**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

March 6, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-0053-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**BRADLEY BLOCK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and ELSA C. LAMELAS, Judges. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Bradley Block appeals from the judgment of conviction, entered following a jury trial, for one count of arson, contrary to WIS. STAT. § 943.02(1)(a)2, and seven counts of first-degree recklessly endangering

safety, contrary to WIS. STAT. § 943.30 (1).[1] Block also appeals from the trial court's order denying his postconviction motion for a new trial. On appeal, Block argues that he is entitled to a new trial based upon: (1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) the interests of justice. We affirm.

## I. BACKGROUND.

¶2 On March 31, 1996, seven Milwaukee police officers were dispatched to the warehouse where Block worked to arrest him for a probation violation. Before the officers were able to arrest Block, he hid in a storage room inside the warehouse. Block persuaded one of his co-workers to lock the doors behind him, and the storage room was padlocked from the outside.

¶3 The officers were informed of Block's hiding place, and banged on the doors calling for him to come out. The officers heard Block yell at them to go away. One of the officers pried off the padlock with his baton and the officers again called for Block to come out. After receiving no answer, the officers started to open the doors. At that moment, they heard a hissing noise and a flame shot through the gap around the partially opened doors. The officers tried again to open the doors without success. They then noticed liquid pouring from under the doors, forming a puddle at their feet. The liquid smelled like gasoline and suddenly ignited, forcing the officers to move back from the doors. The warehouse's ceiling caught fire, endangering the police officers in the warehouse. The officers then contacted the fire department. Block eventually ran from the

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

room and struggled with the officers before he was subdued and placed under arrest.

¶4 At trial, the State presented evidence that Block had used an oxyacetylene torch to produce the flame the officers observed around the door. The State also claimed that Block had poured the gasoline under the door and caused it to ignite. Block, however, claimed that the fire was an accident. He asserted that while moving around the storage room in the dark, he accidentally knocked over the gas can, and when he lit his cigarette lighter to see what he was doing, the lighter ignited the gas, causing the fire. The jury found Block guilty on all counts.

¶5 Block filed postconviction motions for a new trial based on ineffective assistance of counsel and newly discovered evidence. The trial court denied both postconviction motions without a hearing. Block appealed, and this court determined that the trial court erred in denying his postconviction motions without a hearing. We reversed the order denying the postconviction motions and remanded for an evidentiary hearing. The trial court conducted an evidentiary hearing, and again denied Block's motion for a new trial.

## II. ANALYSIS.

¶6 Block asserts that the central question presented to the jury in this case was "whether [he] deliberately started the fire or whether the fire started by accident after [he] knocked over an open gas can, causing gasoline to pour out and subsequently ignite when [he] flicked on his cigarette lighter." Block argues that newly discovered evidence supports his assertion that the fire started accidentally. Block also argues that his trial counsel was ineffective. Therefore, Block concludes that he is entitled to a new trial based on either of these two grounds, or

in the interests of justice pursuant to WIS. STAT. § 752.35. However, under the applicable standards of review, in order for Block to succeed on any of these claims, he must establish a reasonable probability that a different result would be reached at a new trial. Because he is unable to make the requisite showing, we reject his arguments.

¶7 Typically, a motion for new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). "However, as in this case, when a judge who decided such a motion did not hear the evidence at trial this court on appeal starts from scratch and examines the record de novo…." ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971).

¶8 A trial court may only grant a new trial based on newly discovered evidence when all of the following requirements are met:

> (1) [T]he evidence came to the moving party's knowledge after the trial; (2) the moving party has not been negligent in seeking to discover it; (3) the evidence is material to the issue; (4) the evidence is not merely cumulative to that which was introduced at trial; and (5) it is reasonably probable that a new trial will reach a different result.

***Kaster***, 148 Wis. 2d at 801. The defendant bears the burden of proving by clear and convincing evidence that each of the requirements has been met. ***State v. Brunton***, 203 Wis. 2d 195, 208, 552 N.W.2d 452 (Ct. App. 1996). "If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial." ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). In the instant case, Block argues that several pieces of evidence satisfy the criteria.

¶9 Block first points to the fire company's "Alarm Report," a document not discovered until after his trial.[2] The report indicates that, when the firemen arrived on the scene, they heard the hiss of propane gas leaking from some form of container inside the storage room. Block theorizes that the leaking propane tanks, and not an oxyacetylene torch, accounted for the hissing noise the officers heard just before the flame appeared from within the storage room. Block asserts that the company alarm report also states that, in extinguishing the fire, over five hundred gallons of water were released from fire hoses at a pressure of 150 pounds per square inch, causing items to be moved around from their original location. Additionally, he notes that the detectives, in examining the room immediately after the fire was extinguished, also disrupted the evidence. Thus, he submits that the State's circumstantial evidence that he started the fire is suspect.

¶10 Block also points to the testimony, offered by one of the firemen at the postconviction motion hearing, that it would not be unusual for two to three foot flames to shoot through the cracks around the storage room door if someone tried to open it while the room was on fire. Finally, Block also offers, as newly discovered evidence, a videotape demonstrating that the type of torch found in the storage room will not produce a flame as large as the one observed by the officers, and a new gas can which, he contends, "establishes that the can in the storage room was on its side when the fire melted it down." Block concludes that these various pieces of evidence satisfy the criteria entitling him to a new trial. We disagree.

[2] Block asserts that, during discovery, he requested the fire department reports, but only received the "battalion report" and not the "company alarm report." Block maintains that the "[company alarm report] led to the discovery of the information about the hissing [propane] tanks inside the door and other important information about the fire which was never presented at trial."

¶11 Even if this court were to determine that the "new evidence" proffered by Block satisfied the first four criteria, it fails to satisfy the fifth. This court agrees with the circuit court that "the most compelling testimony that the jury heard, and what remains ... the testimony that best explains what happened here on the day of the offense, is the testimony of the officers who were on the scene." All seven of the officers testified that Block was locked in the storage room and refused to come out, and that when one of the officers broke the padlock on the doors and attempted to open them, a flame came shooting out from behind the door in between the partially opened door and the doorframe. One of the officers testified that he was familiar with acetylene torches and he concluded, based on the hissing noise coming from behind the door and the shape of the flame itself, that Block was using an acetylene torch to keep the officers at bay. Several of the officers also testified that the flame did not pour from behind the door as if the entire room was on fire, but seemed to come from a single source that traced the opening between the door and the door-frame. The officer who attempted to open the door also testified that neither the door nor the doorknob was warm, as they would be if the entire room was on fire. The officers also related how they observed a liquid that smelled like gasoline pouring out from under the door that suddenly ignited.

¶12 Other testimony established that after the fire was extinguished, the officers discovered an oxyacetylene torch inside the room. Finally, the detective sent to investigate the scene examined the pour patterns created by the accellerant and the burn pattern created by the fire. The detective testified that he could not find any evidence – loose wires, electrical sockets, etc. – that the fire was caused accidentally. He concluded that the accellerant had been poured in front of the

doors and that, based on the charred beams on the ceiling immediately in front of the doors, the fire had started at that spot.

¶13 Further, other evidence overwhelmingly contradicts Block's claims that the fire was accidental. Specifically, Block never told the police, when questioned four days after the incident, that he had accidentally knocked over the gas can. Also damaging his contention that the fire was accidental is Block's admission that he stored the gas cans on shelves in the corner of the room or under a table along the wall, not in the middle of the floor of the storage room, where he claimed he tripped over the can. Thus, while some of Block's "new evidence" may support his defense, there remains overwhelming evidence against him.

¶14 This court is satisfied that the trial court correctly determined, in light of the remaining evidence presented against him at trial, that Block has failed to establish a reasonable probability that a new trial would end in acquittal. Therefore, Block is not entitled to a new trial based on newly discovered evidence.

¶15 Block's remaining claim of ineffective assistance of counsel, and his request for discretionary reversal in the interests of justice fail for the same reason. First, the familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Id.*** To prove prejudice, "[t]he 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. If we conclude that the

defendant has not proven one prong, we need not address the other. ***Id.*** at 697. Proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634.

¶16 Block argues that his trial counsel was ineffective for three reasons: First, Block claims that counsel was ineffective because he failed to object to a demonstration, conducted by the State, of the length of the flame produced by an oxyacetylene torch without providing the defense expert an opportunity to review the demonstration. Block asserts that there is no evidence that the demonstration, which showed a torch producing flames two to three feet long, was conducted using the exact type of torch that was found in the storage room. Block concludes that "[a]t the very least, defense counsel should have requested a recess to permit his expert to review the state's demonstration evidence so that it could be properly impeached."

¶17 However, Block has not established that counsel's failure to object to the demonstration prejudiced him. Block presented expert testimony that the type of torch found in the storage room will not produce a flame longer than eight inches, contradicting the officers' testimony that the flame they observed coming from the storage room was two to three feet long. Block has not demonstrated that an objection to this rebuttal evidence would have been sustained; or, even if an objection had been sustained, that his expert would have been able to impeach the State's evidence. Further, even if his expert had been able to impeach the evidence, he has not persuaded us that the outcome of the trial would have been different. Thus, Block has not shown that counsel's failure to object was prejudicial.

¶18 Next, Block argues that counsel was ineffective for failing to impeach the detective's testimony regarding the torch found in the storage room. At trial conflicting evidence was presented regarding the "torch head" on the torch found in the storage room. Block testified that the torch was a "cutting torch" with only one head, and that it could not produce a flame as long as the one observed by the officers. In rebuttal, the detective testified that there had been a second torch head attached to the torch, but that the police had destroyed the torch heads because they contained hazardous materials. Block asserts that counsel should have impeached the detective's testimony by using the inventory report and pictures of the torch, neither of which shows a second torch head. He concludes that counsel's failure to do so constitutes ineffective assistance. We disagree.

¶19 Although Block's trial counsel never specifically referred to the inventory report, on cross-examination the detective admitted that he had not mentioned the second torch head during his previous testimony. The detective also admitted that he had no idea what type of tip was on the second torch head. Moreover, during his closing arguments, counsel emphasized the detective's admissions, and specifically called the jury's attention to the photographs of the torch which do not show a second torch head. We are satisfied Block has not demonstrated that the result of the trial would have been different, but for counsel's failure to use the property inventory report and the photograph of the torch to impeach the detective's testimony. Therefore, we conclude that counsel's alleged error was not prejudicial.

¶20 Next, Block argues that counsel was ineffective for failing to impeach the detective's conclusion that the gas can must have been standing upright, because the bottom of the can had not been damaged by the fire. Block contends that "[t]here is no longer any dispute that the undamaged face of the gas

can found facing the floor of the storage room was the side of the gas can which means that the gas can was lying on its side when it was melted down in the fire." Even if we accept Block's assertion, he has not shown that but for counsel's failure to impeach the detective's testimony on this point, the result of the trial would have been different.

¶21 Finally, Block maintains that counsel was ineffective for failing to challenge the reliability of the officers' testimony based on scientific evidence. Specifically, Block argues that counsel was ineffective for failing to present scientific evidence, in the form of published treatises and periodicals, regarding the "potential unreliability of eyewitness testimony." We determine that Block's argument would carry significantly more weight had the officers' testimony been inconsistent or contradictory. However, the officers' testimony was consistent. Thus, Block's allegations of prejudice are merely conclusory. Block has not demonstrated that but for counsel's failure to challenge the officers' testimony based on scientific evidence, the outcome of the trial would have been different.

¶22 In sum, given the evidence presented against him, Block is unable to establish a reasonable probability that, but for trial counsel's alleged mistakes, the result of the trial would have been different. For all of the above stated reasons, Block fails to demonstrate that trial counsel's alleged errors were prejudicial and, therefore, we conclude that counsel was not ineffective.

¶23 Block also requests that this court order a new trial pursuant to WIS. STAT. § 752.35. This court has broad powers of discretionary reversal under § 752.35 if we determine either that "the real controversy has not been fully tried," or that "there has been a miscarriage of justice." ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). However, "[u]nder this second category ... an

appellate court must first make a finding of substantial probability of a different result on retrial." ***Id.*** We are satisfied that here the real case or controversy has been tried. Moreover, because we have already determined that there is not a substantial probability of a different result on retrial, we cannot conclude that there has been a miscarriage of justice in this case. Therefore, we decline Block's invitation to exercise our discretionary powers of reversal in his favor. Accordingly, we affirm.

*By the Court*.—Judgment and order affirmed.

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