COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2114 **Cir. Ct. No. 2001CF6028**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PABLO PARRILLA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

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

¶1 CURLEY, J. Pablo Parrilla appeals *pro se* from the order denying his "motion to vacate, set aside, or correct [his] sentence," after a jury convicted him of first-degree intentional homicide while armed, contrary to WIS. STAT.

§§ 940.01(1)(a) and 939.63(1) (2001-02).[1] Parrilla contends: (1) that he received ineffective assistance of trial and appellate counsel because his attorneys failed to pursue a psychological defense, move for a change in venue, call two character witnesses, and properly object to other acts evidence; (2) that his right to a trial by an impartial jury was violated; and (3) that his ***Miranda***[2] rights were violated because his attorney did not call him to testify at a hearing. We conclude that Parrilla's attorneys were not ineffective, that Parrilla is procedurally barred from arguing that he was not tried by an impartial jury, and that Parrilla's attorney's decision to not call him to testify did not violate Parrilla's ***Miranda*** rights. Therefore, we affirm.

I. BACKGROUND.

¶2 On November 11, 2001, Parrilla, his sister Melodia Parrilla (Melodia), and their mother, Melody Parrilla (Melody), were at Melody's house when they heard Melodia's girlfriend, Juana Vega, arrive and make threatening statements outside. Vega and Melodia had been fighting earlier that day. Parrilla walked outside holding a gun to confront Vega. Vega was apparently holding a hammer and making threats at Parrilla. Parrilla shot and killed Vega. He told police that he shot Vega because he was angry about Vega always beating up his sister. Parrilla was charged with first-degree intentional homicide while armed, for causing Vega's death with intent to kill her. He pled not guilty.

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

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶3 Parrilla's trial counsel brought a motion to suppress Parrilla's statements to police and a ***Miranda-Goodchild***[3] hearing was held. Two detectives testified that Parrilla was given his ***Miranda*** rights, that he voluntarily waived them, and that he did not ask for an attorney. Parrilla did not testify at this hearing. The court ruled the statements to police were admissible.

¶4 Prior to trial, reports about the case appeared in local media outlets, implying that Parrilla had killed Vega because she had "converted" his sister into a lesbian, and suggesting that the prosecutors amend the charge to a hate crime. In response, Parrilla's trial counsel filed a motion for partial, individual *voir dire*, submitting that the "inflammatory nature" of the reports required individual examination of potential jurors. The motion also sought individual *voir dire* with respect to questions about self-defense, spousal abuse, and sexual preference. The court used a method for "sensitive questions" that did not require individual *voir dire* of the entire panel, through which fifteen, of the fifty potential jurors, were interviewed individually. Six were ultimately stricken.

¶5 Throughout the trial, testimony was presented indicating that Vega and Melodia frequently argued, and that Vega had a violent personality. The defense pursued a self-defense strategy, and Parrilla took the stand in his own defense. He admitted shooting Vega, but testified that he did so only because he was scared and because Vega was trying to hit him with a hammer. He testified that he shot her in self-defense and that he hates violence. Over defense counsel's objection, the court allowed the State to introduce evidence to rebut Parrilla's

[3] ***Miranda***, 384 U.S. 436; ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

statement that he hated violence. The State introduced a letter Parrilla had written to Melodia, and argued that it was a threat to kill and contradicted the self-defense claim. The letter read:

> I'm depressed, angry, paranoid, fed up with seeing my family members fight. You said … you wouldn't fight with Juana. … If I see someone lay a hand on you, I will get geeked. I will explode. I don't want to hurt anyone no more. I am scared I will hurt someone or maybe even kill them. If Juana was a guy, I would throw her out the window and all her shit. I can't touch a woman. I'm dying inside. My fuse is about to be lit, and I don't know when the dynamite will go off. I hope you understand.

The State also introduced evidence of an incident that took place in September 2001 when Parrilla allegedly fired a gun at Vega, but did not hit her or cause other harm. Following a seven-day trial, a jury found Parrilla guilty. He was sentenced to life imprisonment with extended supervision eligibility after forty-five years.

¶6 Represented by appointed counsel, Parrilla appealed. The appeal raised one issue: whether the letter and the September 2001 shooting were improperly admitted as other acts evidence under WIS. STAT. § 904.02(2). This court concluded that they were not other acts evidence because they were "not offered to show a similarity between the alleged crime and the other acts," but were instead "offered to contradict Parrilla's testimony that he hated violence and acted only in self-defense," and to show "Parrilla's state of mind, including his own fear that he would commit violence in response to more fighting between Vega and his sister." We concluded that because Parrilla's testimony had opened the door, the State was properly allowed to offer the evidence. We summarily affirmed Parrilla's conviction. *See* ***State v. Parrilla***, No. 03-1142, unpublished slip op. (WI App Sept. 1, 2004).

¶7 On July 20, 2005, Parrilla filed a *pro se* "motion to vacate, set aside or correct sentence" under WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996),[4] arguing that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness, and that trial counsel was ineffective for failing to pursue a psychological defense, move for a change of venue, call two character witnesses, and "properly object" to other acts evidence; that his right to a fair and impartial jury was violated because of publicity; and that he was denied his right to counsel. The trial court denied Parrilla's motion, concluding that Parrilla's trial counsel was not ineffective for failing to: (1) pursue a psychological defense, because the claims were conclusory and Parrilla had not submitted an expert report showing that his state of mind would have been a mitigating factor; (2) move for a change in venue, because Parrilla had not identified any juror who did not appear impartial; (3) call two character witnesses, because the testimony would have been cumulative; or (4) "properly object" to other acts evidence, because the Court of Appeals already determined that the evidence was not other acts evidence.

¶8 The court also rejected Parrilla's argument that due to media coverage he did not receive a fair and impartial trial, concluding that "there is no indication in the record that the jury selected was biased or not impartial." The court likewise rejected Parrilla's contention that his trial counsel was ineffective at the ***Miranda-Goodchild*** hearing for not calling him as a witness, because even if

[4] Under ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), a defendant may bring a claim under WIS. STAT. § 974.06 before the trial court, alleging that postconviction counsel was ineffective because ineffective assistance of postconviction counsel may be "sufficient reason" under ***State v. Escalona-Naranjo***, 185 Wis. 2d 169, 517 N.W.2d 157 (1994), for failing to raise an issue previously. ***Rothering***, 205 Wis. 2d at 681-82.

he would have testified that he had asked for an attorney, "this court can say that it would have found his credibility sorely lacking." Parrilla now appeals the denial of his motion pursuant to WIS. STAT. § 809.30.

II. ANALYSIS.

A. Ineffective Assistance of Counsel

¶9 Parrilla contends that he received ineffective assistance of trial and appellate counsel because his attorneys failed to present a psychological defense, move for a change of venue, call two character witnesses, and properly object to other acts evidence.

¶10 The Sixth Amendment guarantees a criminal defendant a right to effective assistance of counsel. U.S. CONST. amend. VI. The well-known test for whether counsel provided ineffective assistance is set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). The Supreme Court established that counsel's assistance is ineffective if: (1) the performance was deficient; and (2) the deficiency prejudiced the defense. ***Id.*** at 687.

¶11 To establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "[T]he case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id.*** (footnote omitted). Counsel's performance is deficient

only if it was "outside the wide range of professionally competent assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Strickland***, 466 U.S. at 689-90.

¶12 To show prejudice, the defendant must prove that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We need not consider both prongs if we conclude that there is an insufficient showing of one. ***Id.*** at 697.

¶13 An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance resulted in a violation of defendant's right to effective assistance is a question of law that this court reviews independently. ***Id.*** We address each of Parrilla's arguments in turn.

1. "Psychological Defense"

¶14 Parrilla contends that his "trial counsel was ineffective for failing to pursue or investigate a psychological defense." He asserts that the absence of a "psychological report" in the record is "due to trial counsel's deficient performance," but maintains that the record "clearly indicates that Parrilla, prior to and at the time of the offense charge [sic], suffered from chronic anxiety, bipolar

disorder, and sever [sic] depression." He claims that because an investigation into his psychological state should have been trial counsel's main strategy, his failure to pursue it "is unreasonable under professional norms." Parrilla therefore asserts that the prejudice he incurred was that he was deprived of a "legitimate line of defense," and that had his trial counsel sought a psychological evaluation, there existed a reasonable probability that the jury would have returned a different verdict, because the evidence would have shown that he was not "a premeditated murder [sic]," but "a disturbed individual suffering from severe psychological disorders." He also claims that "[a]ppellate counsel was also ineffective for failing to raise issue with trial counsel's ineffectiveness." We disagree.

¶15 Parrilla's contention that his trial counsel should have pursued a "psychological defense" is little more than a hindsight analysis. *See* ***Johnson***, 153 Wis. 2d at 127. In light of Parrilla's admission to police that he shot Vega, his trial counsel decided that self-defense was the best strategy. This was an entirely reasonable approach and was supported by Parrilla's own testimony that he was scared because Vega threatened him, and that he shot her only after she attempted to hit him with a hammer. Even Parrilla's own argument that the fact that Vega initiated the incident by approaching Melody's house and threatening to kill him with a hammer "raises serious questions as to whether Parrilla was responsible for his actions," supports the self-defense strategy, not a psychological defense. Parrilla thus has not shown that his trial counsel's self-defense approach was not a "sound trial strategy." *See* ***Strickland***, 466 U.S. at 689.

¶16 Further, we agree with the State that Parrilla's trial counsel had little reason to pursue a psychological defense because Parrilla did not present any documentation before or during trial, or on appeal, that could have verified his claim that he been diagnosed with psychological conditions. While Parrilla claims

that the record "clearly indicates" that he was suffering from chronic anxiety, bipolar disorder and depression, the only portions of the record he points to for support of a diagnosis are his own testimony about his state of mind at the time of the shooting, and his mother's testimony. He also points to his letter to his sister and contends that it was "a cry for help," and that his references to being depressed, angry, paranoid, and feeling like he was dying inside are "mitigating factors." His and his mother's statements do not indicate a diagnosis, and neither do his references to his letter to his sister.

¶17 Parrilla also blames his trial counsel for the lack of a "psychological report," stating that the lack was "due to trial counsel's deficient performance." We agree with the State that it is unclear how counsel's performance could have affected the "existence" of documentation pertaining to Parrilla's disorder.

¶18 Because Parrilla's trial counsel's performance was not deficient, we do not reach the question of prejudice, and because Parrilla's trial counsel did not provide ineffective assistance, it follows that his appellate counsel was not ineffective for failing to raise ineffective assistance of trial counsel on appeal.

2. Change of Venue

¶19 Parrilla next submits that his pretrial counsel was ineffective for failing to seek a change of venue pursuant to WIS. STAT. § 971.22(3). A defendant may move for a change of venue under § 971.22[5] on grounds that an impartial trial cannot be had in the county where the action is brought. Parrilla

[5] WISCONSIN STAT. § 971.22(3) provides: "If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be had in any county where an impartial trial can be had."

contends that, rather than moving for partial, individual *voir dire*, "the proper course of action on the part of trial counsel should have been a motion seeking a change in venue due to his case being highly publicized." He asserts that in light of the aggressive promotion and pursuit of further criminal charges in the form of a "hate crime enhancer" by Vega's friends and family, "[t]rial counsel's decision with the information he possessed to not move for a change in venue defies logic and 'is unreasonable under professional norms.'" With respect to prejudice, he claims his Sixth Amendment right to a fair and impartial jury was violated, and that moving the trial to another county would have removed the bias from pre-trial publicity to which the local jury was subjected. We disagree.

¶20 Not only does Parrilla fail to explain how trial counsel's performance was deficient, but Parrilla has also not shown that the pre-trial publicity resulted in a jury that was not fair and impartial. Contrary to Parrilla's assertion, the record shows that the parties and the court made a concerted effort to ensure that the jury was not biased. In response to the motion for partial individual *voir dire*, the court discussed the issue at length with Parrilla's counsel and the State, with everyone realizing that there was a serious concern regarding the potential impact of the publicity. The court concluded that the best and most efficient way to address publicity and other "sensitive questions," that is, spousal violence and sexual preference, would be to ask the panel as a whole a general question and ask the jurors not to respond in open court, but to merely identify themselves by their number if they were going to respond, and then conduct individual *voir dire* on those potential jurors. The court addressed the panel as follows:

> At this time in terms of the sensitive questions, I'll begin in this respect.

> Evidence in this case will in part involve a lesbian relationship between the sister of the defendant Melodia Parrilla and Juana Vega, the victim. It also will entail and involve issues concerning spousal violence or domestic violence, again, questions in terms of sexual preference or the lesbian relationship and also deal with issues in terms of local news coverage, whether or not anyone has seen, heard, or read any information about this case from any media source or from any other source, is there anyone that has any issue or problem with these areas which in this case will have an impart on your ability to be a fair and impartial juror? And if there's a positive response, all I want right now is your number.

Based on the way the court phrased the question, it was impossible to know to which portion of the question a given juror was responding. The court conducted individual *voir dire* with fifteen jurors who raised their hand, six of whom were ultimately stricken. These fifteen individuals represent only a small portion of the fifty-person panel, and show that Parrilla's claim that pre-trial publicity made a fair and impartial trial impossible, is incorrect. In the absence of a showing that the jury was biased or impartial, Parrilla's trial counsel's performance could not have been deficient for failing to move for a change of venue, and because we do not reach the prejudice prong, Parrilla's claim for ineffective assistance fails.

3. Character Witnesses

¶21 Parrilla next argues that trial counsel was ineffective for failure to call two character witnesses. Anthony Manian, a relative of Vega's, and Debbie Donald, a previous victim of Vega's violence, would have testified about Vega's violent character, yet neither was called to testify. Parrilla asserts that the testimonies of Manian and Donald would have benefited Parrilla's defense substantially because they would have revealed Vega's violent nature and given Parrilla's self-defense claim more credibility. Parrilla also seems to claim that his

appellate counsel was ineffective for failing to raise the issue on appeal. We again disagree.

¶22 Several of the witnesses who did testify described Vega's propensity for violence. A detective provided testimony about photographs depicting scratches and scrapes Vega had inflicted on Melodia the day of the shooting. Parrilla's mother testified in detail about the violence her daughter experienced at the hands of Vega. Melodia herself testified about the fights she and Vega had, and told the jury that she felt Vega was violent and that at times she was scared of her. Other witnesses provided similar testimonies about Vega's violent character. The jury was thus well aware that Vega was known to be a violent person. Parrilla does not explain what Manian and Donald could have added about Vega's violent character to which numerous other witnesses had not already testified. We therefore conclude that the testimonies of Manian and Donald would have been a needless presentation of cumulative evidence, and would have caused undue delays and a waste of time. *See* WIS. STAT. § 904.03. Parrilla's trial counsel's performance was not deficient for failing to call witnesses whose testimonies would have been cumulative, and hence did not provide ineffective assistance. It follows that Parrilla's appellate counsel was not ineffective for failing to raise the issue.

4. Other Acts Evidence

¶23 Finally, Parrilla asserts that his trial counsel was ineffective for failing "to properly object" to other acts evidence of his letter to Melodia and the September 2001 shooting incident. Parrilla contends that, contrary to the State's assertion at trial that the letter and the shooting were offered to contradict Parrilla's claim of self-defense, to show motive and intent, and to explain the

relationship between Parrilla and Vega, "[t]he State presented the letter and alleged shooting incident for no other reason than to show Parrilla's bad character." He claims that because the State's argument for the admission of the letter and the shooting were faulty, and the letter and shooting were highly prejudicial, trial counsel was ineffective for not objecting to the admission of this other acts evidence on the basis that it was unfairly prejudicial. Parrilla also asserts that his appellate counsel was ineffective for failing to "raise the issue adequately on direct appeal." We once again disagree.

¶24 Parrilla's counsel did object to the introduction of the letter and the shooting when the State sought to introduce them after Parrilla stated that he hated violence, and prejudice was among the grounds that Parrilla's counsel argued: "So I mean, we're playing with a lot of prejudicial stuff here that this court better be concerned about, and I'm alerted to it too," and "I strongly object to getting into this matter." The trial court disagreed however. Although the court noted that the State had argued that the evidence showed motive and intent, the court stated that it was allowing it to rebut Parrilla's claim of self-defense. The court also noted that it did not find the evidence to be unduly prejudicial. On direct appeal, Parrilla's appellate counsel raised the issue of whether the letter and the shooting were improperly admitted as other acts evidence, and this court concluded that they were not other acts evidence under WIS. STAT. § 904.02(2) because they were not offered to show a similarity between the shooting and any other act, but were offered to contradict Parrilla's testimony that he hated violence and were therefore properly admitted. We see no reason to revisit the issue.

¶25 Parrilla's statement that he hated violence, inadvertent as it may have been, did open the door to the admission of a letter that threatened violent action and prior violent behavior, to rebut the claim of self-defense. The trial

court was well within its discretion to allow the evidence. Because the evidence was not other acts evidence and was properly admitted, and because Parrilla's trial counsel did not fail to "properly object" to it, counsel's performance was not deficient. Since trial counsel's assistance was not ineffective, appellate counsel, who did raise the issue of the admission of the letter and the shooting, was not ineffective for failing to "adequately" raise trial counsel's alleged ineffectiveness.

B. Right to Fair and Impartial Jury

¶26 Next, Parrilla contends that his Sixth Amendment right to a fair and impartial jury was violated because, due to a high concentration of pre-trial publicity, "jury selection from Milwaukee Country could not, and did not, result in a fair and impartial jury." He asserts that the trial court erred in not granting him an evidentiary hearing to resolve the claim. We are not convinced.

¶27 Under WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), a defendant is barred from pursuing claims in a subsequent appeal that could have been raised in a prior postconviction motion or direct appeal unless the defendant provides "sufficient reason" for failing to do so. ***Escalona***, 185 Wis. 2d at 181-82. Unlike his ineffective assistance of counsel claims, where appellate counsel's alleged ineffectiveness is considered a "sufficient reason" under ***Escalona*** for failing to raise them sooner, *see* ***Rothering***, 205 Wis. 2d at 681-82, Parrilla has not shown a "sufficient reason" for not raising this issue in his direct appeal. In fact, Parrilla does not even make an effort to explain why this argument was not raised on his direct appeal. He is therefore procedurally barred by ***Escalona-Naranjo*** from raising it now.

¶28 Even so, as already noted in our analysis of Parrilla's argument that trial counsel was ineffective for failing to move for a change of venue, Parrilla has

not shown how the trial court's meticulous method of assuring that the jury was fair and impartial resulted in an impartial jury.

C. ***Miranda*** *Rights*

¶29 Lastly, Parrilla asserts that he was denied his right to counsel during police interrogation. Parrilla appears to phrase this argument in the form of an ineffective assistance of counsel claim by asserting that Parrilla's trial counsel's performance was deficient for failing to call Parrilla to testify at the ***Miranda-Goodchild*** hearing. Parrilla asserts that he did in fact request an attorney, and his attorney should have allowed him to give testimony to that effect at the ***Miranda-Goodchild*** hearing, to contradict the statements of the two detectives that Parrilla did not request an attorney. He claims he should have been granted an evidentiary hearing to resolve the issue. We are not convinced.

¶30 The record contradicts Parrilla's claim that his trial counsel was not ineffective for failing to call him to testify that he asked for an attorney to rebut the detectives' testimonies. As the State correctly notes, Parrilla's trial counsel was actively advocating for Parrilla by bringing the motion to suppress in the first place. The record also shows that Parrilla's trial counsel conferred with Parrilla prior to making the decision not to call further witnesses. Parrilla's counsel may well have kept his client off the stand because his credibility was in question. Parrilla has not shown that this was not a reasonable strategy to pursue, and he could therefore not have been prejudiced. *See* ***Strickland***, 466 U.S. at 689. Parrilla is therefore not entitled to a hearing.

¶31 Moreover, even outside the ineffective assistance context, the trial court was well within its discretion to believe the detectives' testimony that Parrilla was given his ***Miranda*** rights, that he voluntarily waived those rights, and

that he did not ask for an attorney. The court thus had every right to deny Parrilla's motion to suppress his incriminating statement to police. For the reasons stated, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.