, 2010 WI 97 ¶¶50, 52, 328 Wis. 2d 544, 787 N.W.2d 350. A defendant who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding unless there is a "sufficient reason" for failing to raise it earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

¶18 Ineffective assistance of postconviction counsel for failure to raise issues so as to preserve them for appeal may present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See, e.g.*, ***Rothering***, 205 Wis. 2d at 678. To prevail on a claim of ineffective assistance of counsel, Gilliam must show that

[3] It is to Gilliam's benefit for us to treat his motion as a WIS. STAT. § 974.06 motion. Gilliam has offered absolutely no explanation for waiting approximately eighteen years to seek further relief. Thus, if his motion were a petition for a writ of *habeas corpus*, we would deny it simply for lack of timeliness. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 802, 565 N.W.2d 805 (Ct. App. 1997), *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 719 N.W.2d 900.

counsel performed deficiently and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. If one prong is unproven, we need not address the other. *See* ***State v. Manuel***, 2005 WI 75, ¶72, 281 Wis. 2d 554, 697 N.W.2d 811.

¶19 To prove deficiency, a defendant must demonstrate that counsel's conduct falls below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, the defendant must show that "there is 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." ***Id.*** at 694.

¶20 "An allegation that postconviction counsel failed to bring a claim that should have been brought is an allegation that counsel's performance was constitutionally deficient." ***Romero-Georgana***, 360 Wis. 2d 522, ¶43. To prove the deficiency, the defendant must show the unraised issue was clearly stronger than the issues actually raised by postconviction counsel. ***Id.***, ¶¶44-45. Additionally, when a claim of ineffective postconviction counsel is premised on the failure to raise ineffective assistance of trial counsel, the defendant must establish that trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶21 Ineffective-assistance claims present us with mixed questions of fact and law. ***Mayo***, 301 Wis. 2d 642, ¶32. The trial court's findings of historical fact will be upheld unless clearly erroneous; whether those facts constitute a deficiency or amount to prejudice are determinations we review *de novo*. *See* ***id.***

¶22 A trial court may deny a postconviction motion without a hearing if the defendant fails to allege sufficient facts entitling him or her to relief, the defendant presents only conclusory allegations, or the record conclusively demonstrates the defendant is not entitled to relief. ***State v. Allen***, 2004 WI 106, ¶¶13-14, 274 Wis. 2d 568, 682 N.W.2d 433; ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

DISCUSSION

¶23 Gilliam claims that trial counsel was ineffective for failing to present ***McMorris*** testimony from three witnesses—Dathien Smith, Bobby Wilson, and Steve Gaston—in support of his self-defense claim. Under ***McMorris***, if there is a factual basis supporting self-defense in a homicide prosecution, "the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim *by proving prior specific instances of violence within his knowledge at the time of the incident*." ***Id.***, 58 Wis. 2d at 152 (emphasis added).

¶24 The affidavits do not include any evidence that satisfies ***McMorris***. Smith offered no evidence at all about Lucas, only character opinion of Gilliam, so there would have been no reason whatsoever for trial counsel to call Smith in support of the self-defense theory. Wilson and Gaston, while indicating an awareness of Lucas's general reputation, both admitted they were unable to recall any specific instances of violence.

¶25 We are, therefore, unpersuaded that the postconviction motion adequately demonstrates the existence of any ***McMorris*** evidence for trial counsel to have presented. Additionally, as the circuit court noted, Gilliam's motion did not allege that he told trial counsel about these witnesses or that there was any

reason why trial counsel should have independently identified the witnesses.[4] Accordingly, we agree with the circuit court that the postconviction motion fails to properly allege deficient performance of trial counsel.

¶26 Even if trial counsel performed deficiently by failing to call any of the three witnesses, Gilliam also fails to adequately show prejudice. Merely claiming that the failure to present the witnesses "undermines the confidence in the jury's verdict" is conclusory and insufficient pleading. While Gilliam attempts to show prejudice by claiming that witnesses who did testify "did not support [his] belief that he was in fear for his life," the three omitted witnesses do not directly support this belief, either. At best, Wilson and Gaston agreed that Lucas was a bully. But Gilliam's uncle testified about Lucas's reputation as a bully, *and* he was able to offer specific instances of violence that Wilson and Gaston could not. The jury also heard testimony that Gilliam told police he was afraid of Lucas. Gilliam does not refute the circuit court's conclusion that Wilson and Gaston's testimony would have been cumulative to testimony already presented.

¶27 The circuit court also concluded, though, that even if the three witnesses had testified, there was no reasonable probability of a different verdict. As the circuit court explained:

> The victim may have been a bad person. The State conceded as much, and the proffered affidavits would tend to corroborate that belief. But nothing in the affidavits relates specific incidents within the defendant's knowledge to corroborate his claimed fear of [Lucas] …. The evidence of self-defense was plainly not there. The victim did not have a gun. He did not threaten the defendant. He did not strike the defendant. He did nothing to the

[4] There also does not appear to be any allegation that postconviction counsel should have had any reason to find these witnesses and realize a possible ineffective-trial-counsel claim.

> defendant to justify [Gilliam's] lethal actions. The defendant had no excuse for smuggling a gun into the party, no excuse for starting up an argument with the victim, no excuse for pointing a gun at him, no excuse for ignoring the people who were trying to stop him and no excuse for shooting the victim until his gun was empty, even when the victim was on the ground. This was an execution-style killing, and no matter how many witnesses counsel would have paraded into court to testify about the victim's bad acts, there is no reasonable probability that the jury would have seen this case for anything other than what it was—murder.

¶28 On appeal, Gilliam complains that with these statements, the circuit court failed to consider that cross-examination testimony from the medical examiner supported Gilliam's theory of self-defense by showing "there was a version of events that corroborated Mr. Gilliam's story of how the shooting occurred." This argument is undeveloped—Gilliam does not tell us what his "story" was or how the medical examiner's testimony supported it. In any event, the medical examiner's testimony confirms that the first shot was to Lucas's chest, appears to confirm that two shots hit Lucas while he was already on the ground, and indicates that Lucas had no defensive wounds. Further, nothing about the medical examiner's testimony makes Smith, Wilson, or Gaston's information more relevant. We therefore agree with the circuit court's conclusion that Gilliam has failed to establish any prejudice from trial counsel's failure to call the three additional witnesses.

¶29 Because trial counsel was not ineffective, we are not persuaded that the claim is clearly stronger than the issues actually raised by postconviction counsel in the original postconviction proceedings. Gilliam argues that the "entire defense case" was based on self-defense and that calling the three witnesses would have supported that theory. While we have already explained why the witnesses do not support the self-defense theory, Gilliam's assertion is also conclusory as to

the relative strength of the issues and omits any explanation of why the jury-related claims postconviction counsel did raise were the weaker claims.

¶30 Because trial counsel was not ineffective for failing to call Smith, Wilson, and Gaston to offer ***McMorris*** evidence, postconviction counsel cannot have been ineffective for failing to raise that claim. *See, e.g.*, ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Because trial counsel was not ineffective, the ***McMorris*** witness claim is not clearly stronger than the issues previously raised. The WIS. STAT. § 974.06 postconviction motion thus fails to allege sufficient material facts entitling Gilliam to relief and fails to identify a sufficient reason for not raising the ***McMorris*** issue earlier. Thus, the circuit court was free to grant or deny a hearing on the § 974.06 motion in its exercise of discretion. We discern no erroneous exercise of that discretion.

By the Court.—Order affirmed.

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