COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP581 **Cir. Ct. No. 2000CF91**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. JACOBSON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Forest County: MARK MANGERSON, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 GUNDRUM, J. Robert J. Jacobson appeals from an order denying his WIS. STAT. § 974.06 (2009-10)[1] postconviction motion, which raised for the first time three new substantive claims and alleged ineffective assistance of prior postconviction and trial counsel. Jacobson also appeals from an order denying his motion for sentence modification based on "new factors." We affirm.

BACKGROUND

¶2 On July 31, 2001, after a jury trial in which Attorney Jeffrey T. Jackomino ("trial counsel") represented Jacobson, Jacobson was found guilty of three counts of attempted first-degree intentional homicide, as party to the crime, for his role along with brothers Alvin[2] and William Weso in a shootout with Forest county sheriff's deputies. The court sentenced Jacobson to three consecutive twelve-year prison terms.

¶3 Represented by Attorney T. Christopher Kelly, Jacobson filed a postconviction motion for a new trial asserting two grounds: newly discovered evidence[3] and, alternatively, ineffective assistance of counsel based on trial counsel's failure to introduce this evidence at trial. The trial court denied the motion. Still represented by Kelly, Jacobson appealed the denial of his postconviction motion as well as his judgment of conviction, raising the following three issues: that the trial court erred in denying (1) Jacobson's motion for a

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Hereinafter, Alvin Weso will be referred to as Weso; any reference to William Weso will include his first and last name.

[3] Jacobson asserted that the testimony of William Weso and Jacobson's uncle would have contradicted testimony of State witnesses placing Jacobson at the scene of the shootout.

continuance when a deputy subpoenaed by Jacobson was unavailable to testify, (2) his request for a jury instruction regarding the testimony of an accomplice, and (3) his motion to strike the jury panel after a citizen interacted in a questionable manner with jurors before trial. In a May 11, 2004 decision, we affirmed the judgment of conviction and order denying postconviction relief. The supreme court denied Jacobson's petition for review.

¶4 In July 2005, Jacobson, represented by Attorney Raymond Dall'Osto, filed a petition for a writ of habeas corpus, pursuant to ***Knight***,[4] challenging Kelly's effectiveness in representing him on his appeal. Jacobson faulted Kelly for failing to appeal trial court rulings denying trial counsel's motions: (1) to strike the jury pool based on the absence of Native Americans and (2) for a new trial based on William Weso's Fifth Amendment refusal to testify. We denied Jacobson's ***Knight*** petition, and the supreme court denied review.

¶5 On February 24, 2010, represented by current counsel, Attorney Robert Henak, Jacobson filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06 and a motion to modify his sentence based on new factors. In his § 974.06 motion, he raised for the first time three new substantive challenges: (1) the evidence at trial was insufficient for conviction on either or both of Counts 1 and 3, (2) prosecutorial misconduct denied Jacobson due process, and (3) the court's reliance upon inaccurate information at sentencing also denied him due process. In addition, Jacobson raised claims of ineffective assistance of both trial and postconviction counsel relating to these substantive challenges as well as trial

[4] ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992) (allegations of ineffectiveness of appellate counsel must be raised in a petition for writ of habeas corpus filed with the court that heard the appeal).

counsel's failure to argue alternative defenses. After an evidentiary hearing at which both trial and postconviction counsel testified,[5] the trial court denied both Jacobson's § 974.06 motion and his motion to modify sentence. Jacobson appeals, raising these same issues. Additional facts are set forth as necessary.

DISCUSSION

I. WISCONSIN STAT. § 974.06 MOTION

¶6 WISCONSIN STAT. § 974.06(4) "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Where, as here, a defendant presents new issues on collateral review that he did not raise in a prior postconviction proceeding or appeal, his motion brought under § 974.06 is procedurally barred unless the defendant shows a "sufficient reason" why he did not raise those issues in the earlier proceedings. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Whether a defendant offers a sufficient reason to avoid the procedural bar is a question of law we review de novo. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920, *review denied*, 2011 WI 86, 335 Wis. 2d 148, 803 N.W.2d 850. Ineffective assistance of postconviction or appellate counsel may constitute a "sufficient reason" for not previously raising an issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶7 We conclude that Jacobson's sufficiency of the evidence claims are procedurally barred because he has not provided a sufficient reason for his failure

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

to raise these issues when he had the opportunity to do so in his ***Knight*** petition. As to Jacobson's remaining WIS. STAT. § 974.06 claims, the trial court concluded that his allegation of ineffective assistance of postconviction counsel constituted sufficient reason for Jacobson to overcome the procedural bar of § 974.06, and it therefore addressed the issues. We concur and do likewise.

A. Sufficiency of the Evidence

¶8 Jacobson contends the evidence at trial was insufficient to convict him on either or both of Counts 1 and 3. These claims are procedurally barred under WIS. STAT. § 974.06 and ***Escalona-Naranjo*** because Jacobson has not presented any reason, much less a "sufficient reason," to excuse his failure to raise these claims in his ***Knight*** petition.

¶9 Jacobson puts forth that his "sufficient reason" for failing to raise his sufficiency of the evidence challenges in his prior postconviction motion is that his prior postconviction counsel, Kelly, was ineffective. However, sufficiency of the evidence claims are also statutorily preserved for appeal, regardless of whether they are raised by postconviction motion. *See* WIS. STAT. § 974.02(2); ***Rothering***, 205 Wis. 2d at 678 n.3. Thus, Jacobson also had the opportunity to raise these claims in his direct appeal, but failed to do so. And while he appears in his briefs to be putting forth arguments contending he had sufficient reason for failing to raise his sufficiency of the evidence challenges in his direct appeal, he has put forth no reason for failing to raise these claims in his ***Knight*** petition. In his ***Knight*** petition, Jacobson again had the opportunity to raise these claims as underpinning his ineffective assistance of appellate counsel claim. He failed to do so and has not suggested any reason for this failure. As a result, he is procedurally barred from raising these claims now.

B. Prosecutorial Misconduct

¶10 Jacobson argues that "the trial prosecutor's false arguments and failure to correct false testimony regarding what [State witnesses] Weso and Jonathan Czaplicki had to gain by implicating Jacobson denied Jacobson due process." The State contends there were no false arguments or any need to correct Weso's or Czaplicki's true testimony. Jacobson further contends that his trial counsel was ineffective for failing to object to this alleged misconduct by the prosecutor.

¶11 Because Jacobson failed to object at trial to the prosecutor's now-challenged actions, he forfeited these challenges. *See* ***State v. Rockette***, 2006 WI App 103, ¶28, 294 Wis. 2d 611, 718 N.W.2d 269. Nonetheless, we review these challenges, as we may, within the context of the ineffective assistance of counsel claims he also raises. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

¶12 To succeed on a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced him or her. *See* ***id.*** at 768. To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). There is a strong presumption that a defendant received adequate assistance and that counsel's decisions were justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make 'every effort ... to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" ***Domke***, 337 Wis. 2d 268, ¶36 (citations omitted). Counsel's performance is deficient only if the defendant proves that counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35. To prove prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. If the defendant fails to prove one prong, we need not address the other. *See* ***id.*** at 697.

¶13 Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the trial court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶14 In October 2000, fourteen months after the shootout, Weso came forward to authorities and gave a statement implicating Jacobson in the event. At trial, he testified for the State regarding Jacobson's involvement. Jacobson complains that on cross-examination by his trial counsel, Weso testified that when he gave the statement implicating Jacobson to authorities in October 2000 he did not believe it would be beneficial to his own case. Jacobson further complains that Weso answered, "No," to the question, "You hope this testimony is going to help you in your sentencing, don't you?" and "Yes," to the question, "You're just doing this kind of out of the goodness of your heart at this point?" Jacobson contends that Weso's answers were false and complains that the State knew they were false but failed to correct them. He points out that one month before

Jacobson's July 2001 trial, Weso entered into a plea agreement where the State agreed to recommend a parolable seven-year sentence.

¶15 Significantly, Jacobson's contentions do not take into account Weso's other related testimony. Weso also admitted during cross-examination that he did not give the statement implicating Jacobson to authorities until after his brother William Weso had been convicted and sentenced to forty-five years for his role in the offense. He testified that he came forward in October 2000 because his parents told him to tell the truth.[6] Significantly, Weso further acknowledged that he had a plea bargain in place for himself with a recommendation for only seven years in prison and that his sentencing would occur after his testimony in Jacobson's trial.

¶16 On redirect, the State specifically elicited Weso's testimony, again, that sentencing in his case was still pending. Weso also answered, "[Y]es," to the State's question, "[T]here was an agreement between you, your attorney, and my office as to what sentence would be recommended?" Weso further testified that he had no agreement with the State at the time he originally gave his statement implicating Jacobson in October 2000.

¶17 Czaplicki also testified for the State, implicating Jacobson in the shootout based upon statements Jacobson made while the two were jailed together prior to Jacobson's trial. At the time of trial, Czaplicki was serving a sentence on his own felony conviction.

[6] Weso was fifteen years old in October 2000.

¶18 Jacobson complains of testimony solicited by the State and provided by Czaplicki that Czaplicki had already been sentenced for his own crime, had never spoken with the State regarding "any type of deal" related to testifying, had not received any special treatment while in the local jail, and was not testifying because of an anticipation that he would receive a benefit from it, but that it was "just something to get off [his] conscience." Jacobson argues that this testimony gave a false indication that Czaplicki had nothing to gain by testifying and that the prosecutor knew the indication was false because Czaplicki was "free to seek modification of his sentence based on his 'cooperation.'" Jacobson points out that Czaplicki did, in fact, seek and receive a reduction in his sentence after Jacobson's trial. Jacobson argues his trial counsel was ineffective for not objecting with regard to this testimony by Czaplicki.

¶19 As with Weso, we must consider the additional testimony provided by Czaplicki. The above-challenged questioning by the State and testimony by Czaplicki followed trial counsel's cross-examination of Czaplicki, during which Czaplicki acknowledged he was currently serving a five-year sentence, originating from the same county, and it "would be nice" to get that sentence reduced. On the State's redirect examination, Czaplicki did testify in the manner to which Jacobson now objects, but also acknowledged that his appeal "with the [S]tate" was still pending. On recross-examination, trial counsel highlighted this potential motivation for Czaplicki to cooperate with the State by procuring Czaplicki's reiteration that he did have some "postconviction things pending with the [S]tate."

¶20 Jacobson provides no evidence that Czaplicki had any motives for cooperating with the State other than the possible motives Czaplicki himself acknowledged at trial: that he still had his "appeal" and "postconviction things" pending with the State; that he felt it "would be nice" if he could get the sentence

on his current charge reduced, but that there was never any discussion of a "deal" in exchange for his testimony; and that he was testifying because of his "conscience."[7]

¶21 Jacobson further contends that trial counsel was ineffective in failing to object to the State's characterization in closing arguments that neither Weso nor Czaplicki had anything to gain by testifying against Jacobson. We disagree.

¶22 During the ***Machner*** hearing, held nine years after the trial, trial counsel testified that he did not object to the State's closing arguments that Weso and Czaplicki had nothing to gain from their testimony because "I thought we probably covered that in the fact that they had a lot to gain in terms of their sentence modification." As previously shown, these issues were sufficiently addressed during Weso's and Czaplicki's testimony. And, significantly, while trial counsel did not object to the State's closing arguments regarding Weso and Czaplicki, he did directly respond to the arguments with his own closing arguments regarding their possible motives for cooperating with the State.

¶23 As to Weso, trial counsel reminded jurors that Weso only gave his October 2000 statement implicating Jacobson after Weso's brother had been sentenced to forty-five years for his role in the offense, contrasting that sentence with the deal Weso got—a State recommendation of seven years. Trial counsel further emphasized that Weso's own sentencing was scheduled for the following month, contending Weso was testifying in order to help himself in his sentencing.

[7] Jacobson does not allege that Czaplicki was actually aware at the time he testified that he could potentially seek modification of his sentence for cooperating with the State in Jacobson's case, much less that the State knew that he was aware of such a possibility. Further, Jacobson admits there was "no prior agreement regarding a specific benefit."

As to Czaplicki, trial counsel pointed out that Czaplicki's testimony was uncorroborated, that Czaplicki himself was a felon serving a sentence, that his appeal still was pending, and that he could seek to have his sentence reduced as a result of assisting the State in the trial against Jacobson.

¶24 Considering all the relevant testimony and closing arguments, the jury received an accurate picture of Weso's and Czaplicki's possible motives for cooperating with the State. Further, we find no fault in trial counsel choosing to expose those possible motives through cross-examination and closing arguments countering the State's, rather than by objecting. Jacobson has failed to demonstrate that his trial counsel performed deficiently, and thus ineffectively, in his handling of these issues.

C. Trial Counsel's Failure to Argue Alternative Defenses

¶25 Jacobson further criticizes his trial counsel for failing to pursue the following alternative, nonidentification defenses at trial: (1) Jacobson dropped his gun and therefore withdrew from any crime being committed by the Weso brothers; (2) Jacobson was guilty at most of Count 2 (shooting to kill only one deputy as a party to a crime); and (3) two of the deputies were not actually shot at by the Wesos or Jacobson, but rather were caught in the crossfire of their own shots. Jacobson contends trial counsel conceded at the ***Machner*** hearing that these defenses were not inconsistent with his defense that Jacobson was "not there" and therefore trial counsel was ineffective for failing to raise these alternative defenses. We disagree.

¶26 At the ***Machner*** hearing, trial counsel testified that at the time of Jacobson's trial, he had conducted about 200 criminal trials, and that he generally avoided alternative, nonidentification defenses, like those Jacobson now raises.

While trial counsel acknowledged that what he considered or did not consider "nine years ago [was] somewhat vague to [him]" at the time of the hearing, he stated that he "generally [tried] to have one theory and stick to it as opposed to taking a shotgun approach because, quite frankly, juries do not like multiple theories and it's tougher to be able to try to get a jury to believe that." He testified that he "tried to get one theory that works."

¶27 Trial counsel further testified that Jacobson denied being involved in the shootout "in any way, shape, or form." In response to the State's suggestion at the hearing that arguing an alternative, nonidentification defense would have "shot a hole in your main theory that [Jacobson] wasn't there," trial counsel stated, "I don't think I can admit something that my client denies. That really is not good practice for a criminal defense attorney. Mr. Jacobson maintained his innocence." Asked to consider whether the deputies being caught in their own crossfire was a plausible alternative defense he could have raised at trial, trial counsel responded:

> I'm assuming during the melee certainly it's a plausible argument, but given the fact that Mr. Jacobson denied that he was even present, that was not something that I really looked at real hard. *I just thought it would probably take away from the main focus which was he was not present.* (Emphasis added.)

At his trial, Jacobson ultimately took the stand and testified directly that he was not present at the shootout.

¶28 Jacobson criticizes trial counsel's singular focus on the "not there" defense because the testimony of Weso and Czaplicki placed Jacobson at the scene, guns at the scene were linked to Jacobson, and Jacobson had no witnesses to corroborate his alibi. However, the "not there" defense was *Jacobson's* defense, and he insisted he was not at the shootout, directly testifying to that

himself. Further, he testified that the guns were at the scene because Weso and one of his friends "came over and borrowed 'em" a day or two before the shootout. As we also have already pointed out, trial counsel raised legitimate questions for jury consideration regarding Weso's and Czaplicki's credibility.

¶29 Jacobson seeks to Monday-morning quarterback the strategic decisions of trial counsel. We must be "highly deferential" to counsel's decisions, evaluating the conduct from the perspective at the time. *See* ***Domke***, 337 Wis. 2d 268, ¶36. Jacobson has not shown that trial counsel's decision to not utilize a "shotgun approach" arguing alternative defenses, but to instead maintain one theory consistent with his client's insistence of innocence—that he was not involved "in any way, shape, or form"—was so objectively unreasonable under all the circumstances of the case as to constitute deficient performance. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶31. He has thus failed to show that trial counsel was ineffective.

D. Sentenced upon Inaccurate Information

¶30 Jacobson also contends he is entitled to resentencing on the grounds that he was sentenced, at least in part, based on inaccurate information in violation of his due process rights. Additionally, Jacobson argues that his trial counsel performed ineffectively by failing to object to the inaccurate information at sentencing, including information in the presentence report relating to the number of individuals shooting during the shootout.

¶31 A defendant has a "due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. When a defendant seeks resentencing, the defendant must establish by clear and convincing evidence both that the information at issue is inaccurate and

that the sentencing court actually relied upon it. ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. We independently review a defendant's due process challenge to the sentence. ***Tiepelman***, 291 Wis. 2d 179, ¶9.

¶32 Jacobson lists three "untrue" "factors" he contends the sentencing court relied on in imposing his sentence: first, that all three individuals, including Jacobson, actually shot at the officers; second, that "Jacobson chose to 'flee[] Wisconsin forfeiting $50,000 in bail"; and third, that Czaplicki gave his testimony without any expectation of gain for himself.

¶33 As to the first factor, Jacobson points to the following comments by the court at sentencing: "Shots were fired. As one of the officers testified at trial, all three of the individuals fired shots. That, in my estimation, indicates a willingness on the part of each individual to commit murder." He also complains about language in the presentence report suggesting all three men fired shots during the shootout. Jacobson argues that the evidence at trial showed that, at most, only two of the three men fired shots at officers and that Jacobson was not one of them.

¶34 The State concedes that only two of the men fired their weapons, but emphasizes that one of those may have been Jacobson. It further points out that both Weso and Czaplicki testified at trial that Jacobson told them he had fired one of the weapons. The State also contends Jacobson "[a]t least … aided and abetted or conspired with the Weso brothers to shoot the deputies," arguing that the evidence at trial showed Jacobson brought the guns to the house where the shootout occurred, "those guns were loaded and fired that night, the gunmen fled out a rear window with the loaded weapons and rather than obey orders to drop

their weapons and surrender, two of them fired upon the deputies while Jacobson successfully escaped."

¶35 We must consider the sentencing court's inaccurate comments about "all three" of the men firing shots, in light of other comments made by the court at sentencing regarding this issue:

> Now, one problem during trial that I foresaw was the fact that we didn't have any specific law enforcement officer or other individual as an eyewitness saying that that officer saw Mr. Jacobson point a weapon at a specific officer and fire that weapon at that particular officer.
>
> That, of course, would be the best information ….
>
> But, you know, we have a lot of cases where we don't have eyewitness testimony and yet we have a crime committed….
>
> ….
>
> We have the testimony from other reliable individuals, which I think, beyond a reasonable doubt, places Robert Jacobson at the scene as one of those three individuals who fired at the law enforcement officers.
>
> When we have other very good information tending to prove and reaching the burden beyond a reasonable doubt that a defendant committed a crime and the defendant then continues to deny all involvement, we have a very, very dangerous situation.

¶36 The sentencing court specifically noted that Jacobson continued denying any involvement in the shootout. However, having presided over the trial,[8] the court also knew that other witnesses had placed Jacobson there. During the trial, Weso testified that Jacobson told him that he (Jacobson) had fired at the

[8] The same judge presided over the trial, sentencing, and all relevant postconviction proceedings in the trial court.

officers. Czaplicki testified that Jacobson had told him he was there for the shootout and, while "[h]e didn't exactly state that he fired guns, [] he tended to do imitations of like a cowboy shooting guns." When asked at trial, "Did [Jacobson] tell you what he intended to do by shooting the gun?" Czaplicki responded that Jacobson's exact words were "I wish I would have killed the motherfuckers." The court referenced this testimony by Czaplicki in its sentencing remarks.

¶37 Nonetheless, after reviewing the sentencing transcript upon postconviction review, the trial court concluded that it had sentenced Jacobson "regardless of whether Mr. Jacobson actually fired shots." As support, the court quoted its statement from the sentencing transcript that "[e]ven if you didn't shoot at all three of them, on the facts I heard, as a party to the offenses, you were as guilty as those others who fired at the other law enforcement officers." The court pointed out its willingness to sentence Jacobson based on other factors, "such as the fact that he brought firearms to the scene."

¶38 While the court did incorrectly state at sentencing that all three individuals fired shots at officers, we are not convinced from the record that it actually relied on this mistaken belief in its sentencing of Jacobson. The court indicated it sentenced Jacobson because of his involvement in the shootout, "regardless of whether [he] actually fired shots." Further, even if the court had sentenced Jacobson in part because of a belief that *he* fired shots during the shootout, that belief was supported by evidence presented during the trial. Jacobson has failed to establish by clear and convincing evidence that the court actually relied in its sentencing upon the mistaken belief that all three men fired shots during the shootout. *See* ***Payette***, 313 Wis. 2d 39, ¶46. To the extent the court may have relied upon the belief that Jacobson himself fired shots, Jacobson has not proven that such a belief was inaccurate.

¶39 Jacobson next argues that he was sentenced on inaccurate information because the sentencing court erroneously believed he was present in court for the scheduling of his January 22, 2001 arraignment date and thus that the court erroneously believed Jacobson was "willing to write off $50,000 [in bail money]" by not appearing for the arraignment, instead "[t]rying to hide down in Illinois." The court indicated at sentencing this showed a "clear indication of guilt." It is undisputed that the arraignment date was not set while Jacobson was in court.

¶40 The record reflects that, in considering this issue for sentencing, the court actually relied upon other facts supporting its comment that Jacobson was "willing to write off $50,000," evidencing his guilt, not whether Jacobson was actually in court when the arraignment hearing date was scheduled. At trial, Jacobson testified that he did not come back for his January 22, 2001 arraignment because "I didn't know about it. The [notice] I had was, I think, January 25th." Jacobson testified he did not receive the notice of his arraignment date until the day after his arraignment, "[s]omething like" January 23, 2001. He admitted he did not return on January 25, 2001, either. Jacobson further acknowledged he never called the court, his attorney, or anyone else to address the fact he missed his court date and did not voluntarily return to Wisconsin to address the issue. He admitted he did not return to court until he was arrested in Illinois weeks later and brought back. At sentencing, the court indicated that if Jacobson "truly intended to show up at the [arraignment], [he] would have sent a message to someone, I'm having trouble getting back; perhaps your defense attorney who certainly could have resolved that."

¶41 In its decision on this postconviction motion, the trial court noted that it had the opportunity during the trial to "explore the accuracy" of Jacobson's

claim that he missed his arraignment date "accidentally," and concluded that he had failed to prove this. And while the court did acknowledge in its postconviction decision that it relied at sentencing upon the belief that Jacobson "fled the state for his bail hearing," it concluded that Jacobson had not proven that belief was inaccurate.

¶42 Reviewing the record, we conclude that in sentencing Jacobson the trial court did not actually rely upon the mistaken belief that he was in court when the arraignment date was set. The court did sentence Jacobson in part because he did not appear at any time for his arraignment and never notified his attorney or anyone else. This indicated to the court that Jacobson did not "truly intend[]" to show up for his arraignment and was "hiding down in Illinois," and supported the court's conclusion that Jacobson was "willing to write off $50,000" in bail money. Jacobson has not demonstrated the court's belief in this regard was inaccurate.

¶43 Finally, Jacobson argues that the court relied at sentencing upon the inaccurate belief that Czaplicki had no expectation of a reduction in his own sentence for testifying against Jacobson. Jacobson criticizes the court's sentencing comment that "I heard nothing to indicate that Mr. Czaplicki was getting any sort of break or bonus or consideration for testifying here at trial." However, in his appellate brief, Jacobson acknowledges that at the time of the trial, "Czaplicki had no prior agreement regarding a specific benefit" for his testimony. Jacobson nonetheless seeks to make the leap that because *at some later date* Czaplicki sought and obtained a reduced sentence, in part because of his testimony at Jacobson's trial, that *at the time of trial* he was expecting some "sort of break or bonus or consideration for testifying." Jacobson has failed to demonstrate that the

sentencing court's apparent belief that Czaplicki was testifying without any expectation of gaining anything for himself was inaccurate.[9]

¶44 Jacobson has failed to show that the trial court actually relied on any inaccurate information in imposing his sentence. As a result, he has failed to demonstrate that his due process rights were violated or that trial counsel's failure to object to the challenged information prejudiced him. Because he has not shown he was prejudiced, he has not proven trial counsel was ineffective.

II. SENTENCING MODIFICATION MOTION

¶45 Jacobson alternatively argues that he is entitled to sentence modification based upon new factors. We disagree.

¶46 A "new factor" is

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Harbor, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a "fact or set of facts put forth by the defendant constitutes a 'new factor' is a question of law." ***Id.***, ¶36. A defendant bears the burden of proving by clear and convincing evidence that a "new factor" exists. ***Id.***

[9] To the extent the *possibility* of personal benefit existed for Czaplicki, the court had sat through the trial testimony where Czaplicki acknowledged the appeal and "postconviction things" on his own felony conviction were still pending. It is also fair to assume the court was aware that Czaplicki could possibly seek modification of his sentence after Jacobson's trial.

¶47 "The existence of a new factor does not automatically entitle the defendant to sentence modification." ***Id.***, ¶37. Rather, "to prevail, the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***Id.***, ¶38. However, "if a court determines that the facts do not constitute a new factor as a matter of law, 'it need go no further in its analysis' to decide the defendant's motion." ***Id.*** (citation omitted).

¶48 Jacobson raises three familiar issues as new factors that merit sentence modification: (1) only two men, the Wesos, fired shots, not all three as the sentencing court stated; (2) Jacobson was not in court when his arraignment date was scheduled, as the sentencing court said, before he "fle[d]" to Illinois; and (3) the sentencing court noted that Czaplicki had made no deals for his testimony, even though Czaplicki's sentence was reduced after Jacobson's trial.

¶49 Regarding the first factor, Jacobson contends, "The sentencing court here overlooked the indisputable physical and testimonial evidence that Jacobson never fired at the officers…." As previously explained, however, the trial court was aware at sentencing that Jacobson continued to deny any involvement in the shootout, but noted that there was testimony during the trial from "reliable individuals" that Jacobson was at the scene and fired at the officers. Thus, his contention now that he was not one of the individuals who fired at the officers is anything but new. Further, consistent with our conclusion that the sentencing court did not actually rely in imposing sentence upon the number of individuals who fired shots in the shootout, the number of individuals who fired shots was not highly relevant to the imposition of sentence. What was highly relevant was that the court was convinced Jacobson was present and involved in the shootout.

¶50 And while Jacobson is correct that the trial court mistakenly commented that Jacobson was in court when his arraignment date was set, the record reflects that this particular detail was not highly relevant to the court. The court's comments at sentencing, as previously discussed, indicate that what *was* highly relevant was that Jacobson *knew* he had an arraignment date on either January 22 or 25, that he did not appear for either date, and that he made no effort to notify his attorney or anyone else that he had difficulty making the arraignment, thus indicating to the court that he did not intend to show up for the arraignment. These facts supported the court's conclusion that Jacobson was "willing to write off $50,000" in bail money, evidencing his guilt.

¶51 Lastly, Jacobson's argument that Czaplicki's subsequent sentence reduction is a "new factor" also fails. In his brief-in-chief, Jacobson states that the "sentencing court … could not know that Czaplicki shortly would seek and receive the sentence reduction he disavowed at trial." Jacobson makes no further argument as to why this is a new factor entitling him to sentence modification. In his reply brief, he simply contends that the State concedes that the sentencing court relied on this "false information" and this therefore constitutes a "new factor" entitling Jacobson to resentencing. As previously noted, Jacobson admits in his brief that Czaplicki had no agreement prior to trial for a personal benefit in exchange for his cooperation at trial. He fails to explain how the modification of Czaplicki's sentence *after* his testimony at trial, when there was no deal in place for such modification, is highly relevant to the imposition of sentence. Jacobson offers nothing but speculation that Czaplicki testified with the expectation of receiving a reduction in his own sentence.

¶52 Jacobson has not met his burden to show that any of the three "factors" he complains of were "new factors" warranting sentence modification.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.