COURT OF APPEALS
DECISION
DATED AND RELEASED

August 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2318-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Jack Williams,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

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

PER CURIAM. Jack Williams appeals from a judgment of conviction, following a jury trial, for first-degree intentional homicide party to a crime. He also appeals from the trial court orders denying his postconviction motions. He raises several issues. We affirm.

I. FACTUAL BACKGROUND

In their briefs to this court, neither party has provided a statement of the facts. The trial court, however, in its decision denying one of Williams's postconviction motions, provided a factual summary:

> The evidence at trial established, with little or no controversy, that there was a traffic dispute involving a car containing the defendant and a car containing Robert Mills, a dispute which began with an exchange of verbal insults and hand gestures and the display of a gun by the defendant. The cars separated, but at the urging of the defendant, the occupants of his car went looking for the victim's car for the purpose of pursuing the confrontation. At least one other occupant of the defendant's car was armed with a handgun. The victim's car was quickly found and followed. When the victim's car stopped, the defendant's car pulled up and the defendant pointed a handgun out the window and fired five shots at Mills as Mills was trying to get out of his car. The bullet which killed Mills entered the rear of his arm, passed th[r]ough his chest cavity, and came out the front of his chest.

The trial court also identified the key issues in the case:

> The primary issues at trial concerned self-defense, and the principal factual dispute concerned whether Robert Mills removed or displayed his weapon before he was shot. The State argued that he did not, although the defendant testified that he believed that Mills pulled out a gun. The defendant contended that his conduct was completely privileged or at least that imperfect self-defense mitigated the offense to second degree intentional homicide.

Initially, Williams was found to be incompetent to stand trial and he was committed to a mental health facility. The mental health professionals who evaluated Williams disagreed about whether he was truly incompetent or merely malingering. Eventually, however, those who originally believed Williams was incompetent came to conclude that he had improved to the point where he was competent to stand trial.

Following Williams's conviction, and as part of the presentence process, Williams was evaluated by a psychologist, Dr. Robert H. Ver Wert. It is Dr. Ver Wert's report that formed the basis for Williams's second postconviction motion and for most of his challenges on appeal. Dr. Ver Wert's report stated, in part:

> [Williams's] results on the Wechsler Adult Intelligence Scale - Revised were all consistently within the 60 IQ range, Mild Mental Retardation (1st percentile). His verbal IQ was a 63, his pro-rated nonverbal IQ was a 63 and his full scale IQ was a 62. All but two of the nine subtests were in the Mentally Retarded Range. Of special interest would be his comprehension subtest which measures social maturity. It indicated little social maturity and a problem with impulse control. His score was a "2" with 1 to 4 being in the Mentally Retarded Range. His results would suggest he would have trouble comprehending what society is expecting him to do.

II. SELF-DEFENSE JURY INSTRUCTION

Based on the Ver Wert report, Williams first argues that the standard self-defense instruction provided by the trial court was erroneous in this case because it required the jury to evaluate his self-defense theory according to what "a person of ordinary intelligence and prudence" would have perceived when, in fact, he was not "of ordinary intelligence and prudence."[1]

Williams failed to object to the standard self-defense instruction. Thus, he has waived a direct challenge on this issue. ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). Consequently, Williams can only challenge the jury instruction by arguing that counsel was ineffective for failing to object, or by asking this court to exercise its power of discretionary reversal under § 752.35, STATS. As the State points out, however, although Williams has argued both ineffective assistance and discretionary reversal with reference to other issues he has presented on appeal, he has argued neither theory with reference to the jury instruction. Thus, we reject Williams's first challenge to his conviction. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

III. EXPERT TESTIMONY

Williams next argues that he did not receive a fair trial due to the lack of expert testimony on his mental condition. He contends, therefore, that he is entitled to either (1) a new trial where he would "present expert testimony

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[1] In relevant part, WIS J I—CRIMINAL 805 states:

> In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.
>
> (Footnotes omitted.)

to the effect that his ability to reasonably judge whether he was threatened by the victim, and whether the defendant's response to the victim was appropriate, was impaired by his mental retardation and depression" or (2) a special plea trial where he would "be entitled to a 'second phase' trial on the issue of whether he was not responsible due to a mental disease and defect."

A. Newly-Discovered Evidence

Williams contends that he is entitled to a new trial based on what he considers to be newly-discovered evidence, which he terms "[t]he [e]xtent of [his] [m]ental [d]efect" and the "state of mental retardation" documented in Dr. Ver Wert's report. For evidence to qualify as "newly-discovered evidence" requiring a new trial, it must satisfy five criteria:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

State v. Herfel, 49 Wis.2d 513, 521-522, 182 N.W.2d 232, 237 (1971). "Each test must be satisfied to entitle the moving party to a new trial." ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989).

We need not consider all the criteria because it is clear that Williams has failed to satisfy the first two. We agree with the following analysis in the State's brief:

> The first criterion is that the evidence must have come to the moving party's knowledge after the trial. If one were to focus specifically on the testing done by Dr. Ver Wert, this criterion might be deemed satisfied. But viewing the evidence at issue in the broader sense as being evidence of the defendant's

> mental retardation, such evidence was clearly within the defendant's knowledge before trial. As the trial court pointed out, one of the psychiatrists who interviewed the defendant for the pretrial competency determinations suggested that the defendant was "a person with borderline intelligence."[2] During proceedings immediately before trial commenced, defense counsel stated regarding the defendant that he has "some minor mental problems" and is "a little slow in certain respects." During the ***Goodchild-Miranda*** hearing held at the same time, defense counsel referred to the defendant as having an "obvious learning disability and slight slowness." When the defendant testified at his trial, he indicated that he had been in "special education-type classes" on account of his "[l]earning disability." ... Under the circumstances, it cannot be said that the defendant and his counsel did not know of the defendant's mental retardation before trial. The first criterion for newly discovered evidence has not been shown here.
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> And, if one were to view the evidence at issue in the narrow sense of being the particular evidence of mental retardation that Dr. Ver Wert was ready to offer (i.e., the intelligence testing showing his IQ), the first criterion might be present, but the second clearly would not. Given what the defendant and his counsel knew about the defendant's slowness, they would certainly have to be deemed negligent in failing to discover evidence of his IQ through intelligence testing.

B. Ineffective Assistance

[2] Denying Williams's second post-conviction motion, the trial court wrote that the "evidence that the defendant may have been of 'borderline intelligence' was contained in the competency evaluations, and the specific scores asserted by Dr. Ver Wert do not constitute material new evidence."

Williams further argues that the trial court at least should have held an evidentiary hearing on the question of whether trial counsel was ineffective for failing to pursue a theory of defense based on his mental condition. The trial court concluded that Williams had failed to offer sufficient factual allegations to require a hearing.

We review a trial court's denial of an evidentiary hearing under the two-part test enunciated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
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> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson [v. State***, 54 Wis.2d 489, 195 N.W.2d 629 (1972).][3]

Id. at 310-11, 548 N.W.2d at 53 (citations omitted).

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[3] In ***Nelson v. State***, 54 Wis.2d 489, 195 N.W.2d 629 (1972), the supreme court stated that:

> if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 497-498, 195 N.W.2d at 633.

In this case the trial court correctly concluded that Williams failed to offer anything more than conclusory allegations of ineffective assistance of counsel. Williams's motion merely asserted that "the failure of defense counsel to consider a 'mind-science' defense has been ruled to be ineffective assistance of counsel." Williams failed to allege facts that, if true, would have established that counsel's failure to consider such a defense constituted deficient performance or was prejudicial.

IV. DISCRETIONARY REVERSAL

Williams argues that we should grant discretionary reversal and order a new trial under § 752.35, STATS.[4], to allow for the introduction of expert testimony on his mental condition, either at a single-phase trial, or at the second phase of a special plea trial. We conclude, however, that Williams has not established that discretionary reversal would be appropriate.

The power of discretionary reversal should be exercised "only in exceptional cases." ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990). Under § 752.35, STATS., we will grant discretionary reversal only where the real controversy has not been fully tried or where justice has miscarried. Moreover, of particular importance in this case, discretionary reversal is "not intended to allow a party to try a case on one theory and losing on that theory to have a second trial on a different, valid theory." ***State v. Sarinske***, 91 Wis.2d 14, 60, 280 N.W.2d 725, 746 (1979); *see also* ***State v. Hubanks***, 173 Wis.2d 1, 29, 496 N.W.2d 96, 106 (Ct. App. 1992) ("[T]he statute was not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense at a new trial merely because the defense presented at the first trial proved ineffective.").

In this case, as the trial court explained in denying Williams's second postconviction motion, "the principal factual dispute concerned whether Robert Mills removed or displayed his weapon before he was shot. The State argued that he did not, although [Williams] testified that he believed that Mills pulled out a gun." The jury thus had to evaluate the credibility of the witnesses and their respective accounts of the incident. In doing so, the jury had the

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[4] Section 752.35, STATS., in relevant part, states:

> **Discretionary reversal**. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment ... regardless of whether the proper motion or objection appears in the record and may ... remit the case to the trial court ... for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

chance to consider not only Williams's account, but also his individual circumstances, including his mental capacity, in determining whether his "beliefs were reasonable" according to "what a person of ordinary intelligence and prudence would have believed *in the defendant's position under the circumstances that existed*."

V. MISSTATEMENT IN JURY INSTRUCTION

Finally, Williams argues that a new trial is required because the trial court accidentally substituted the word "defendant" for "State" at one point in the jury instructions.[5] This, Williams contends, "placed a non-existent burden on the defendant in a case where the jury instructions were already very complex[,] ... holding [him] to a standard of care he could not possibly meet." As the trial court's written decision denying Williams's first postconviction motion carefully explains, however, this single error could not have had any bearing on the jury's understanding.

The instructions, accurate in all other respects, clarified the burden of proof and, further, the written instructions provided to the jury were accurate. Additionally, as the trial court explained, "the use of the word 'defendant' as misread by the court makes absolutely no sense, since the defendant obviously did not want to prove these things and obviously did not have to prove them." We agree and, therefore, here, as we have commented in

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[5] Reading the instructions to the jury, the trial court mistakenly substituted "defendant" for "State" where italicized in the following:

> [T]he third element ... requires that the defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This ... requires the *State* to prove any one of the following:
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> One, that the defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or; two, the defendant did not actually believe he was inimminent danger of death or great bodily harm; or, three, that the defendant did not believe the force used was necessary to prevent great bodily harm to himself.

a comparable case, "the instructions, considered in their entirety, render any error harmless because the overall meaning communicated by the instructions was a correct statement of the law." ***State v. Hatch***, 144 Wis.2d 810, 826, 425 N.W.2d 27, 34 (Ct. App. 1988). Accordingly, we conclude that there is no "reasonable likelihood that the jury applied the instruction in a way that violates the defendant's rights." ***State v. Foster***, 191 Wis.2d 14, 28, 528 N.W.2d 22, 28 (Ct. App. 1995).

By the Court. – Judgment and orders affirmed.

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