COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP404-CR **Cir. Ct. No. 2009CF1566**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM F. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. William Williams appeals a judgment convicting him, as a repeat offender, of first-degree reckless injury by use of a dangerous weapon. He also appeals an order denying his motion for postconviction relief. The issues on appeal are whether trial counsel provided ineffective assistance by

not presenting evidence about his victim's violent past and by requesting the wrong jury instruction on self-defense, and whether Williams is entitled to a new trial in the interest of justice. We affirm the conviction and postconviction order for the reasons discussed below.

BACKGROUND

¶2 Williams was charged based upon an altercation in which he admittedly struck another man, Bruce Allen, in the head with a piece of wood. Williams asserted self-defense at trial, claiming that he was afraid of Allen based upon a series of events leading up to the incident.

¶3 Two days earlier, Williams had been released from jail where he had been held in conjunction with an assault on Cornelius Adams, who was a father figure to Allen. The night of Williams' release, Allen and a friend of Allen's confronted Williams about having hurt Adams. Both Williams and another witness testified that Allen's friend punched Williams during that confrontation. Williams also testified that Allen and his friends followed, threatened, and attacked Williams several more times over the next day and a half.

¶4 Prior to trial, the prosecution filed a motion in limine seeking to bar or limit the introduction of any prior bad act or ***McMorris*** evidence that Williams was aware of specific instances of past violence by the victim. *See generally* ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). However, trial counsel did not seek to introduce evidence that Allen had two convictions for battery about ten years earlier, or that he had participated in a number of violent acts as part of a gang operating on State Street. At the postconviction hearing, trial counsel testified that he had hired a private investigator to find witnesses who could corroborate Allen's participation in violent gang activity, but was unable to

locate any, and that Williams' own testimony on that point at his revocation hearing had fallen flat. Trial counsel further explained that he made a strategic decision to focus the jury's attention on the assaults by Allen and his friends that had happened immediately before the charged incident, so as not to go off on tangents and confuse the jury.

¶5 Trial counsel did request a self-defense instruction, which the trial court gave. However, trial counsel admitted that he inadvertently asked for the wrong instruction, WIS JI—CRIMINAL 805, relating to intentional crimes, rather than WIS JI—CRIMINAL 801, relating to reckless crimes.

STANDARD OF REVIEW

¶6 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

¶7 This court also has the power to independently consider the record to determine whether to grant a new trial in the interest of justice. WIS. STAT. § 752.35 (2011-12).[1] However, we will exercise our discretionary reversal power

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

"only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

DISCUSSION

Assistance of Counsel

¶8 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her counsel made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. ***Id.*** To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.*** We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

¶9 Here, we are satisfied that trial counsel was acting within professional norms when he made a strategic decision to focus on Allen's most recent assaults against Williams—one of which was corroborated by another witness—without introducing ten-year-old battery convictions or uncorroborated testimony from the defendant about Allen's gang activity which had not gone well, in trial counsel's opinion, at a prior hearing. In other words, it would be reasonable for trial counsel to think that Allen's most recent activity presented the strongest available evidence for Williams' self-defense claim, and that the evidence would be most effective if trial counsel "kept it simple." Because we do

not deem trial counsel's performance deficient, we cannot conclude that his assistance was ineffective in this regard.

¶10 Assuming, however, for the sake of argument that trial counsel did perform deficiently by mistakenly requesting the wrong self-defense instruction, we are not persuaded that the mistake was in any way prejudicial to the defendant.

¶11 The only substantive difference between the two instructions is that the one intended to be used for reckless crimes would have included a sentence stating, "In deciding whether the defendant's conduct was criminally reckless conduct which showed utter disregard for human life, you should also consider whether the defendant acted lawfully in self defense." *Cf.* WIS JI—CRIMINAL 801 and WIS JI—CRIMINAL 805. In other words, the alternate instruction would have explicitly directed the jury to consider whether Williams' self-defense claim actually negated an element of the offense. However, the court also instructed the jury that the jury could not find Williams guilty of first-degree reckless injury unless it was satisfied that his conduct showed utter disregard for human life, taking into account a number of factors including "why the defendant was engaged in that conduct." Because the parties vigorously litigated the question of self-defense, the instruction on the charged offense directed the jury to take the reason for the defendant's conduct into account, and the court separately instructed the jury on what constituted self-defense, we do not see any substantial probability that the jury would have reached a different result if it had been provided with the additional sentence or given the instructions on the offense and the affirmative defense in a different order. *See* ***State v. Gordon***, 2003 WI 69, ¶¶33-43, 262 Wis. 2d 380, 663 N.W.2d 765 (under harmless error rule, effect of instructional errors must be viewed in the context of the entire trial).

Interest of Justice

¶12 A defendant may be entitled to a new trial in the interest of justice when the real controversy has not been fully tried or when there has been a miscarriage of justice. ***State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). To establish a miscarriage of justice, there must be "a substantial degree of probability that a new trial would produce a different result." ***Id.*** (citations omitted).

¶13 As we have already suggested above, we are satisfied that the real controversy in this case was tried by the presentation of evidence that Allen and his friends had attacked Williams four times in the days preceding the charged offense. The absence of evidence of additional criminal convictions or past violent activity did not prevent the jury from considering whether Williams had a reasonable basis to fear Allen, and we see no reasonable probability that a new trial with a self-defense instruction better tailored to reckless conduct would produce a different result.

By the Court.—Judgment and order affirmed.

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