COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1345-CR **Cir. Ct. No. 98-CF-708**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. STUART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Paul J. Stuart appeals from a judgment convicting him of first-degree intentional homicide in the 1990 shooting death of Gary Reagles and from an order denying his postconviction motion seeking a new trial. We reject all of Stuart's appellate issues and affirm.

¶2 Stuart first argues that the circuit court erred in admitting at trial the preliminary hearing testimony of his brother, John Stuart, who implicated Stuart in the shooting. This issue was addressed in ***State v. Stuart***, 2003 WI 73, 262 Wis. 2d 620, 664 N.W.2d 82, and we will not address it further.

¶3 Stuart next contends that his trial counsel was ineffective. As a preliminary matter, we note that Stuart's trial counsel, Robert Bramscher, died before Stuart's postconviction motion hearing could be held, and Stuart was unable to preserve his testimony as generally required by ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nevertheless, Stuart still bore the burden to support his ineffective assistance allegations with corroborating evidence to show that his trial counsel acted unreasonably and that he was prejudiced by counsel's deficient performance. ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983).

¶4 The ineffective assistance standards are:

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.
>
> We review the denial of an ineffective assistance claim as a mixed question of fact and law. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law.

State v. Kimbrough, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted).

¶5 To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed,*** 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885, *review denied,* 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 891 (Wis. Sept. 26, 2002) (No. 01-2973-CR). The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). The circuit court concluded that trial counsel's representation did not prejudice Stuart or require a new trial.

¶6 Stuart first argues that trial counsel was ineffective because he did not offer evidence of charges that John Stuart intimidated a victim and solicited obstruction of justice when he sought to dissuade his wife, Elaine Stuart, from pursuing her allegations that John sexually assaulted her. Stuart contends that this evidence would have been admissible under ***State v. Amos***, 153 Wis. 2d 257, 450 N.W.2d 503 (Ct. App. 1989), to undermine John's credibility.[1]

¶7 ***Amos*** does not apply here. In ***Amos***, the circuit court admitted evidence that the defendant attempted to suborn perjury by arranging for an alibi witness in the case against him. ***Id.*** at 271. The circuit court determined that the evidence was relevant to the defendant's credibility. ***Id.*** This court affirmed on the grounds that Amos's attempt to suborn perjury "tended to show in some

[1] John Stuart's credibility was challenged in other ways. The jury knew of John's four prior convictions and that John and Paul had committed a burglary one to two weeks before the murder.

degree a consciousness of guilt" of the charge lodged against the defendant. ***Id.*** at 272. Here, however, John's actions in the matter involving Elaine Stuart were unrelated to John's incriminating testimony in the prosecution of Paul Stuart. Therefore, the evidence of John's allegedly criminal conduct would not have been admissible under ***Amos***, and Stuart's trial counsel was not ineffective for failing to offer this evidence. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be faulted for not bringing a motion that would have failed).

¶8 Stuart next makes two arguments in support of his claim that the jury should have been informed that John was facing criminal charges when he incriminated Stuart in statements to detectives and in testimony at Stuart's preliminary hearing in the summer of 1998. Stuart argues that evidence of the pending charges would have shown John's bias and that he had an incentive to lie about Stuart to gain a more favorable disposition of the pending charges. Stuart challenges trial counsel's failure to use this evidence and the circuit court's evidentiary ruling declining to take judicial notice of this evidence.

¶9 With regard to trial counsel, the record reveals that counsel moved the circuit court to take judicial notice of the pending charges against John of kidnapping and first-degree sexual assault and four counts of victim intimidation. Therefore, counsel did not perform deficiently.

¶10 We turn to Stuart's claim that this evidence should have been admitted. We will uphold the circuit court's discretionary decision to exclude evidence or refuse to take judicial notice if the court had a reasonable basis for the decision. ***Wester v. Bruggink***, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994) (evidentiary decisions are discretionary); *cf.* ***Johnson v. Misericordia Cmty.***

Hosp., 97 Wis. 2d 521, 553, 294 N.W.2d 501 (Ct. App. 1980), *aff'd,* 99 Wis. 2d 708, 301 N.W.2d 156 (1981) (judicial notice is discretionary).

¶11 The circuit court did not misuse its discretion in declining to take judicial notice of the charges against John. The prosecutor stated that John did not receive any consideration on his pending charges in exchange for implicating Stuart in the murder of Reagles, and John reaffirmed his incriminating statements at Stuart's postconviction motion hearing.

¶12 Furthermore, John first incriminated Stuart in the Reagles murder in 1992 when he told police that he believed Stuart had murdered Reagles. Although John again implicated his brother six years later, his 1992 accusation was made before John faced the criminal charges which Stuart claims should have been evidence of John's bias. Additionally, court records reveal that the charges against John were resolved before he testified at the preliminary examination, thereby undermining Stuart's argument that John had an incentive to falsely accuse Stuart. We agree with the circuit court that the record does not demonstrate, beyond mere speculation, that John falsely accused Stuart of the Reagles murder or that there was a link between John's statements and the disposition of the charges against him.

¶13 Even if the evidentiary ruling were error, it was harmless. An "error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). Four other witnesses testified that Stuart told them he shot Reagles. Therefore, impeaching John with evidence of pending criminal charges and implications of a side arrangement with the State to testify against Stuart would not have affected the other evidence against Stuart.

¶14 Stuart argues that his trial counsel was ineffective for failing to impeach Art Parramoure, a witness for the State, with his two prior criminal convictions. Stuart's trial counsel did not ask Parramoure about these convictions during cross-examination. Stuart argues that this was deficient performance by counsel. The circuit court held that Stuart was not prejudiced by counsel's failure to impeach Parramoure with his prior convictions because, in the court's experience, one or two prior convictions does not impact the jury's decision based upon all the other evidence. Even if the jury had known of Parramoure's prior convictions, the jury would not have had any difficulty assessing Parramoure's testimony.

¶15 Even if counsel was deficient in failing to impeach Parramoure, we conclude that Stuart was not prejudiced because the error was harmless, i.e., it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.*** (citation omitted). Stuart's own trial testimony corroborated much of Parramoure's testimony. Parramoure testified that a few days after the murder, Stuart admitted to him that he shot Reagles. The next day, Stuart told Parramoure that this claim "was just bullshitting." During his testimony, Stuart admitted that he told Parramoure that he shot Reagles, and that he later told Parramoure he was "just bullshitting." However, Stuart explained that he claimed Reagles's murder in an attempt to make Parramoure afraid of him and to enhance Parramoure's treatment of his ex-wife, who happened to be Stuart's niece.

¶16 The failure to impeach Parramoure was not prejudicial in light of the other evidence of Stuart's guilt. In addition to the preliminary examination testimony of John Stuart (which was offered at trial), four other witnesses testified that Stuart admitted shooting Reagles. Michael Schultz testified that in March

1990, he met Stuart in a bar and Stuart told him that he had to kill Reagles. David Small testified that when he shared a jail cell with Stuart in September 1998, Stuart told him details of the Reagles shooting. Benjamin Woody testified that he was in the jail with Stuart in October 1998 when Stuart began talking about the case and suggested the State could not prove that he shot Reagles. Damian Simpson was present during Stuart's statements to Woody and stated that Stuart admitted killing Reagles. Counsel's failure to impeach Parramoure was not prejudicial because it is not reasonably probable that impeachment would have resulted in an acquittal.

¶17 Stuart next argues that his trial counsel was ineffective because he did not object when the prosecutor cross-examined him about the nature of his prior drug conviction. Counsel did not perform deficiently because Stuart opened the door to this topic during his direct examination. Stuart moved to Arizona near the time of the murder. On direct examination about his ownership of two body shops in Arizona, Stuart explained that he had to depart the first body shop after he was convicted of a drug offense. Stuart stated that his wife was caught with cocaine, and he took the blame on her behalf. Because Stuart informed the jury during his direct examination of the nature of his drug conviction, Stuart's counsel was not ineffective for failing to object to the prosecutor's inquiries on cross-examination regarding the drug conviction. *See* ***State v. Nielsen***, 2001 WI App 192, ¶¶35-36, 247 Wis. 2d 466, 634 N.W.2d 325 (defense counsel not ineffective for failing to object to questions when defense opened the door to the inquiry).

¶18 Stuart also complains about the prosecutor's inquiries regarding the burglary Stuart and John committed one to two weeks before Reagles was killed. The gun used to kill Reagles was stolen in that burglary. Stuart admitted giving the gun to Reagles the night before the shooting. The State viewed the burglary as

a motive for Reagles's killing because Reagles knew about the burglary and was threatening to disclose it if Stuart did not let him keep the gun. The defense viewed the burglary as part of the explanation for Stuart's sudden move to Arizona after the shooting. Either way, the burglary was part of the story of the murder, making it an appropriate topic for examination. Therefore, counsel was not ineffective when he failed to object to questions regarding the burglary.

¶19 Stuart contends that a new trial is necessary due to newly discovered evidence in the form of John's posttrial recantation of his statements incriminating Stuart. John allegedly told several fellow inmates that he knew Stuart did not kill Reagles, but he had implicated Stuart so that the State would drop charges against him. At the postconviction motion hearing, the circuit court concluded that the evidence of John's recantation did not make it reasonably probable that Stuart would have been acquitted.

¶20 A new trial is warranted if, among other things, the defendant establishes by clear and convincing evidence that "it is reasonably probable that, with the evidence, a different result would be reached at a new trial." ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). Where the newly discovered evidence consists of recantation testimony, the recantation testimony must be supported by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 477, 561 N.W.2d 707 (1997). This corroboration requirement is satisfied if there is a feasible motive for the initial false statement and there are circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78. The motion for a new trial is addressed to the circuit court's sound discretion, and we will affirm the court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***Carnemolla***, 229 Wis. 2d at 656.

¶21 Stuart must demonstrate that there is a feasible motive for John's original false statement and circumstantial guarantees of the trustworthiness of his recantation. *See* ***McCallum***, 208 Wis. 2d at 477-78. This burden cannot be met. The circuit court did not find that John incriminated Stuart to reduce his charges (a feasible motive to lie) and, more importantly, John denied the recantation statements when he testified at the postconviction motion hearing. At that hearing, John reaffirmed the truthfulness of his preliminary examination testimony which was introduced at trial. The circuit court concluded that there was not a reasonable probability that the outcome would be different if the jury were to hear the allegedly newly discovered evidence of John's recantation, particularly in light of the large amount of evidence from other sources linking Stuart to the crime. We agree. The circuit court properly exercised its discretion in denying Stuart's motion for a new trial.

¶22 Finally, citing all of his previous arguments, Stuart asks that we reverse his conviction in the interest of justice. Having rejected these arguments, we also reject the request for a reversal in the interest of justice.

By the Court.—Judgment and order affirmed.

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