COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2460-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEPHEN TOLIVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 SCHUDSON, J. Stephen Toliver appeals from the judgment of conviction for first-degree intentional homicide, party to a crime, following a jury trial, and from the order denying his motion for postconviction relief. He raises numerous issues. We affirm.

I. BACKGROUND

¶2 In 1991, Commosie Thompson was running a drug business out of the residence where he and his mother, Jo-Etta Foster, lived with Stephen Toliver, Tina Rogers, and others. When Thompson discovered that he was missing $1,800 in drug sale proceeds, he paged Stephen, one of his drug runners, and informed him about the missing money; Stephen told Thompson that Rogers had taken it. Stephen and his brother, Oliver Toliver, then armed themselves, located Rogers, and took her back to the residence. There, Stephen placed his sawed-off shotgun next to Thompson and, according to his own trial testimony, as well as that of several other trial witnesses, told Thompson to shoot whomever he thought had taken the money.

¶3 Thompson did not respond to Stephen's directive. Stephen then asked him what he would like to do and Thompson responded, "Whatever is clever." Then Oliver shot Rogers in the head at point-blank range with the gun he had been carrying. Stephen then spoke, stating words that remained in dispute at trial: either "kill that bitch, kill her," "shoot the bitch," or "you done killed the bitch." Oliver then shot Rogers again in the head and, later that night, he and Stephen disposed of her body.[1]

¶4 In separate trials, juries found Oliver, and then Stephen, guilty of first-degree intentional homicide, party to a crime. Stephen unsuccessfully sought postconviction relief until finally, in 1999, the United States District Court for the Eastern District of Wisconsin "granted conditionally" his petition for writ of

[1] Additional detailed factual background is provided in this court's first decision affirming Stephen Toliver's conviction. *See* ***State v. Toliver***, No. 93-0510-CR, unpublished slip op. (Wis. Ct. App. May 10, 1994).

habeas corpus, "allowing the state to reinstitute Toliver's appeal and provide him appointed appellate counsel, unless he knowingly and intelligently elects to proceed pro se." ***Wisconsin ex rel. Toliver v. McCaughtry***, 72 F. Supp. 2d 960, 979 (E.D. Wis. 1999).[2] Stephen, represented by counsel, then returned to state circuit court and moved for postconviction relief. On August 24, 2000, the circuit court, in a lengthy written decision, denied Stephen's postconviction motion.

¶5 Denying Stephen's postconviction motion, the circuit court did not hold an evidentiary hearing. Instead, it relied on the evidentiary record developed in Stephen's 1993 postconviction hearing, and on an analysis of Stephen's most recent motion and the accompanying affidavits. The circuit court did so despite the fact that Stephen's 1993 hearing had taken place when he was *pro se*, and notwithstanding the fact that the federal court, conditionally granting Stephen's petition for the writ, had rejected this court's conclusion that "Toliver's rights were not compromised because of his agreement to proceed *pro se*." *See* ***State v. Toliver***, No. 93-0510-CR, unpublished slip op. at 6 (Wis. Ct. App. May 10, 1994); ***McCaughtry***, 72 F. Supp. 2d at 979 ("[T]he state appeals court's finding of waiver [of appellate counsel] by Toliver is so inadequately supported by the record and so arbitrary that the writ must issue.").

[2] Although the federal court "granted" Stephen Toliver's petition for the writ "conditionally," its decision concluded: "**THEREFORE, IT IS ORDERED** that Toliver's petition for writ of habeas corpus is **GRANTED. IT IS FURTHER ORDERED** that execution of the writ is **STAYED** for 120 days and that Toliver be released from custody at the end of that period unless the state reinstates his direct appeal, providing him with appointed counsel, within that time." ***Wisconsin ex rel. Toliver v. McCaughtry***, 72 F. Supp. 2d 960, 979 (E.D. Wis. 1999).

II. DISCUSSION

A. Lesser-Included-Offense Instruction

¶6 Stephen first argues that the trial court erred in denying his request for the lesser-included-offense instruction on felony murder.[3] He contends that nine facts, viewed in the light most favorable to his theory of defense, supported the instruction. He specifies:

> First, the defendant and his brother armed themselves and brought the victim, Tina Ro[]gers to Commosie Thompson's apartment. Second, in doing so, they logically took her from a situation where, at some point, she was alone with the two of them into an environment where they would be face-to-face, not only with Mr. Thompson, but with Ms. [Jo-Etta] Foster, Mr. [Corey] Henry, and Mr. [Darian] Robinson. Third, they were questioning Tina Ro[]gers with respect to the missing $1,800.00 of drug proceeds belonging to Mr. Thompson. Fourth, when the defendant's brother initially and aggressively approached Ms. Ro[]gers, the defendant intervened on Ms. Ro[]gers' behalf. Fifth, the defendant disarmed himself and asked Mr. Thompson what he wished to do. Sixth, thereafter, without testimony of any kind indicating an affirmative action on the part of the defendant, to support or direct in any way the upcoming intentional conduct of his brother, Ms. Ro[]gers was shot in her forehead at point[-]blank range by the defendant's brother who did so in a rapid manner. Seventh, all parties, including the defendant[,] indicated they were shocked by what had happened and that it was unexpected. Eighth, after the shooting, the parties who were present testified that they heard the defendant state "kill the bitch." Ninth,

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[3] WISCONSIN STAT. § 940.03 (1999-2000) provides:

> **Felony murder.** Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.225(1) or (2)(a), 943.02, 943.10(2) or 943.32(2) may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt.

Section 940.03 has retained its original text. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> the defendant testified that what he, in fact, said was "you done killed the bitch."

Thus, Stephen argues that while these facts "clearly establish the basis upon which, as party to a crime, [he] was involved in the kidnapping/false imprisonment/attempted armed robbery of Tina Ro[]gers," they also provide a reasonable basis: (1) for the jury to conclude that Rogers' death was "due to the unexpected, irrational and intentional actions of his brother"; and (2) for his (Stephen's) acquittal on first-degree intentional homicide and conviction on the lesser-included offense of felony murder.

¶7 We have carefully considered Stephen's claim, keeping in mind that an instruction regarding a theory of defense ordinarily is required where there is "'any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.'" ***United States v. Lehman***, 468 F.2d 93, 108 (7th Cir. 1972) (citation omitted). With further assistance from the parties at oral argument, we have evaluated whether the felony-murder instruction was supported by sufficient evidence and, in doing so, recognized that we must not, in the words of ***State v. Mendoza***, 80 Wis. 2d 122, 152, 258 N.W.2d 260 (1977), "weigh the evidence" or "look to the 'totality' of the evidence … in determining whether the instruction was warranted." Rather, we must view the evidence in the light most favorable to Stephen and the giving of the felony-murder instruction. *See* ***State v. Jones***, 147 Wis. 2d 806, 809, 434 N.W.2d 380 (1989).

¶8 The supreme court has explained:

> A circuit court has broad discretion in deciding whether to give a requested jury instruction. However, a circuit court must exercise its discretion in order "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." In addition, a criminal defendant is entitled to a

> jury instruction on a theory of defense if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence.

State v. Coleman, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (citations omitted). Evidence to support the instruction is sufficient if "a reasonable construction of the evidence will support the defendant's theory 'viewed in the most favorable light it will reasonably admit of from the standpoint of the accused.'" ***Mendoza***, 80 Wis. 2d at 153 (citation omitted).

¶9 We conclude that although Stephen correctly contends that his conduct could have constituted felony murder, he has failed to clear the first hurdle that must be cleared in order to gain the lesser-included-offense instruction: a reasonable basis for acquittal on first-degree intentional homicide, party to a crime.[4]

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[4] The trial court rejected the proposed instruction on this same basis, stating, in part:

> Looking at the evidence in the light most favorable to the defendant, there is not a reasonable ground for acquittal on the greater and conviction on the lesser here.… [A]ll the witnesses who were in the home who testified indicated that the defendant put down the shotgun, that he stated to Commosie Thompson, the witnesses said, shoot whoever you think did this, and immediately thereafter Oliver Toliver followed that command and shot Tina Rogers at close range in the head.
>
> The defendant testified that he said, shoot me or whoever you think took the money, and he testified that immediately thereafter his brother shot Tina Rogers.
>
> ….
>
> The defendant got the gun, the shotgun, and the Tech. 9 for his brother. The defendant took his brother to find Tina. The defendant found Tina. The defendant brought her to the house. The defendant asked her where the money was. The defendant had the shotgun. The defendant told Commosie to shoot him or whoever it was he believed took the money. He knew his brother had the gun.

(continued)

¶10 Stephen argues that "[i]t would be … totally reasonable for a jury to decide that, when [he] placed his shotgun on the table and asked Mr. Thompson to shoot whoever he believed was responsible for the taking of his [Thompson's] money, … this did not, in fact, direct his brother to shoot Tina Ro[]gers." He relies on ***State v. Chambers***, 183 Wis. 2d 316, 515 N.W.2d 531 (Ct. App. 1994). In ***Chambers***, after Chambers and his accomplice had committed a burglary, they ran from the police, then separated, and Chambers hid under a porch some distance from his accomplice. ***Id.*** at 319. While Chambers remained under the porch, his accomplice shot and killed one of the pursuing officers. ***Id.*** Chambers was convicted of felony murder, party to a crime. ***Id.*** Thus, Stephen argues that "there is certainly a well-established precedent upon which he could be convicted, under the facts of his case, for felony murder."

¶11 As the State points out, however, no lesser-included-offense instruction was at issue in ***Chambers***; this court only considered whether the evidence was sufficient for Chambers' conviction for felony murder, party to a crime. ***Id.*** at 318. Indeed, the State does not dispute that, assuming Stephen committed a requisite underlying felony, the elements of felony murder would have been established in the instant case. But that is not the issue. As the State correctly argues, to determine in this case whether the trial court erred in denying

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The court also commented:

> And while the jury could easily find … the defendant guilty of felony murder, the critical issue is can they get beyond first[-]degree intentional homicide.… I don't want … my ruling to sound like felony murder isn't in the ballpark. It would only be in the ballpark, so to speak, if there was a reasonable ground for acquittal on first degree intentional. And I found … that that's not reasonable, and that's why we didn't give felony murder ….

the felony-murder instruction, the issue is whether the evidence provided any reasonable basis for Stephen's acquittal for first-degree intentional homicide.

¶12 "The submission of a lesser-included[-]offense instruction is proper *only* when there exists reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Borrell***, 167 Wis. 2d 749, 779, 482 N.W.2d 883 (1992). Moreover, "[t]he mere fact that the accused was fortuitous enough to be committing a felony at the time he caused the death of a human being with the intent so to do is not enough to justify an instruction" on felony murder. *See* ***Laster v. State***, 60 Wis. 2d 525, 537, 211 N.W.2d 13 (1973).

¶13 In ***Jordan v. State***, 93 Wis. 2d 449, 287 N.W.2d 509 (1980), where Jordan was convicted of first-degree murder, party to a crime, the evidence did not establish that he fired the fatal shot killing an off-duty police officer who was in a tavern when he and his accomplices committed armed robbery. ***Id.*** at 453-54, 469-70. Nevertheless, the supreme court concluded that the trial court correctly rejected Jordan's request for the lesser-included-offense instruction on third-degree murder because he "agreed and participated in the armed robbery" during which his conduct and that of his accomplices "demonstrated an intent to kill" the officer who attempted to intervene. ***Id.*** at 470.

¶14 Similarly, in ***State v. Shears***, 68 Wis. 2d 217, 229 N.W.2d 103 (1975), where the three appellants were convicted of crimes including two counts of first-degree murder, each as party to a crime, they committed an armed robbery of a restaurant/bar. ***Id.*** at 222. The evidence, however, did not establish which of them had fired the shots resulting in the deaths of the bartender and a customer. ***Id.*** at 223, 244. Nevertheless, the supreme court concluded that the trial court correctly rejected the appellants' request for the lesser-included-offense instruction

on third-degree murder because "[t]here was no reasonable doubt as to the requisite intent" to kill, by whichever of the accomplices fired the fatal shots. ***Id.*** at 244-45.

¶15 Here, Stephen's directive to Thompson to shoot whomever Thompson thought responsible for taking the money—in combination with the circumstances preceding that directive—precludes any reasonable basis for concluding that Stephen, as a party to the crime of first-degree intentional homicide, did not intend to cause Rogers' death. Under the circumstances of this case, the fact that Stephen's directive to Thompson did not specify who the victim should be, and the fact that Oliver, not Thompson, fired the fatal shot, do not alter our conclusion.

¶16 As we commented in rejecting Stephen's first appeal to this court, "The facts … overwhelmingly establish Toliver's culpability, indeed his leadership, for this savage murder." ***Toliver***, No. 93-0510-CR at 6. Stephen responded to Thompson's page. Stephen enlisted Oliver's assistance. Stephen and Oliver armed themselves and brought Rogers back to Thompson. Stephen directed Thompson to shoot whomever Thompson believed had taken the drug money. The fact that Oliver, not Thompson, shot Rogers in no way reduces Stephen's complicity in Oliver's intentional act of killing her.[5]

¶17 Thus, our fresh review of this case returns us to our earlier conclusion: "Although Oliver immediately caused Rogers' death, it was Stephen who intentionally directed it and assisted in it." ***Id.*** at 2. Therefore, the jury could

[5] And, as he acknowledges in his reply brief to this court, Stephen "does not quibble with the fact that the conduct of his brother was undoubtedly intentional."

have had "no reasonable doubt as to the requisite intent" of either Stephen or his brother. *See* ***Shears***, 68 Wis. 2d at 245. Accordingly, the trial court correctly rejected Stephen's request for the felony-murder instruction.

B. Foster's Testimony Regarding Oliver Toliver's Statement

¶18 Stephen next argues that the trial court erred in allowing testimony from Foster, relating a statement that she said Oliver made the day after the homicide, in a car where she, Oliver, and Stephen were together. We disagree.

¶19 The prosecutor asked Foster, "[I]n the presence of Stephen [on the day after the homicide], did Oliver say why he shot Tina Rogers?" The defense objected on hearsay grounds and the trial court, after considering Foster's proposed testimony outside the presence of the jury, allowed her to answer in the presence of the jury. Foster responded: "Yes. Because he would do anything for his brother, Steve, [his sister,] Carey, and his mother."

¶20 The court ruled that Oliver's comment was the statement of a coconspirator in furtherance of the conspiracy, under WIS. STAT. § 908.01(4)(b)5,[6] and that it was also admissible as an adoptive admission under WIS. STAT. § 908.01(4)(b)2.[7] We agree with the latter rationale.

¶21 Although Stephen vigorously argues that the statement does not qualify as that of a coconspirator under WIS. STAT. § 908.01(4)(b)5, he offers no

[6] Under WIS. STAT. § 908.01(4)(b)5, "A statement is not hearsay if … [t]he statement is offered against a party and is … [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

[7] Under WIS. STAT. § 908.01(4)(b)2, "A statement is not hearsay if … [t]he statement is offered against a party and is … [a] statement of which the party has manifested the party's adoption or belief in its truth."

challenge, until his reply brief, to the trial court's alternative rationale—that the statement was admissible as an adoptive admission under WIS. STAT. § 908.01(4)(b)2. We need not address an argument raised for the first time in a reply brief. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). Nevertheless, we note that in ***Caccitolo v. State***, 69 Wis. 2d 102, 230 N.W.2d 139 (1975), the supreme court explained:

> [I]f a statement is made in the presence of … the defendant … which would ordinarily be denied by [the defendant] if it were not true[,] and [the defendant] does not deny it, then [the defendant] has forgone the opportunity to dispute the statement…. Since the person whose interest was damaged by the statement did not avail himself of the opportunity to refute it, it is presumably trustworthy.

Id. at 110. Further, such an adoptive admission falls within the rule on firmly rooted hearsay exceptions, *see* ***State v. Marshall***, 113 Wis. 2d 643, 655, 335 N.W.2d 612 (1983), thus obviating the need for a court to further consider whether the statement is accompanied by indicia of reliability beyond the statement itself, *see* ***White v. Illinois***, 502 U.S. 346, 348-49, 356-57 (1992).

¶22 Here, Oliver's comment, in Stephen's presence, that he shot Rogers because "he would do anything for his brother, Steve," linked his (Oliver's) conduct to Stephen's intentions. Stephen, in turn, had the opportunity to dispute the statement—Stephen could have protested that Oliver did not shoot Rogers for him because he had not intended that Oliver shoot her. Because Stephen "did not avail himself of the opportunity to refute" Oliver's statement, it was "presumably trustworthy" and admissible under WIS. STAT. § 908.01(4)(b)2.

C. Testimony of Corey Henry

¶23 Stephen next argues that he was denied a fair trial due to prosecutorial misrepresentations regarding the potential sentence facing Corey Henry, one of the State's witnesses to the shooting. Again, we disagree.

¶24 Responding to one of the prosecutor's questions, Henry acknowledged that, in his opinion, Stephen "was kind of directing what was going on in the room" immediately preceding the shooting. Further, according to Stephen's brief to this court, Henry's testimony "implied … that the irrational conduct of [Oliver] was, in some way, potentially under [Stephen's] direction." Thus, Stephen maintains, the State needed Henry's testimony to establish the link between his (Stephen's) conduct and his brother's shooting of Rogers and, therefore, Henry's credibility was crucial. Stephen contends, however, that the jury was misled by Henry's false testimony, elicited by the prosecutor.

¶25 When he testified at Stephen's trial, Henry was awaiting sentencing, in an unrelated case, for possession of cocaine with intent to deliver, while armed. At Stephen's trial, Henry testified that he had not received any consideration for his testimony. Additionally, in response to the prosecutor's questions, he testified:

> [PROSECUTOR]: And in fact you are going to have to do a mandatory three years in prison. Is that right?
>
> [HENRY]: Correct.
>
> [PROSECUTOR]: At least?
>
> [HENRY]: Minimum.

This testimony was not accurate. Henry was facing a *presumptive* minimum mandatory sentence of three years, not a minimum mandatory sentence.[8] Moreover, the assistant district attorney prosecuting Henry's case had agreed to recommend two to three years in prison.

¶26 At Henry's sentencing, the assistant district attorney prosecuting the Toliver cases appeared and advised the court of Henry's cooperation—in both the trial of Stephen and the earlier, separate trial of Oliver. The Toliver prosecutor stated:

> There was no deal given to Mr. Henry for his testimony. In fact, I just found out that this case was pending right before Mr. Henry testified, and that he did not ask for any consideration in the case, but I can tell the court that he was very cooperative, that he gave key testimony, and that his testimony was one of the reasons why these two gentlemen were convicted.

Henry was placed on probation with no incarceration.

¶27 Stephen argues that the jurors were "misled to believe that they had a good samaritan before them as a witness, one who was testifying as to the truth as to what happened, knowing that he was facing a mandatory three years in prison, irrespective of how he testified." Further, Stephen contends, "The defense had no ability to know that the information being provided was totally false." Accordingly, he maintains that the defense was denied the ability to effectively cross-examine Henry.

[8] As the State pointed out in oral argument before this court, however, the trial court, not the prosecutor, first advised the parties of the incorrect information about Henry's potential sentence, stating, just before Henry testified, that the penalty Henry was facing included "a minimum mandatory three[-]year term of incarceration."

¶28 At Stephen's 1993 hearing, at which he appeared *pro se*, the postconviction court found that "[t]he record doesn't reflect … that any promises were made, that any false testimony was suborned by [the prosecutor] whatsoever." In his current appeal, however, Stephen implies that Henry had an undisclosed agreement with the State and that, at an evidentiary hearing, he would be able to establish this by providing "vital testimony on this issue." But Stephen never told the circuit court what that "vital testimony" would have been, and he fails to tell us anything more. In short, he offers nothing that would establish that the court's findings in 1993 were wrong, or anything that would merit an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). Thus, we conclude, the circuit court correctly denied Stephen's motion without a hearing, declaring that "there is nothing set forth in the current motion which demonstrates that significant facts were overlooked at the prior hearing on this issue [of Henry's testimony] or that other specific facts would have altered the result."[9]

[9] Additionally, as the State explains:

> The trial court said that during the defendant's trial his attorney had established that [the prosecutor for the Toliver cases] might speak for Henry at sentencing; and, therefore, the jury could assess Henry's testimony in that light. The trial court pointed out that the defendant's attorney had thus established in front of the jury that Henry might have had some reason to hope for benefit from his testimony so that the jury could assess it in its proper light. The court concluded that the defense had been given latitude in cross-examining Henry to establish bias and motivation for testifying.

(Record references omitted.) Moreover, the State clarifies that information about Henry's potential sentence was not exclusively within its control—reference to the statutes would have clarified the distinction between a minimum mandatory sentence and a *presumptive* minimum mandatory sentence.

D. Compliance with Federal Court Order

¶29 Stephen next argues that the postconviction court violated the federal court order by failing to hold an evidentiary hearing. We disagree.

¶30 The federal court concluded that Stephen had been impermissibly denied the assistance of postconviction counsel on his appeal. Thus, in his most recent postconviction motion, Stephen, with the assistance of counsel, was able to present any of his previous postconviction claims as well as others he chose to pursue. The circuit court concluded, however, that Stephen's new postconviction motion had not "eradicated" the evidence adduced at the 1993 hearing. Therefore, the circuit court evaluated Stephen's motion by considering its allegations and accompanying affidavits, and by referring to the evidentiary record from the 1993 hearing. The court concluded that Stephen had failed to present anything meriting an additional evidentiary hearing.

¶31 Stephen now argues that had he been "appropriately represented at his initial postconviction hearing, … it is most reasonable to expect that the hearing would have been much different." He adds that "to allow the first hearing to stand as a factual basis for the denial of his request for a hearing in which he can be represented, denies the due process protections that our system is meant to provide to all defendants."

¶32 A circuit court may, in the exercise of discretion, deny a postconviction motion without holding an evidentiary hearing when a defendant "'fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***Bentley***, 201 Wis. 2d at 309-310 (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). Whether a

postconviction motion alleges facts that would entitle a defendant to relief presents a question of law, subject to our *de novo* review. ***Id.*** at 310. If the circuit court denies a postconviction motion summarily, having determined that it fails to allege sufficient facts to entitle the defendant to relief, we apply the erroneous-exercise-of-discretion standard to review the court's decision. ***Id.*** at 310-11.

¶33 Nothing in the federal court order conflicts with the ***Bentley*** standards or requires an evidentiary hearing. Although the federal court commented that "[i]t appears … that the recommencement of Toliver's direct appeal will wipe clean the slate," ***McCaughtry***, 72 F. Supp. 2d at 979, it did so in the context of explaining that Stephen's appellate claims were "'unexhausted,'" and clarifying that Stephen retained the right to pursue future federal habeas corpus review following the completion of his state appeals, ***id.*** Thus, we read nothing in the federal court order to somehow mandate an evidentiary hearing. Under ***Bentley***, if such a hearing simply was unnecessary because of the adequacy of the existing evidentiary record, the state circuit court had discretionary authority to deny Stephen's request.

¶34 Therefore, while Stephen was entitled to consideration of his postconviction motion following the federal court's decision, his motion and accompanying affidavits still had to offer the circuit court some basis for holding an evidentiary hearing. The fact remains that Stephen's motion alleged nothing to establish any material inaccuracy in the factual findings from the 1993 evidentiary hearing, and he has offered nothing to alter the legal conclusions of the circuit court's 2000 decision.

¶35 Thus, we reject Stephens assertion that the circuit court "clearly ignore[d] the mandate" of the federal court decision. Nothing in the federal court

order precluded the state court's consideration of the record from the 1993 hearing. The circuit court did not exclude the possibility of a new evidentiary hearing; in addition to reviewing the 1993 record, it also considered Stephen's 2000 motion and the accompanying affidavits. Accordingly, we conclude that the circuit court appropriately exercised discretion in denying Stephen's request for an additional evidentiary hearing.

E. Prosecutorial Misconduct/Exculpatory Evidence

¶36 Stephen next argues that he was denied a fair trial due to the prosecutor's withholding of exculpatory evidence and solicitation of evidence against him. We disagree.

1. Correspondence between Cornell Smith and the Prosecutor

¶37 Stephen contends that the prosecutor should have disclosed a letter that the prosecutor allegedly received from Cornell Smith prior to trial. According to Smith's March 30, 2000 affidavit, which accompanied Stephen's postconviction motion, he (Smith) wrote a letter to the Toliver prosecutor on June 10, 1991, asking the prosecutor to "talk with" a Kenosha County assistant district attorney to help him (Smith) obtain clemency. In exchange, Smith offered, "I would testify to what Commosie Thompson and Cor[e]y Henry told me [about the murdered woman] when I spoke with them over the telephone on May 28th, 1991." In substantial part, Smith's affidavit continued:

> I called Cor[e]y, and he told me that [he] and Commosie had almost gott[e]n charged with a murder. I asked what murder, and Cor[e]y told me that Commosie's [m]other[']s boyfriend[']s brother, a dude they called Oz, killed this female named Tina Rogers. Cor[e]y then gave Commosie the phone to tell me what happened. Commosie told me that he thought Tina had stolen his stash "money/some cocaine" out of his room. So he confronted her about it

after his [m]other tracked her down at some bar she was at, then his [m]other's boyfriend, Stevie Toliver, and his [b]rother, Oz, "Oliver Toliver[,"] went to the bar and picked her up and brought her home. Commosie[] said he asked her why she stole his stash, she laughed about it, then Oz … went to do something to Tina because she laughed, but Stevie pushed him back and told him to back off or chill out.

Commosie said Oz didn't like Tina because she wouldn't give him any action sexually even though she was a crack head and usually dope dated. Cor[e]y was in the background confirming what Commosie was telling me by yelling, that's right. He went on to say that Stevie told him, look man, she must, didn't steal it even though she's the only crack head in the house, then he threw his shot[]gun to Commosie and told him if you think I took it shoot me or whoever you think stole it! I asked him if dude, Stevie, really said that and he said, yeah, but he knew dude was bluffing, but when dude said that all of a sudden a shot was fired, and everybody looked and saw Oz standing over Tina, pointing his gun, then Stevie grabbed at dude and yelled, you killed the bitch! Then he, Commosie, Cor[e]y, and their guy Dee, "Darien Williams" ran down the stairs getting out of there when they heard another shot fired. I asked if he left his [m]other in the house and he laughed and said, hell yeah.

I asked how they could almost get charged when dude did the shooting, Cor[e]y was back on the phone, and he said that the police and D.A.[] were going to charge them with murder if they didn't cooperate. I asked him what was the D.A.'s name, that is when I learned Mark Williams was the Assistant District Attorney in the case. Cor[e]y and Commosie told me that the police wanted Commosie's [m]other[']s boyfriend and his brother who done the killing and that the police more or less told them what to say in their statements ….

I told Mr. Williams, Commosie told me that the day after the murder he went home and talked to his [m]other about what happened and she told him that she had things under control and to talk with Cor[e]y and Dee "Darien" about keeping quiet and she would take care of everything else and would keep them out of it. He said he talked to Stevie … and asked him why Oz did that? Commosie said Stevie told him Oz was crazy! And had problems with crack head women, that's why he probably killed Tina. Commosie said he knew that Oz was trying to get with Tina on the sex side but she thought he was funny looking

> and wouldn't give him any action, not even on the dope dating tip.
>
> ….
>
> I heard back from Mr. Williams, either on June 17th or 18th, 1991, and he told me that what I had written to him … didn't shed anything new in the homicide of Tina Rogers, and that he couldn't help me with my goal to seek clem[en]cy anyway because I was convicted in another jurisdiction.

¶38 "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). The prosecutor's duty to disclose evidence favorable to the accused includes the duty to disclose "impeachment evidence as well as exculpatory evidence." ***Strickler v. Greene***, 527 U.S. 263, 280 (1999). Such evidence is material, however, only if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***United States v. Bagley***, 473 U.S. 667, 682 (1985).

¶39 We conclude that disclosure of the alleged Smith-Williams correspondence would not have affected the outcome of Stephen's trial. Assuming that the correspondence took place,[10] and assuming that Smith testified consistent with his affidavit, his statements conceivably could have affected the jury's views of the persons Smith named, their motives for testifying, and Oliver's reasons for shooting Rogers. For the reasons we expressed in rejecting Stephen's

[10] The State notes that the prosecutor, responding to Stephen's motion, "alleged that he had not received [Smith's] letter" so that, at most, this court could grant an evidentiary hearing to determine the existence of the alleged correspondence.

argument for the felony-murder instruction, however, Smith's testimony could not have altered the jury's view of Stephen's involvement in the homicide.

2. Negotiations with Jo-Etta Foster and Others

¶40 Stephen also asserts that the prosecutor should have disclosed information regarding negotiations between the district attorney's office and Jo-Etta Foster, and possibly others who were present at the shooting. Stephen vaguely alleges that "there must have been a concern as to their own culpability for what had happened," and that it is likely that the party-to-a-crime concept had been explained to them so that, presumably, some negotiations involving promises or inducements must have occurred. Therefore, Stephen maintains that his postconviction motion "establish[ed] the basis upon which to justify a hearing for purposes of sorting out the truth as to these 'understandings.'"

¶41 Stephen has failed to establish that negotiations between the district attorney's office and various witnesses to the shooting affected the outcome of his trial. He has offered nothing more than speculation of "understandings" he would hope to reveal at a hearing. Clearly, such speculation is insufficient to gain an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 309-10. Further, as the circuit court commented in its decision denying postconviction relief, "[Toliver's] claim that Jo[-E]tta Foster tried to negotiate on behalf of her family to be held harmless in exchange for their testimony does not establish that relevant and essential facts were held back or that the true facts were not presented."

F. Newly Discovered Evidence

¶42 Stephen argues that he is entitled to a new trial based on newly discovered evidence—the information from Cornell Smith, and the information

contained in an affidavit from Daniel Hubbart, which also accompanied the postconviction motion. In his affidavit, Hubbart stated that in 1991 he had been "hanging out" with Commosie Thompson and Darien Williams. It continued:

> I heard about a murder that happened at Commosie's house …. Word was that he had killed … Tina Rogers, because she had stole some money and drugs from him …. But he put the blame on Stevie Toliver and his brother Oz (Oliver Toliver) for the killing. There was a copy of the police report that Commosie had given to the police, circulating around the neighborhood. And everybody said Commo[si]e[] was working for the police and snitching, along with Darien and Cor[e]y…. I overheard [Commosie and Darien] talking about having to get their testimony right before they took the stand to testify in Stevie Toliver's case. They said that if they did[n']t get it exactly the way the D.A. and police wanted it, their ass was out!! And that[']s the reason they were allowed to read Stevie's police report before they gave their statements to the police on the day they were questioned in the case.

¶43 To gain a new trial based on newly discovered evidence, a defendant must show that the evidence satisfies five criteria, the fifth of which requires the defendant to establish clearly and convincingly that, as a result of the introduction of such evidence, "it must be reasonably probable that a different result would be reached on a new trial." ***State v. Brunton***, 203 Wis. 2d 195, 200-07, 552 N.W.2d 452 (Ct. App. 1996). Further, under ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972), "[d]iscovery of new evidence which merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone." Here, we agree with the circuit court's conclusion that neither the Smith nor the Hubbart information established a reasonable probability of a different result.

¶44 We have explained why Smith's information would not have affected the outcome of Stephen's trial. For a closely related yet distinct reason, Hubbart's information could not have made any difference either. After all, if, based on Hubbart's testimony, a jury had concluded that Commosie Thompson,

not Oliver, had shot Rogers right after Stephen told him to shoot whomever he thought had taken the money, the jury still would have held Stephen responsible as party to the homicide. In fact, the connection between Stephen's directive and the shooting would have been even closer; it would not have been complicated by the possibly unexpected action of Oliver. Thus, Hubbart's testimony would not have altered the outcome of Stephen's trial.

G. Ineffective Assistance of Counsel

¶45 Stephen argues that counsel was ineffective for failing to call three witnesses: (1) Angeal Toliver, the mother of his children; (2) Harvey Toliver, his cousin; and (3) Oliver Toliver. Again, we reject Stephen's arguments.

¶46 The standards for reviewing a claim of ineffective assistance of trial counsel are well settled and need not be elaborated here. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-98 (1984). For purposes of this case, suffice it to say that to establish that counsel's allegedly deficient performance constituted ineffective assistance, Stephen must show that any such deficiency prejudiced his defense. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Stephen has failed to do so.

1. Angeal Toliver

¶47 Stephen submitted an affidavit from Angeal Toliver to establish that she would have testified that Jo-Etta Foster told her that Stephen had yelled at Oliver, "you shot the bitch" or, according to Angeal, "something like that." Thus, he maintains, Angeal's testimony would have impeached Foster's testimony that Stephen said "shoot the bitch." But because Angeal's statement included the "or something like that" qualification, it would not have resolved the conflict between

the two versions of Stephen's words. It therefore could not have made any difference in the jury's perception of Foster's account of Stephen's words; whether Stephen said "shoot the bitch" or "you shot the bitch," the outcome would have been the same. Thus, no prejudice could have resulted from counsel's failure to call Angeal Toliver to testify.

2. Harvey Toliver

¶48 Stephen submitted an affidavit from Harvey Toliver to establish the testimony he would have given about Oliver's reasons for shooting Rogers. The affidavit stated, in part:

> I asked Stevie and OZ, why was the police questioning them about that woman who was found murdered …. Stevie[] immediately said because this crazy nigger, meaning OZ, … killed her! And I asked was he serious and why. Then OZ said because she was a dope feined [sic] bitch and deserved to die[.] Stevie got up[]set and said to OZ, you shouldn't have killed her because it wasn't any of our business if … Tina … did or didn't steal Commosie's dope and money, it wasn't OZ['s] business. OZ said the bitch made him mad when she laughed after Commosie asked her if she stole his money, so he shot the bitch and he said he didn't like her anyway.

While Harvey Toliver's testimony could have established that Oliver had his own reasons for shooting Rogers, it would not have reduced Stephen's participation in the homicide. For the abundant reasons we have recited, Stephen took several direct and powerful actions that were substantial factors in causing Rogers' death, regardless of the personal animus Oliver may have felt that led him to pull the trigger. Thus, any failure to call Harvey Toliver to testify was not prejudicial.

3. Oliver Toliver

¶49 Stephen argues that trial counsel was ineffective for failing to call Oliver to testify that he (Stephen) did not direct the shooting. At the 1993

evidentiary hearing, however, trial counsel explained that Oliver had just testified at his own trial that neither he nor Stephen had even been in the house when Rogers was killed. Thus, any testimony by Oliver at Stephen's trial either would not have supported Stephen's theory of defense or would easily have been impeached. Thus, the failure to call Oliver to testify at Stephen's trial was not prejudicial.

H. Interests of Justice

¶50 Stephen contends that he should receive a new trial in the interests of justice. He argues that if we were to find that "any issue raised in this appeal may be deemed waived by failure to preserve the issue by proper motion or objection," he still would be entitled to relief, and that "the combined errors as noted resulted in the real controversy not being tried, and it is most probable that justice has been miscarried." We have not declined to address any of Stephen's arguments, on the basis of waiver or for any other reason. We also have not concluded that any errors occurred.

I. Plain Error

¶51 Finally, Stephen argues that plain error requires a new trial. He maintains that "the identified errors, as noted, are of such magnitude that they rise to the level of a constitutional violation and substantially impaired his right to a fair trial." We have not, however, concluded that any error occurred.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.