COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3135 **Cir. Ct. No. 1993CF2073**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES C. DILLARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. James Dillard appeals an order denying postconviction relief from a judgment convicting him of first-degree intentional homicide, first-degree recklessly endangering safety, and attempted second-degree intentional homicide. Dillard was convicted in 1995, and we affirmed his

conviction in 1996. In 2006, Dillard filed a WIS. STAT. § 974.06 (2005-06)[1] motion alleging that he received ineffective assistance from the attorney who represented him on his appeal. After a hearing, the circuit court denied the motion. We affirm.

¶2 Our decision in Dillard's first appeal sets forth the basic facts of the case as follows:

> The charges arose out of a confrontation between two groups of people: the "Allison group," comprised of (among others) the victims of the offenses, Fontaine Allison, Roy Allison and Brian Cunnigan, and the "Dillard group," comprised of the defendant, James Dillard, Aaron Brooks, and Melissa Kelly and her brother, Mathew Kelly.
>
> The incidents leading up to the confrontation occurred after members of the Allison group, learning that members of the Dillard group had made gang-related threats against them, confronted the Dillards at Melissa Kelly's apartment. There is no dispute that, while in the apartment, James Dillard shot Fontaine Allison and Brian Cunnigan, and that Fontaine Allison died from his wounds. There was also evidence, which Dillard denies, that he shot Roy Allison in the hallway outside the apartment. Beyond that, the facts leading up to the shootings, and the actions of members of both groups before and during the confrontation, were the subject of highly conflicting testimony ….
>
> Dillard was initially charged with one count of first-degree intentional homicide and two counts of attempted first-degree intentional homicide. His defense to the charges was that he shot the victims in defense of himself and/or other members of his group….
>
> The jury found Dillard guilty of the first-degree murder charge (Fontaine Allison) and of the lesser-included offenses of first-degree reckless endangerment (Roy

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> Allison) and attempted second-degree murder (Brian Cunnigan).

State v. Dillard, No. 1995AP2880-CR, unpublished slip op. at 2-3 (Wis. Ct. App. Nov. 14, 1996).

¶3 Dillard alleged in his WIS. STAT. § 974.06 motion that the attorney who represented him in the WIS. STAT. Rule 809.30 proceedings performed ineffectively, because that attorney did not raise issues concerning trial counsel's performance. Dillard alleged that trial counsel's ineffectiveness included counsel's failure to: (1) obtain an imperfect self-defense instruction, (2) call an expert ballistics witness to dispute the State's version of one of the shootings, (3) object to improper closing argument, (4) seek a new trial upon learning that the jury relied on improper extraneous information to find Dillard guilty, and (5) put into evidence testimony or a statement from a potentially helpful witness. After a hearing on the motion, the circuit court held that Dillard failed to show that either postconviction counsel or trial counsel performed ineffectively. On appeal, Dillard again contends that postconviction counsel should have challenged trial counsel's effectiveness on all of the grounds listed above.

¶4 A defendant may bring a claim of ineffective postconviction counsel by a WIS. STAT. § 974.06 motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-83, 556 N.W.2d 136 (Ct. App. 1996). A § 974.06 motion is typically barred procedurally, if filed after a direct appeal, unless the defendant shows sufficient reason why the issues raised could not have been raised in the appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). However, ineffective assistance of postconviction counsel may constitute a sufficient reason to avoid the ***Escalona*** bar. ***Rothering***, 205 Wis. 2d at 682. When a defendant claims ineffective assistance of postconviction counsel based on

a failure to raise trial counsel's ineffectiveness, the defendant must first establish that trial counsel provided ineffective assistance. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Whether an attorney provided effective assistance of counsel is a question of law which we review *de novo*. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). To prove ineffective assistance, a defendant must show both deficient performance by counsel and prejudice from that performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶5 Dillard first claims that trial counsel should have obtained an imperfect self-defense instruction. That claim is meritless because the trial court did, in fact, give this instruction.

¶6 Dillard next claims that trial counsel should have called an expert ballistics witness to dispute the State's version of one of the shootings. Dillard failed to show prejudice from trial counsel's alleged failure to call a ballistics expert for the defense because Dillard failed to offer any proof that a ballistics expert would have provided exculpatory testimony. Dillard presented the claim in conclusory fashion, based on nothing more than his own speculation as to what an expert might have said. There is no merit to this claim.

¶7 Dillard's next claim is that trial counsel should have objected to improper closing argument. Dillard failed to show that the prosecutor made improper remarks in closing. The prosecutor indicated in closing that the case largely boiled down to a credibility contest between Dillard and a veteran police officer. The prosecutor then declared that he did not think the jury could say that the officer, given his background, fabricated the case against Dillard and then lied about it at trial. In Dillard's view, by making these comments the prosecutor

improperly vouched for the officer's credibility. In our view, the prosecutor did nothing improper. A prosecutor may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces the prosecutor and should convince the jury. ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115. That is what the prosecutor did here. It was not improper to argue that either Dillard or the testifying police officer was a liar, because that is what their conflicting testimony showed. It was also not improper for the prosecutor to state his opinion on that conflict, or to ask the jury in making its determination to consider the police officer's experience and credentials. There is no merit to this claim.

¶8 For the first time in his reply brief, Dillard also contends that the prosecutor misstated facts in his closing argument. We generally do not address issues raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Additionally, Dillard fails to develop the argument, and we do not address it for that reason as well. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶9 Dillard next claims that trial counsel should have sought a new trial upon learning that the jury relied on improper extraneous information to find him guilty. After the trial, Dillard's trial counsel interviewed two jurors about the deliberations. Counsel learned that one juror had relied on his experience as a big game hunter to evaluate some of the evidence, and communicated his conclusions to the other jurors. A second juror reported that the jurors invited the prosecutor into the jury room after the trial and criticized him for not charging another person involved in the shootings. Dillard contends that counsel should have then challenged the verdict on the grounds that the jury impermissibly relied on

extraneous information, and engaged in improper ex parte communication with the prosecutor. However: "A juror's life experiences, even if they reflect predilections and inclinations that may stem from feelings of bias or prejudice, do not constitute either 'extraneous prejudicial information' or 'outside influence' as those terms are used in RULE 906.06(2), and may be shared with the jury …." ***State v. Delgado***, 215 Wis. 2d 16, 26, 572 N.W.2d 479 (Ct. App. 1997). Counsel's report indicates that nothing more occurred here than one juror sharing his life experience as a hunter which, as ***Delgado*** indicates, provided no grounds to challenge the verdict. As for the jurors' meeting with the prosecutor, counsel's report strongly suggests that the meeting took place after the verdict, at which point it did not matter. Dillard presented no evidence that it occurred before the verdict, when it might arguably have affected the outcome. This claim, likewise, is meritless.

¶10 Dillard's final claim is that trial counsel should have put into evidence the testimony or a statement from a potentially helpful witness. After the shootings, Cheryl Allison, presumably a relative of Fontaine Allison, applied to the Wisconsin Department of Justice for a victim's award under WIS. STAT. ch 949. The executive director of the Crime Victim Services unit, Carol Latham, denied the award upon concluding that Fontaine engaged in conduct that substantially contributed to his own death by seeking out a confrontation with Dillard and his group. Dillard contends that trial counsel performed ineffectively by failing to secure either Latham as a witness or her report as an exhibit. In fact, counsel moved to introduce both Latham's report and her testimony, and the trial court denied both requests. We agree with the trial court that Latham's opinion on what may have contributed to Fontaine's death, based on the Department's secondary investigation of the matter, was irrelevant. Because the trial court ruled

correctly, counsel cannot be faulted for failing to gain admission of the proffered evidence.

By the Court.—Order affirmed.

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