COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP1121
2005AP1395

Cir. Ct. Nos. 1994CF940682
1994CF940682

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE LYNDELL AVERY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEAN W. DiMOTTO, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Andre Lyndell Avery appeals from orders denying his *pro se* motions for postconviction relief. In 1994, a jury convicted Avery of one count of first-degree intentional homicide while possessing a dangerous weapon,

as a party to a crime, for shooting and killing Chris Davis, and two counts of first-degree recklessly endangering safety while possessing a dangerous weapon, as a party to a crime, for shooting and injuring Vilisity Rupert and Shirley Rogers. Avery was tried simultaneously with his brother and codefendant, Leonard Avery, before two juries.

I.

¶2 According to the main witness to the shooting, Sackie Roby, there was a longstanding feud between the Avery and Davis families. Roby testified that on January 15, 2004, after Davis threatened Andre Avery, he, Andre and Leonard Avery went to a tavern to shoot Davis. Roby claimed that he had a Tech .9 millimeter gun and that Andre Avery had a .9 millimeter gun. According to Roby, Leonard Avery went into the tavern to get Davis to come out while he and Andre Avery stayed outside. Roby testified that about three or four minutes later Leonard Avery ran out of the tavern and Andre Avery fired several shots toward the door. Roby claimed that he and the Avery brothers then ran to their car and drove away. Roby testified that he did not see at whom Andre Avery was shooting, but when they got into the car, Leonard Avery asked Andre Avery if he "'g[o]t him,'" and Andre Avery replied that he was not sure.

¶3 Andre Avery testified and admitted that he shot and killed Davis. He claimed that on the night of the shooting, Leonard Avery called him on the telephone and told him that Davis was at a tavern "talking crazy" and threatening the Averys. Andre Avery testified that he and Roby then went to the tavern with a .9 millimeter and a Tech .9 millimeter gun to see if Leonard Avery was ok. Andre Avery claimed that he and Roby were walking toward the tavern when he saw his brother run out of the tavern with Davis behind him pointing a gun at his brother's

back. Andre Avery testified that he then took his gun and shot toward the tavern because he was afraid that Davis was going to shoot his brother. Andre Avery admitted he shot first and that Davis did not have a chance to point his gun at him.

¶4 Andre Avery's lawyer requested and the trial court gave jury instructions on the defense of others. *See* WIS. STAT. § 939.48 (1993–94) (self-defense and defense of others).

¶5 In November of 1995, Andre Avery filed a WIS. STAT. § 809.30 postconviction motion, claiming, among other things, that he was prejudiced by the use of two juries. The trial court denied Andre Avery's motion, and we affirmed, concluding that, "under § 971.12(3), Stats., Wisconsin law does allow for the simultaneous trials of two defendants before two juries and, in this case, the trial court carefully employed dual jury procedures that protected Avery's rights." ***State v. Avery***, 215 Wis. 2d 45, 48–49, 571 N.W.2d 907, 908 (Ct. App. 1997). The Wisconsin Supreme Court denied Andre Avery's petition for review in March of 1998.

¶6 Andre Avery then filed three postconviction motions that are material to this appeal. In December of 2003, Avery, *pro se*, filed a WIS. STAT. § 974.06 motion, alleging, among other things, that his postconviction counsel was ineffective because the lawyer did not raise various claims of ineffective

assistance of trial counsel.[1] *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (allegation of ineffective assistance of postconviction counsel sufficient reason to permit additional issues to be raised in § 974.06 motion). On February 10, 2004, the Honorable Richard J. Sankovitz denied Andre Avery's motion without a hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶7 Andre Avery appealed the February 10, 2004, order and, at his request, we held his appeal in abeyance pending his March of 2004, *pro se*, WIS. STAT. § 805.15 motion. In that motion, Avery sought a new trial based on what he contended was newly-discovered evidence, namely that Roby had recanted some of his trial testimony.[2] To support his motion, Avery submitted Roby's affidavit in which Roby averred, among other things, that: the shooting was not planned; he saw Davis come out of the tavern with a gun pointed at Leonard Avery's back; he heard shots, but did not see who fired the shots because he ran away; and he was sorry that he had testified falsely.

¶8 Judge Sankovitz appointed a lawyer to represent Andre Avery "for purposes of the limited evidentiary hearing [on the newly-discovered-evidence

[1] Andre Avery also claims that his appellate counsel was ineffective for not raising the ineffective-assistance-of-trial and postconviction-counsel claims in his direct appeal. A claim of ineffective assistance of appellate counsel is generally raised by filing a habeas-corpus petition with the appellate court that heard the appeal, *see* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992), while a claim of ineffective assistance of postconviction counsel is raised in the trial court either by filing a habeas-corpus petition or by WIS. STAT. § 974.06, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996). Andre Avery pursued the latter option. We thus construe his claim as one of ineffective assistance of postconviction counsel. This makes no substantive difference to our decision.

[2] Leonard Avery joined in the motion. He appealed and we affirmed. ***State v. Avery***, No. 2005AP1447, unpublished slip op. (WI App Mar. 14, 2006). Leonard Avery has nothing to do with this appeal.

motion] and subsequent briefing by the parties," and the Honorable Jean W. DiMotto held hearings on January 27, 2005, and February 1, 2005. Roby testified at both hearings. Judge DiMotto denied Andre Avery's motion, finding Roby's recantation incredible and without circumstantial guarantees of trustworthiness.

¶9 Finally, in October of 2004, Andre Avery filed a *pro se* motion to compel the postconviction discovery of: (1) ballistic reports to confirm or exclude that his gun injured Vilisity Rupert and Shirley Rogers, and (2) test results from any swabs taken for gunshot residue from Davis's hands. Judge DiMotto denied this motion, concluding that, based on the trial testimony, there was no reasonable probability of a different outcome. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 320–321, 588 N.W.2d 8, 15–16 (1999) (defendant must show reasonable probability that if evidence had been disclosed earlier the result at trial would have been different).

¶10 Andre Avery then appealed the two orders, and we consolidated Andre Avery's claims into this appeal. We address his contentions in turn.

II.

A. *Alleged ineffective assistance of counsel.*

¶11 Andre Avery's ineffective-assistance-of-counsel claims are governed by ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), which held that a defendant claiming that his or her lawyer gave ineffective representation must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result.

¶12 Andre Avery claims that his trial lawyer did not effectively impeach Roby at the trial. Before Avery's trial, Roby pled guilty to a reduced charge of

first-degree reckless homicide, as a party to a crime. At the trial, the prosecutor asked Roby about the plea negotiations:

> Q How is it that you came to be a witness here in this trial?
>
> A To get a lesser charge.
>
> Q Did you talk to your lawyer about this case?
>
> A Yes, I did.
>
> Q Did your lawyer -- do you know whether or not your lawyer negotiated this case for you with the District Attorney's office?
>
> [Objection overruled.]
>
> [A] They -- yes, he did.
>
> Q Is it your understanding that you have a negotiation with the District Attorney's office?
>
> A Yes.
>
> Q *Have you been promised anything relative to your sentence?*
>
> A *No, I haven't.*

(Emphasis added.) Avery claims that Roby lied when he testified that he was not "promised" anything and, had his trial lawyer talked to Roby's trial lawyer, she would have learned that Roby made a "deal" with the State for a lesser sentence. Avery has not shown that his trial lawyer's performance was deficient or prejudicial. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who alleges that his lawyer was ineffective because the lawyer did not investigate must show what the investigation would have revealed and how it would have affected the outcome of the proceeding).

¶13 Andre Avery has not pointed to any evidence that, other than standard plea negotiations, Roby had a "deal" with the State. Moreover, the prosecutor and Andre Avery's trial lawyer extensively questioned Roby about the plea bargain. The prosecutor established that Roby had: (1) pled guilty to a lesser homicide charge for his involvement in the shooting; (2) understood that in exchange for a lesser charge he was to testify truthfully; and (3) knew that he was facing a forty-three-year prison sentence. On cross-examination, Andre Avery's lawyer established that Roby: (1) could have gone to prison for the rest of his life if convicted on the original charge; (2) pled guilty to the reduced charge so that he could get out of prison and see his children; and (3) hoped that by cooperating he would receive less than forty-three years in prison. In short, despite Andre Avery's argument, the jury knew that Roby had a strong motivation to cooperate with the State.

¶14 Andre Avery also contends that his trial lawyer should have objected to the trial court's pre-trial ruling that, when questioning Roby, the lawyers could ask Roby about the reduced charge — first-degree reckless homicide, as a party to a crime — but could not refer to it by that name. Andre Avery's trial lawyer *did* object, however.

¶15 At a pre-trial hearing on the motion to exclude the statute's characterization of the reduced charge, Andre Avery's lawyer argued that she should be allowed to ask what the reduced charge was. Further, as Judge Sankovitz pointed out in his written decision and order denying Andre Avery's WIS. STAT. § 974.06 motion, Avery was not prejudiced:

> Mr. Avery argues that the order precluded the jury from considering a fact, *i.e.*, the name of the reduced charge, that was important for the jury to consider in determining the extent of Mr. Roby's bias. I am not

> persuaded. In determining Mr. Roby's bias, it seems to me that the fact that the reduced charge carries a lesser sentence (a fact of which the jury was apprised) is of far more significance than the name given the charge.

We agree. There is no reasonable probability that the result of the trial would have been different had the jury heard the specific name of the crime to which Roby pled guilty.

¶16 In addition to his ineffective-assistance-of-counsel claim, Andre Avery also argues that the trial court's ruling that the lawyers could not ask about the statute's characterization of the reduced charge violated his right to confront and cross-examine Roby. We disagree.

¶17 The fundamental inquiry in deciding whether a defendant's right of confrontation was violated is whether the defendant had the opportunity for effective cross-examination. *See* ***Delaware v. Fensterer***, 474 U.S. 15, 19–20 (1985) (per curiam); ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325, 330 (1990). As we have seen, Andre Avery's lawyer effectively cross-examined Roby about his motivations for testifying. Andre Avery's confrontation rights were not violated.

¶18 Andre Avery also claims that his trial lawyer gave him ineffective representation because she did not request perfect and imperfect self-defense instructions.[3] We disagree. Whether to give a requested defense instruction "'turns on a case-by-case review of the evidence.'" ***State v. Stoehr***, 134 Wis. 2d

[3] Andre Avery also claims that his trial lawyer should have requested an unnecessary-defensive-force instruction. Unnecessary defensive force is the current equivalent of imperfect self-defense. ***State v. Head***, 2002 WI 99, ¶69, 255 Wis. 2d 194, 230, 648 N.W.2d 413, 430. Accordingly, we do not discuss unnecessary defensive force separately.

66, 87, 396 N.W.2d 177, 185 (1986) (quoted source omitted). Under the law at the time Andre Avery was tried, the privileges of perfect and imperfect self-defense applied when a defendant objectively reasonably believed that he was preventing or terminating an unlawful interference with his person. ***State v. Camacho***, 176 Wis. 2d 860, 869–871, 501 N.W.2d 380, 383 (1993).

¶19 It is clear from Andre Avery's testimony that he did not believe he had a right to act in self-defense. Andre Avery never testified that he shot at Davis to protect himself. As we have seen, he testified that he shot toward the tavern because he was afraid that Davis was going to shoot his brother, and the trial court instructed the jury on defense-of-others. Accordingly, the trial court accurately instructed the jury on the law. *See* ***Stoehr***, 134 Wis. 2d at 87, 396 N.W.2d at 185.

¶20 Andre Avery contends, however, that the defense-of-others jury instructions violated due process. The law is set out in WIS. STAT. § 939.48(1) and (4) (1993–94):

> **(1)** A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.
>
> ….
>
> **(4)** A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the third person would be

> privileged to act in self-defense and that the person's intervention is necessary for the protection of the third person.

See also ***State v. Head***, 2002 WI 99, ¶83, 255 Wis. 2d 194, 235–236, 648 N.W.2d 413, 433 (same requirements for self-defense and defense of others). Andre Avery claims that the jury instructions did not accurately state the law because they measured his belief that Leonard Avery was subject to an "imminent threat" under an objective rather than a subjective standard. We disagree.

¶21 While Andre Avery does not cite to ***Head***, he appears to rely on its holding that a defendant seeking an imperfect self-defense instruction "is *not* required to satisfy an objective threshold showing that she was acting under a reasonable belief that she was in imminent danger of death or great bodily harm or that the force she used was necessary to defend herself." ***Id.***, 2002 WI 99, ¶5, 255 Wis. 2d at 207, 648 N.W.2d at 419 (emphasis by ***Head***). ***Head***, however, does not apply retroactively to cases on collateral review. ***State v. Lo***, 2003 WI 107, ¶85, 264 Wis. 2d 1, 38, 665 N.W.2d 756, 774. When Andre Avery was tried in 1994, the first element of imperfect-self defense, which required a reasonable belief that the defendant was preventing or terminating an unlawful interference with his person, was measured under an objective standard. ***Camacho***, 176 Wis. 2d at 870–871, 501 N.W.2d at 383. Accordingly, the jury instructions did not misstate the law.

¶22 Finally, Andre Avery contends that his trial lawyer should have had Davis's gun admitted into evidence at the trial. Avery claims that this would show that Davis had a gun and that he did not shoot an unarmed man. In denying Avery's WIS. STAT. § 974.06 motion, Judge Sankovitz determined that "[m]erely producing a gun at trial and proving to the jury that the gun was owned by the

victim would not have led to a rational conclusion that therefore the victim was wielding the gun at the time Mr. Avery shot him." We agree. The prosecutor conceded in her opening argument that Davis had a gun. Moreover, the jury heard substantial evidence that Davis had a gun:

- Andre Avery testified that Davis came out of the tavern with a gun pointed at his brother;
- two witnesses testified that after Davis was shot they saw a .9 millimeter Glock at Davis's feet, and one of the witnesses testified that the police had the gun; and
- a firearms examiner for the Wisconsin State Crime Laboratory testified that he examined a Glock semiautomatic handgun at the prosecutor's request.

There is no reasonable probability that the result of the trial would have been different had the jury seen Davis's gun.

¶23 In a related claim, Andre Avery contends that the trial court erred when it denied his WIS. STAT. § 974.06 motion without a ***Machner*** hearing. In light of our ruling that there is no merit to Andre Avery's ineffective-assistance claims, the trial court properly exercised its discretion when it denied Andre Avery's § 974.06 motion without a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437 ("if the motion does not raise facts sufficient to entitle the movant to relief … the [trial] court has the discretion to grant or deny a hearing").

B. *Two juries.*

¶24 Andre Avery claims that he was prejudiced by the use of two juries. He acknowledges that we decided this issue in his direct appeal, *see* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."), but contends that we should "reconsider" it in light of ***Gray v. Maryland***, 523 U.S. 185 (1998). We disagree.

¶25 The holding in ***Gray*** that the rule prohibiting the introduction during a joint trial of the confession of a nontestifying codefendant, which names the defendant as a perpetrator, extends to redacted confessions, does not apply here. *See* ***id.***, 523 U.S. at 188. Andre Avery's jury did not hear Leonard Avery's confession. When Leonard Avery's confession was introduced at the trial, Andre Avery's jury was excused from the courtroom. Accordingly, we decline to "reconsider" this issue. *See* ***Witkowski***, 163 Wis. 2d at 990, 473 N.W.2d at 514.

C. *Alleged newly discovered evidence.*

¶26 To prevail on a claim asserting that there is newly discovered evidence, a defendant must prove by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence before he or she was convicted; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707, 711–712 (1997). If the defendant proves these four criteria by clear and convincing evidence, the trial court must determine whether a reasonable probability exists that a different result

would be reached in a trial. ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 134, 700 N.W.2d 62, 74.

¶27 As we have seen, the lynchpin of Andre Avery's newly-discovered-evidence claim is Roby's recantation affidavit. "[A] recantation will generally meet the first four criteria." ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445, 447 (Ct. App. 1996). Thus, the determinative factors to be considered are whether there is a reasonable probability that a jury looking at both the accusations and the recantation would have a reasonable doubt as to the defendant's guilt, and whether the recantation is sufficiently corroborated by other newly discovered evidence. ***McCallum***, 208 Wis. 2d at 473–474, 561 N.W.2d at 711; ***Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11, 17 (1971).

¶28 At the January 27, 2005, hearing, Roby initially testified on direct-examination that the recanting affidavit was in his own handwriting and that no one told him what to say. When Andre Avery's lawyer asked whether everything in the affidavit was "true and correct," however, Roby testified, "No, it's not." When Andre Avery's lawyer asked what in the affidavit was not true, Roby replied, "Pretty much ain't [*sic*] none of it true." Roby claimed that he "copied [the affidavit] off another piece of paper" and that by executing the affidavit, he expected to receive a "favor for a favor." Roby did tell the trial court, however, that the affidavit correctly provided that he saw Davis come out of the tavern with a gun behind Leonard Avery's back.

¶29 On cross-examination, Roby testified that Andre Avery told him what to write in the affidavit and where to send it. Roby also claimed that from late 2003 until the spring of 2004, he received three-way telephone calls from Andre Avery and members of Avery's family. According to Roby, Andre Avery

told him that it would be worth his while to change his trial testimony. Roby testified that after he signed the affidavit, he went to a check-cashing place in March of 2004 to cash a $300 wire from one of Andre Avery's brothers.

¶30 At the February 1, 2005, hearing, Roby testified on direct-examination that, contrary to his affidavit, he did not see a gun in Davis's hand. Roby claimed that his trial testimony was true, including his statement that Leonard Avery asked Andre Avery if he "g[o]t him" and Andre Avery's answer that he was not sure.

¶31 As we have seen, Judge DiMotto found incredible Roby's alleged "recantation":

> I base my findings on the portions of Roby's testimony that I find credible together with corroborating evidence from the State in the form of a wire transmission receipt. I find that Roby's motivation for his recantation in his affidavit arose during as many as ten three-way phone calls from his best friend, Andre, and the Averys' mother or their brother, Tony, as well as Roby's understanding of "a favor for a favor" with Andre. This favor materialized in the form of money ($300) wired to Roby from Derrick Avery, another brother of the Averys, soon after Roby wrote out in his own hand the written information supplied to him by Andre to form the content of the unsworn affidavit.
>
> I further find that Roby credibly disavowed his recantation under oath during the hearing and affirmed his trial testimony. In other words, I find his recantation incredible. Additionally, I find no circumstantial guarantees of trustworthiness as required by *Nicholas* and *McCallum*. Indeed, the contrary is true.

Andre Avery claims that these findings were clearly erroneous. We disagree. *See* ***McCallum***, 208 Wis. 2d at 479–480, 561 N.W.2d at 713 (trial court in best position to evaluate credibility of witnesses).[4]

D. *Due process*.

¶32 After the January 27, 2005, hearing on Andre Avery's newly-discovered-evidence motion, Andre Avery asserted that his due-process rights were violated because: (1) the prosecutor did not correct allegedly false testimony by Roby, and (2) the prosecutor withheld exculpatory evidence. These claims were addressed at the February 1, 2005, hearing, where Roby testified that he told Milwaukee police detectives during a January 30, 2005, interview that, before he pled guilty in 1994, he told the prosecutor that he had "broke[n] the guns down," and that he could get them. Roby claimed that the prosecutor told him that she did not want the guns.

¶33 The prosecutor from Andre Avery's trial testified that Roby never told her before Andre Avery's trial that he took the guns apart or that he could get them for her. She testified that "certainly if [Roby] had told me that he could get the guns that were the murder weapon, I would have had a detective go and recover them." The prosecutor also testified that the only negotiations between

[4] Andre Avery also claims that the trial court applied the wrong legal standard, arguing that instead of the five-part test from ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), the trial court should have applied the three-part test from ***Gordon v. United States***, 178 F.2d 896 (6th Cir. 1949), and ***Larrison v. United States***, 24 F.2d 82 (7th Cir. 1928), *overruled by* ***United States v. Mitrione***, 357 F.3d 712 (7th Cir. 2004), *vacated*, 543 U.S. 1097 (2005). ***Larrison*** is not the law in Wisconsin. *See* ***McCallum***, 208 Wis. 2d at 483, 561 N.W.2d at 714 (Abrahamson, C.J., concurring). As we have seen, Wisconsin uses the five-factor test as described in ***McCallum***. The trial court applied the correct legal standard.

her and Roby were put on the Record when Roby pled guilty. According to the prosecutor, the negotiations were complete before Roby testified at Andre Avery's trial and Roby was sentenced after he testified. The prosecutor testified that Roby agreed to testify truthfully and she believed that he did. Further, a detective who was at a 1994 interview with Roby and the prosecutor testified that he never heard Roby tell the prosecutor that he had taken the guns apart or the prosecutor tell Roby that she did not want the guns.

¶34 Judge DiMotto, in her written decision and order denying Andre Avery's newly-discovered-evidence motion, found credible the prosecutor's and the detective's testimony. She thus concluded that there were no due-process violations because there was no exculpatory evidence for the prosecutor to disclose or false testimony for the prosecutor to correct. As we have seen, however, Andre Avery claims that the trial court erred when it found the prosecutor's testimony credible. As noted, though, the determination of witness credibility is left to the trial court. *See* ***McCallum***, 208 Wis. 2d at 479–480, 561 N.W.2d at 713. Andre Avery had not shown that the trial court's credibly finding was clearly erroneous.

E. *Postconviction discovery.*

¶35 Andre Avery also claims that the trial court erred when it denied his motion for postconviction discovery without an evidentiary hearing. As noted, to obtain postconviction discovery, the defendant must show a reasonable probability that, if the evidence had been disclosed earlier, the result at trial would have been different. ***O'Brien***, 223 Wis. 2d at 320–321, 588 N.W.2d at 15–16. "'The mere possibility that an item of undisclosed information might have helped the defense'" is not enough. ***Id.***, 223 Wis. 2d at 321, 588 N.W.2d at 16 (quoted

source omitted). We will uphold a trial court's denial of postconviction discovery absent an erroneous exercise of discretion. ***Id.***, 223 Wis. 2d at 322, 588 N.W.2d at 16.

¶36 As we have seen, Andre Avery sought postconviction discovery of: (1) ballistic reports confirming or excluding that his gun injured Vilisity Rupert and Shirley Rogers, and (2) test results from any swabs taken for gunshot residue from Davis's hands. The trial court did not err in denying his motion.

¶37 First, Andre Avery has not pointed to any evidence that any bullet-comparisons were done. Indeed, in a March of 2003 letter, the captain of the Milwaukee Police Department informed Andre Avery that "a check of the files of the Milwaukee Police Department fails to disclose any information as to 'bullet comparisons' relative to other victim's [*sic*] of this incident or to" Rupert and Rogers. Accordingly, the State did not fail to disclose alleged exculpatory evidence because there was no such evidence.

¶38 Further, Andre Avery does not point to any evidence that any bullets were found in Rupert or Rogers. Additionally, bullets found at the scene of the shooting and Davis's and Andre Avery's guns were examined to determine which gun fired the bullets. At the trial, a firearms examiner for the State Crime Laboratory testified that he examined the bullets from the victim and the scene of the shooting and determined that they were .9 millimeter automatic caliber full metal jacketed bullets that had all been fired through the same firearms barrel. He also testified that he looked at the Glock semiautomatic handgun believed to be Davis's and that it fired a bullet that was larger than the .9 millimeter gun used to shoot Davis. In short, the trial evidence showed that all of the bullets from the shooting were fired from Andre Avery's gun.

¶39 Andre Avery also contends that the State did not disclose the results from a gunshot residue test allegedly conducted on swabs taken of Davis's hands. He claims that the results of the test would have been helpful to his defense because they would have shown that Davis fired a gun. Andre Avery has not pointed to any evidence, however, that the swabs of Davis's hands were tested for gunshot residue.

F. *Alleged prosecutorial misconduct.*

¶40 In June of 2005, after Andre Avery filed the notices of appeal from the orders at issue in this case, he filed a *pro se* "supplemental" WIS. STAT. § 974.06 postconviction motion, claiming that the prosecutor committed misconduct in closing argument and that his trial lawyer was ineffective because the lawyer did not object. Andre Avery then filed a motion with us to stay his appeal until his "supplemental" § 974.06 motion was decided and we denied the motion. There is no trial court decision on this motion in the Record. *See* ***State v. Malone***, 136 Wis. 2d 250, 257, 401 N.W.2d 563, 566 (1987) (orders must be reduced to writing before appellate court has jurisdiction to review them).

¶41 Moreover, Andre Avery does not allege a sufficient reason for his not raising these contentions in his December of 2003 WIS. STAT. § 974.06 motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157, 162 (1994) (issues not raised in earlier postconviction motion cannot be raised absent a "sufficient reason" for the failure to do so). In his reply brief, Andre Avery claims that he was "abandoned" by his postconviction lawyer after the January 27, 2005, and February 1, 2005, hearings. This, however, is not true. As we have seen, the trial court appointed a lawyer to represent Andre Avery on his motion for a new trial based on newly-discovered evidence, and Andre Avery

does not explain why the performance of a lawyer appointed to represent him after he filed his *pro se* § 974.06 motion prevented him from raising the prosecutorial misconduct issue in that motion.

G. *Interest of justice/plain error.*

¶42 Finally, Andre Avery asks us to review any issue he waived in the interest of justice or under the doctrine of plain error. Either separately or cumulatively, however, the matters about which Andre Avery complains did not deprive him of a fair trial. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976).[5]

By the Court.—Orders affirmed.

Publication in the official reports is not recommended.

[5] On May 5, 2006, Andre Avery filed a *pro se* motion with this court to hold his appeal in abeyance, and seeking a remand to the trial court so that he could file a new postconviction motion regarding "unresolved issues." We denied his motion on May 17, 2006, because "[t]hese appeals have been briefed and are now ready for disposition," and instructed Avery, if he "wishe[d, he could] file a new postconviction motion in the circuit court."