

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2006

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. 2005AP73
STATE OF WISCONSIN**

Cir. Ct. No. 1997CF2031

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD D. DAGNALL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ROBERT A. DeCHAMBEAU, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Todd Dagnall, pro se, appeals an order denying his motion for postconviction relief brought pursuant to WIS. STAT. § 974.06 (2003-

04).¹ Dagnall argues that he received ineffective assistance of trial counsel because counsel did not pursue a defense of voluntary intoxication and because counsel did not adequately investigate or question state witnesses Christopher Murray and James Rich. Dagnall also argues that the circuit court should have appointed an attorney to represent him in bringing this action and that we should exercise our discretionary authority to grant him a new trial. We reject Dagnall's arguments and affirm.

¶2 To substantiate a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding[s] would have been different." *Id.* at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense." *Id.*

¶3 Dagnall first contends his attorney should have pursued a voluntary intoxication defense. Voluntary intoxication is a defense to a crime only if it "[n]egatives the existence of a state of mind essential to the crime." WIS. STAT. § 939.42(2). "A bald statement that the defendant had been drinking or was drunk

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

is insufficient” because it does not show that the defendant suffered a “*mental impairment* due to the consumption of intoxicants sufficient to negate the existence of the intent to kill.” *State v. Strege*, 116 Wis. 2d 477, 486, 343 N.W.2d 100 (1984) (emphasis added).

¶4 According to the trial testimony of Michael Masino, Steve Vandersanden and Sharon Hollis, who were tending bar at the places Dagnall visited the night of the murder, Dagnall had a total of seven or eight drinks over a five-hour period. All three bartenders testified that Dagnall did not appear intoxicated. Although Sheila Trentin and Aaron Alt testified that everyone in their group seemed “very intoxicated” or “pretty drunk,” their testimony was not sufficiently specific as to *Dagnall* to provide a basis for the jury instruction. To the contrary, Trentin testified that Dagnall had no trouble walking and she had no trouble understanding him. Because the testimony did not support a jury instruction regarding voluntary intoxication, counsel was not deficient for failing to request it.

¶5 Dagnall also contends an expert witness should have been called to substantiate his claim of voluntary intoxication. This claim fails because Dagnall has not explained what such an expert would have testified to that would substantiate an intoxication defense in this case. *See State v. Arredondo*, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647 (to show counsel was deficient for failing to investigate, the defendant must allege with specificity what the particular witness would have said and how it would have altered the outcome of the case).

¶6 Dagnall next argues he received ineffective assistance of counsel because his attorney did not more rigorously question Christopher Murray, his co-defendant, about Murray’s motive for testifying against Dagnall. Our review of

the transcript shows that Dagnall's attorney *did* thoroughly question Murray about his motives for testifying against Dagnall. Dagnall also contends that his attorney should have challenged the credibility of James Rich, an inmate who testified that Dagnall confessed committing the crime to him. Again, Dagnall's attorney *did* adequately question Rich about his motives and the possible advantages he hoped to receive by testifying against Dagnall. As for Dagnall's claim that his attorney should have attempted to introduce evidence of Rich's prior "bad acts," counsel would have been prohibited from doing so by statute. *See* WIS. STAT. § 906.08(2). In sum, all of Dagnall's claims of ineffective assistance of counsel are unavailing.

¶7 Dagnall next argues that the circuit court improperly denied his request for court-appointed counsel to help him pursue his claim under § 974.06. A criminal defendant is not entitled to counsel on appeal as a matter of constitutional or statutory right except on direct appeal from a conviction. *State ex rel. Payton v. Kolb*, 135 Wis. 2d 202, 207, 400 N.W.2d 285 (Ct. App. 1986). Because this is not a direct appeal from a conviction, Dagnall had no right to court-appointed counsel, so this claim fails.

¶8 Finally, Dagnall argues that he is entitled to discretionary reversal in the interest of justice. *See* WIS. STAT. § 752.35. We do not have authority to grant discretionary reversal under § 752.35 in this case because this is not a direct appeal from the judgment of conviction. *See State v. Allen*, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426 (Ct. App. 1990).

By the Court.—Order affirmed.

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

