COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2830 **Cir. Ct. No. 1996CF964194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MYRON A. GLADNEY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: REBECCA F. DALLET and DENNIS R. CIMPL, Judges.[1] *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

[1] The Honorable Rebecca F. Dallet entered the order denying Gladney's postconviction motion. The Honorable Dennis R. Cimpl entered the order denying Gladney's motion for a new trial.

¶1 PER CURIAM. Myron A. Gladney appeals an order denying his motion for postconviction relief brought pursuant to WIS. STAT. § 974.06 (2009-10). He also appeals an order denying his motion for a new trial based on newly discovered evidence. Gladney argues: (1) that he received ineffective assistance of trial counsel because his attorney did not object to the imperfect self-defense jury instruction; (2) that he received ineffective assistance of trial counsel because his attorney did not challenge a juror for cause who said that he could not be impartial; and (3) that he is entitled to a new trial based on newly discovered evidence. We affirm.

¶2 Gladney was convicted of first-degree intentional homicide in 1996 and sentenced to life imprisonment, with a parole eligibility date of December 18, 2071. He filed a direct appeal from his conviction. We affirmed the conviction in 1998. Gladney filed a motion for postconviction relief in 2009, raising his current ineffective assistance of counsel claims. The circuit court denied the motion, and Gladney filed this appeal. While the appeal was pending, Gladney moved for remand to the circuit court on the grounds of newly discovered evidence. To facilitate the consideration of all of Gladney's claims together, we granted the motion to remand. After a hearing, the circuit court denied the motion for a new trial based on newly discovered evidence. That claim is now before us, in addition to the issues stemming from the 2009 order denying Gladney's motion for postconviction relief on the basis of ineffective assistance of counsel.

¶3 Gladney argues that he received ineffective assistance of trial counsel because his attorney did not object to the imperfect self-defense jury instruction. The jury instruction complied with then-current case law, which provided that imperfect self-defense required a showing that the defendant had an objectively "reasonable belief that he was preventing or terminating an unlawful

interference with his person." ***State v. Camacho***, 176 Wis. 2d 860, 865, 501 N.W.2d 380 (1993) (holding modified by ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413). Gladney contends that the instruction was in error because ***Camacho*** was subsequently overturned by ***Head***, in which the supreme court held that "a defendant seeking a jury instruction on unnecessary defensive force (imperfect self-defense) to a charge of first-degree intentional homicide is *not* required to satisfy an objective threshold showing that she was acting under a reasonable belief … that the force she used was necessary to defend herself," and must instead show only "some evidence that she *actually* believed … that the force she used was necessary to defend herself." ***Id.***, 255 Wis. 2d 194, ¶5.

¶4 An attorney does not render ineffective assistance when he acts in accordance with established law, even if that law is subsequently overturned. *Cf.* ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994). Gladney's attorney had no reason to object to the imperfect self-defense jury instruction because the instruction was based on the law as it stood as of the time the trial was conducted. Therefore, we reject this argument.

¶5 Gladney next contends that he received ineffective assistance of trial counsel because his attorney did not move to strike one of the jurors for cause. The juror, who was a police officer, informed the court that he knew one of the detectives involved in the case. The following exchange took place:

> THE COURT: If he is called as a witness in this case, will you be able to apply the standards … in assessing his testimony and weigh it for credibility and all those other factors I advised you about? Will you be able to do that?
>
> JUROR: Yes, ma'am.
>
> THE COURT: Would the fact you know of him affect your ability to be fair and impartial as a juror in this case?

JUROR: Yes.

THE COURT: Do you think you could be fair and impartial?

JUROR: Yes.

¶6 After reviewing this colloquy as a whole, we conclude that the juror simply misspoke when he answered "yes" to the second question. After the juror answered "yes," the circuit court then restated the question, asking "[d]o you think you could be fair and impartial?" The juror answered "yes," and was unequivocal in making this clarification, which *followed* the prior contrary answer. Therefore, we reject Gladney's argument that trial counsel erred by failing to move to strike the juror for cause from the jury panel.

¶7 Gladney next argues that he is entitled to a new trial based on newly discovered evidence. "When moving for a new trial based on the allegation of newly discovered evidence, a defendant must prove … 'the evidence was discovered after the conviction.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). In his motion for remand, Gladney contended that he discovered on February 4, 2010, that his trial counsel had "fail[ed] to investigate an exculpatory witness." He further contended that the potential witness, Carl Calhoun, would have testified that the victim had robbed Gladney, Carl Calhoun, and others a few weeks prior to the altercation during which Gladney shot Calhoun. However, at the hearing on the postconviction motion, Gladney admitted that his attorney knew about Carl Calhoun as a potential witness since before the trial, but told Gladney before trial he did not intend to call him. Calhoun's potential testimony was thus not "newly discovered" evidence because trial counsel knew about Carl Calhoun's potential testimony before trial.

Therefore, we reject Gladney's claim that he is entitled to a new trial based on newly discovered evidence.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).