COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2034 **Cir. Ct. No. 92CF922369**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO VALTIERREZ,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Antonio Valtierrez appeals from an order denying his motion to vacate his judgment of conviction for first-degree intentional

homicide based on the alleged ineffective assistance of trial counsel.[1] Valtierrez argues that trial counsel was ineffective for failing to: (1) subpoena witnesses; (2) rigorously cross-examine prosecution witnesses; and (3) call him to testify in support of his self-defense claim. We affirm.

I. Background

¶2 In 1992, a jury convicted Valtierrez of first-degree intentional homicide for the 1990 murder of Juan Nieto, during a shooting outside a southside tavern. Samantha Gallegos, a tavern patron, testified that on exiting the tavern, she heard Valtierrez and Nieto exchange words and then saw Valtierrez fire several gunshots in the direction of Nieto and his truck. Trial testimony established that the fatal shot was delivered at nearly point-blank range after the victim had been incapacitated by Valtierrez's previous shots. Evidence also established that although Nieto had a gun in his vehicle, it had not been fired recently.

¶3 Valtierrez did not testify at trial. His account of the incident—that the shooting was in self defense—was presented to the jury through the testimony of Detective Procopio Sandoval. Recounting Valtierrez's post-arrest statement,

[1] Whether a claim of ineffective assistance of postconviction or appellate counsel provides "sufficient reason" to allow a defendant to raise claims for the first time in a WIS. STAT. § 974.06 motion is currently on review before the supreme court. *See* ***State v. Lo***, No. 01-0843, unpublished slip op. (Wis. Ct. App. Dec. 28, 2001), *review granted*, 2002 WI 48, 252 Wis. 2d 148, 644 N.W.2d 685 (April 29, 2002).

Sandoval stated that Valtierrez claimed that Nieto had threatened to kill him and had appeared to be reaching for a weapon when he fired at him.[2]

¶4 Following his conviction, Valtierrez appealed, arguing that: (1) he had been denied the right to effective assistance of counsel when the trial court ordered new counsel appointed to represent him after counsel requested a continuance; and (2) the trial court erred in refusing to grant a continuance to his predecessor counsel. This court summarily affirmed the judgment. *See* ***State v. Valtierrez***, No. 93-2020-CR, unpublished slip op. (Wis. Ct. App. July 15, 1994).

¶5 On March 18, 2002, Valtierrez, represented by new appellate counsel, filed a postconviction motion to vacate the judgment of conviction and to modify his sentence. He argued that he was denied effective assistance of trial counsel because counsel failed to call witnesses, including himself, and failed to ask certain questions of prosecution witnesses. He claimed that he had not raised these issues in his direct appeal because his previous appellate counsel was also ineffective, and that, under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), he may raise his "new" issues. Reviewing the postconviction motion, the circuit court addressed the merits of his claims, held that none of Valtierrez's arguments had merit, and denied the motion without conducting an evidentiary hearing. On appeal, Valtierrez challenges only the denial of his

[2] The State called Detective Sandoval who, in his direct testimony, related Valtierrez's statement. Defense counsel, cross-examining Sandoval, then elicited additional information about Valtierrez's statement, including the claim that Nieto had threatened to kill him and had appeared to be reaching for a weapon. Although this was hearsay, *see* ***State v. Johnson***, 181 Wis. 2d 470, 491 n.12, 510 N.W.2d 811 (Ct. App. 1993), neither party objected. "Unobjected-to hearsay is admissible." ***Id.***

motion to vacate his conviction based on the alleged ineffective assistance of trial counsel.

II. Analysis

¶6 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶7 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶8 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a

question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. ***Id.*** at 309-10. Whether a motion alleges facts warranting relief and thus entitles a defendant to a hearing is a legal issue, which we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has the discretion to deny the postconviction motion without a hearing, ***id.*** at 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶9 Valtierrez first argues that trial counsel was ineffective for failing to subpoena three witnesses—Jessica, who allegedly witnessed the shooting; Sandra Coriano, Valtierrez's then-girlfriend, who was also present at the shooting, and Antolino Coriano, Sandra's father, whom Valtierrez told police had hired him to kill Nieto. The circuit court rejected Valtierrez's claim because he had failed to show what those witnesses would have said if they had testified at trial. Thus, the circuit court concluded that Valtierrez had not shown that he was prejudiced by counsel's alleged failure to subpoena the witnesses.

¶10 On appeal, Valtierrez contends that his inability to show what the witnesses would have said had they testified is not his fault but, rather, is a direct result of trial and appellate counsel's deficient performances, which have left him unable to find the missing witnesses. Accordingly, he asks this court to "carve out an exception" to the prejudice prong of the ***Strickland*** test. This we cannot do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify or withdraw language from a previously published decision).

¶11 Moreover, even if we could carve it out, such an exception would not cover these facts. No factual predicate supports Valtierrez's contention that he is unable to obtain the information he needs to support a showing of prejudice. Nothing in the record shows that Valtierrez or his current counsel has made any effort to locate Jessica, Sandra or Antolino, much less that they were unable to locate the witnesses. Thus, as the State aptly observes, "no basis [exists] for [this] court to conclude that Valtierrez's current inability to locate the witnesses (if indeed he is unable to locate them) results from the [alleged] deficient performance of his prior counsel rather than from his own lack of diligence in attempting to locate those witnesses for the past eight years." We agree. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (A defendant who alleges trial counsel's failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case.).

¶12 Valtierrez also asserts that counsel was ineffective for failing to bolster his self-defense theory through a more thorough cross-examination of the medical examiner, the State's firearms expert, and one of the investigating detectives. We reject his assertion.

¶13 Valtierrez complains that during cross-examination of Dr. Jeffrey Jentzen, the medical examiner who performed the autopsy on Nieto, trial counsel did not ask any questions that would have determined whether Nieto had fired a gun. His complaint is without merit. In his preliminary examination testimony, Dr. Jentzen testified that although swabs of the victim's hands had been prepared, no evidence of powder residue was found on them. Hence, even if defense counsel had asked Jentzen if any evidence showed that the victim had fired a gun, his response, if consistent with his preliminary hearing testimony, would not have

assisted Valtierrez's defense. Clearly, Valtierrez was not prejudiced by counsel's alleged deficient performance.

¶14 Valtierrez also complains that when the State called Reginald Templin, a firearms expert, "[t]rial [c]ounsel again failed to ask any questions about the gun which was found in the victim's car." Again, his complaint lacks merit. Templin testified that he examined the gun and detected dirt and dust, but saw no evidence that it had been fired recently. In light of this testimony, and given Valtierrez's failure to offer any other information indicating that Nieto had brandished or fired his gun, it is difficult to understand what information Valtierrez thinks his counsel could or should have elicited from Templin.

¶15 Finally, Valtierrez complains that after Detective Michael Durfee testified in a manner that "seemed to indicate that there was no blood on the [gun's handgrip] where the victim would have been holding [it]," his counsel did not ask follow-up questions "that easily could have shown that the victim was actually holding a gun at the time of the shooting, which would have bolstered [his] self[-]defense argument." We disagree.

¶16 Durfee testified that blood was on the victim's gun. On cross-examination, defense counsel asked where it was located, and Durfee said, "There was blood on the bottom of the clip" and "on the front of the handgrip near the bottom." After the detective gave that answer, the trial court remarked, "Actually[,] you could see some blood on [sic] the photo [exhibit]; can't you?" The detective responded, "[Y]es, I believe so."

¶17 From this testimony, Valtierrez infers that the blood found on the gun reveals that the victim was holding the gun, thus supporting his self-defense claim. Although Valtierrez intimates that the evidence supports this inference, the

testimony, at best, suggests that the location of the blood might have been consistent with the gun having been in Nieto's grasp at the time he was shot. But, as the State notes,

> [E]ven [this] conclusion is a stretch, as the detective did not describe how far up the grip the blood extended and the photograph that showed the gun is not in the appellate record. There is simply no basis in the record, therefore, for Valtierrez's assertion that had his counsel questioned the detective further, he could have shown that Nieto was holding a gun at the time of the shooting.

We agree. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("appellate court's review is confined to those parts of the record made available to it").

¶18 Valtierrez has failed to establish that additional cross-examination of Dr. Jentzen, Mr. Templin or Detective Durfee would have yielded any testimony that would have aided his defense. The circuit court properly concluded that counsel was not ineffective in his questioning of these witnesses.

¶19 Valtierrez also argues that trial counsel was ineffective for failing to call him to testify about "his state of mind when presenting his self-defense claim." In his affidavit in support of his postconviction motion, Valtierrez claimed that he did not testify "because [he] did not understand that [he] could testify, and [he] was not asked to testify." He also claimed that "[he] did not speak any [E]nglish" and that he "had no knowledge of what was going on in [his] case." We reject his claims.

¶20 A defendant's right to testify is fundamental. ***State v. Wilson***, 179 Wis. 2d 660, 670, 508 N.W.2d 44 (Ct. App. 1993). We recognize, however, that a defendant may waive the right to testify. ***Id.*** at 671-72. Whether the record

demonstrates that the defendant knowingly and voluntarily waived this right presents a mixed issue of law and fact. *See* ***State v. Hajicek***, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781. We review the circuit court's factual findings to determine whether they are clearly erroneous. ***Id.*** We review issues of law *de novo*. ***Id.*** In deciding whether Valtierrez waived his right to testify, we consider the totality of the record. ***State v. Simpson,*** 185 Wis. 2d 772, 778, 519 N.W.2d 662 (Ct. App. 1994). Here, the trial record conclusively refutes Valtierrez's contention that he was unaware of his right to testify.

¶21 As the postconviction court observed:

> The record as a whole … shows conclusively that the decision not to testify was the defendant's, that it was knowing and voluntary, and that it was not motivated by unprofessional advice from defense counsel. Contrary to the image the defendant attempts to conjure in his affidavit that he was in the dark about testifying until after the trial, the court record and the transcripts show:
>
> > > that an interpreter was present during all proceedings on December 2, 1992 [when he was questioned on his decision whether to testify] …;
> >
> > > that [the trial court] asked in the defendant's presence whether the defendant would testify, and the defendant's lawyer told the [trial court] that he would "talk to him over the lunch [break]";
> >
> > ….
> >
> > > that the defendant himself told [the trial court], through an interpreter, that he discussed with his attorney his right to testify and his right not to testify and that it was his decision not to testify;
> >
> > > that the defendant's lawyer told [the trial court] in the defendant's presence that he had discussed the defendant's right to testify "in great detail both today and on previous

> occasions" with the defendant and that the defendant "has been always in agreement with me that he does not wish to testify[.]"
>
> Thus the trial transcript belies the defendant's claims, made almost 8 years later, that he was unaware of or misled as to his right to testify….

¶22 On appeal, Valtierrez asserts that because he had no criminal record "[t]here was no objective or subjective reason to keep [him] from testifying in his own defense." We disagree. One critical reason supported his decision not to testify: his testimony from the ***Miranda-Goodchild*** hearing. The glaring inconsistencies of Valtierrez's testimony at that hearing led the trial court to deem him not credible. In light of this, Valtierrez's decision not to testify was logical and consistent with his defense. After all, by not testifying, Valtierrez was able to present his version of the incident to the jury without being subjected to cross-examination.[3] Hence, he reduced the risk that the jury would reject his account as incredible, and eliminated his chance of being impeached by his prior testimony.

¶23 Consequently, we conclude that the circuit court properly found that the "transcript belies [Valtierrez's] claims . . . that he was unaware or misled as to his right to testify." The record conclusively demonstrates that Valtierrez knowingly and voluntarily, with the assistance of counsel, decided not to testify.

By the Court.—Order affirmed.

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

[3] *See* footnote 2, above.