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May 9, 2014

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP1817 State of Wisconsin v. Casey J. Shelton (L.C. #2007CF68)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Casey Shelton appeals an order that denied his second postconviction motion from a reckless homicide conviction for the death of his infant son Christopher. The question before us on this appeal is whether the circuit court properly denied the motion without a hearing.[1] After

[1] Shelton also complains that the circuit court did not individually address each of his current claims in its written decision. We need not reach that issue, however, because we independently determine whether the allegations in the postconviction motion warranted a hearing. *See* ***State v. Allen***, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124.

reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2] We affirm.

In the postconviction motion currently under review, Shelton enumerated over a dozen issues and sub-issues, several of which overlapped. We understand Shelton's arguments to revolve around the following core claims: (1) trial counsel should have elicited impeachment testimony from two witnesses interviewed by a defense investigator regarding various incidents of physical and verbal abuse the two had witnessed the victim's mother, Amy Uptegraw, and her parents Ron and Cindy Uptegraw, perpetrate upon Amy's children;[3] (2) trial counsel should have objected to demonstrative evidence in which an expert witness used a doll to show potential ways the victim could have been injured; (3) trial counsel should have requested a change of venue due to pretrial publicity; (4) trial counsel should have moved to strike a number of jurors for cause; (5) trial counsel should have moved to suppress autopsy photos and the death certificate as unduly prejudicial, and raised a hearsay objection to a videotaped recording of the statement the victim's mother made to police; (6) trial counsel should have requested a cautionary instruction regarding the limited use of other acts evidence; (7) the prosecutor failed to turn over potentially exculpatory evidence, including Shelton's 911 call and hospital records that contradicted testimony given by the State's witnesses; (8) the prosecutor elicited false testimony regarding the chain of custody of the victim's clothing, as evidenced by the hospital records; (9) the prosecutor offered personal opinions, vouched for witnesses, and called for

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

impermissible inferences from character evidence during his closing argument; (10) the admission of other acts evidence violated not only State evidentiary rules (as argued on Shelton's prior appeal), but also federal rules and constitutional principles; (11) the circuit court should have excluded evidence relating to prior injuries to the victim; (12) the evidence was insufficient to establish Shelton's guilt beyond a reasonable doubt because there was not even certainty as to the exact cause of death, much less what actions had led to it; (13) the lack of evidence beyond other acts relieved the State of its burden of proof; and (14) the cumulative effect of these errors deprived Shelton of his constitutional due process rights.

The State argues—and the circuit court found—that all of Shelton's current claims are procedurally barred by past proceedings in which Shelton either could have raised them or actually did raise them. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (claims that could have been raised on a prior direct appeal or postconviction motion from a criminal judgment of conviction cannot be the basis for a subsequent § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim in the earlier proceeding); ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (an appellant may not relitigate in subsequent postconviction proceedings matters previously decided on a direct appeal, no matter how artfully rephrased).

Shelton concedes that he previously raised the issues of ineffective assistance of trial counsel and the admission of other acts evidence, but he contends that his legal theories on those issues are significantly different now and that he did not previously raise the other issues. He

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[3] Shelton also contends that the jury should have been informed that other children were removed from the care of the victim's grandparents just two weeks after Shelton's trial, based upon additional abuse allegations. However, events that happened after trial are outside the scope of a postconviction motion filed under WIS. STAT. § 974.06.

attributes his failure to raise all of the issues he is now advancing in their current form to ineffective assistance of postconviction counsel.

We independently review Shelton's motion to determine whether the allegations therein are sufficient to warrant a hearing, or whether they are procedurally barred. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We begin our analysis of whether Shelton's claims are procedurally barred by reviewing two prior decisions of this court.

On his direct appeal, Shelton challenged the admission of evidence relating to his past physically-violent and verbally-abusive conduct toward the victim, two of the victim's siblings, the children's mother, and the parents of the children's mother. *See* ***State v. Shelton***, No. 2011AP52-CR, unpublished slip op. (WI App Nov. 15, 2012). We determined that testimony that Shelton had thrown the victim's twin brother on the floor two days before the victim's death in response to the child's vomiting was other acts evidence properly admitted to establish a potential motive for injuring the victim—namely, an obsession with cleanliness. ***Id.***, ¶¶8, 10-11, 18. We further determined that testimony that Shelton had threatened en route to the hospital to kill the family of the victim's mother if she "said anything" was admissible to show consciousness of guilt, and that other testimony about Shelton's treatment of members of the mother's family was admissible evidence to place the threat into context. ***Id.*** at ¶¶21-22. We assumed without deciding that testimony that Shelton had put rags in the mouths and blankets over the heads of the victim and his twin brother on several instances when they cried should have been excluded because those incidents were not sufficiently similar to the head injury that had killed the victim, but concluded that any error was harmless given the strength of the properly admitted evidence. ***Id.*** at ¶¶19-20. We also rejected Shelton's additional claims that trial counsel provided ineffective assistance by failing to request a limiting instruction on the other

acts evidence and by failing to raise a hearsay objection to the mother's videotaped statement to police. ***Id.*** at ¶¶25-26.

Shelton subsequently petitioned this court for a writ of habeas corpus alleging that appellate counsel had provided ineffective assistance by failing to adequately challenge the relevance of the testimony that Shelton had previously thrown the victim's brother to the floor; the relevance of testimony about additional non-fatal injuries suffered by the victim; and the sufficiency of the evidence to support the verdict. *See* ***State ex rel. Shelton v. Schwochert***, No. 2013AP2073-W, unpublished slip op. (WI App Dec. 10, 2013). In rejecting these claims, we emphasized that evidence presented by the State "that the victim suffered a fatal brain injury while in the exclusive care of Shelton—coupled with evidence that Shelton had a plausible motive for inflicting violence on the child and that Shelton had threatened on the way to the hospital to kill the family of the victim's mother if she said anything—provided [more than enough circumstantial evidence for the jury to infer] that Shelton had recklessly caused his son's death." We concluded that it would not have made any difference to the outcome of the appeal if appellate counsel had raised the additional issues identified by Shelton or framed his arguments the way Shelton wanted.

Based upon our review of Shelton's two prior proceedings in this court, we conclude that the sixth, ninth, tenth, eleventh, twelfth, and thirteenth claims, and the second part of the fifth claim in Shelton's current WIS. STAT. § 974.06 motion—which all relate to the admission, use, and sufficiency of other acts and other injury evidence—have already been substantially litigated, and are therefore barred by ***Witkowski***. The State argues that Shelton's first, second, third, and fourth claims, and the remaining part of his fifth claim are also barred by ***Witkowski***, because they are all presented in the framework of ineffective assistance of trial counsel. The

State similarly contends that Shelton's seventh and eighth claims are barred by ***Witkowski,*** because Shelton raised a different claim of prosecutorial misconduct in his original postconviction motion. We disagree, and view as a separate claim each allegation of ineffective assistance of counsel or prosecutorial misconduct that is premised on a legally and factually distinct alleged error by trial counsel or the State.

We next consider whether Shelton's remaining claims of ineffective assistance of trial counsel and prosecutorial misconduct are barred by the consolidation requirement of ***Escalona-Naranjo*** because they *could* have been raised in his first postconviction motion, on his prior appeal, and/or in his habeas corpus petition. As far as we can determine from the materials before us, Shelton had all the facts necessary to raise his additional claims by the time he filed his original postconviction motion. Shelton's assertion that the reason he did not timely assert any of these additional claims was due to postconviction counsel's deficient choice of issues requires Shelton to not only make allegations establishing deficient performance and prejudice, but to also show that the "'ignored issues are clearly stronger than those presented.'" ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (quoted source omitted).

Shelton's first, second, fifth, seventh, and eighth claims all revolve around evidence that Shelton believes the jury erroneously heard or was prevented from hearing due to the actions of counsel or the prosecutor. We reject the second and fifth claims because the demonstrative doll evidence, autopsy photos, and death certificate were all plainly admissible, and therefore counsel had no reason to object to them. As to the first, seventh, and eighth claims, the allegations in Shelton's motion are insufficient to show that the exclusion of the challenged evidence or the disclosure and admission of withheld evidence would have made a difference in the outcome of his trial. *See* WIS. STAT. RULE 805.18(2) (an evidentiary error does not require a new trial unless

it "has affected the substantial rights of the party seeking to reverse or set aside the judgment"); ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (evidence is material for purpose of establishing a ***Brady*** violation only when there is a reasonable probability that its disclosure would have led to a different result in the proceeding).

Broadly speaking, Shelton contends that the jury would have been less likely to find the State's witnesses credible—and may have viewed one or more of them as potential suspects—if it had known that the victim's mother and her parents had committed other abusive acts towards children and if it had seen hospital records that appeared to provide information inconsistent with testimony given about the chain of evidence for the victim's clothing and about whether family members were left alone with the victim's body before the coroner arrived at the hospital. Shelton further contends that the jury would have been less likely to draw adverse inferences about his actions and mental state if it had heard the tone of his voice in the 911 call. All these assertions of prejudice rest on the premise that the infant's death could have been caused by an injury inflicted four to ten days earlier, resulting in a "chronic" hematoma that placed increasing pressure on the infant's brain. But the medical evidence produced at trial did not support that defense theory because even the defense expert conceded that the autopsy photos did not show a sufficient volume of blood in the infant's brain to indicate a chronic hematoma, and Shelton himself told investigators that the infant's behavior was normal until shortly before his death. Rather, the overwhelming medical evidence established that the infant died nearly instantaneously after receiving a blow to the head while in Shelton's sole care.

In short, regardless whether other relatives also were abusive to the victim or to others, or whether any of them had access to the infant's body or clothing after the infant's death, none of them had an opportunity to inflict the fatal injury. Since the relatives were neither witnesses to

the act that killed the infant nor viable alternative suspects themselves, their testimony about Shelton's prior bad acts went only to establish Shelton's potential motive and consciousness of guilt. Given the strength of the medical evidence, we do not view the relatives' credibility as being as essential to the State's case as Shelton contends, and are not persuaded that additional impeachment evidence or playing the 911 call would have altered the outcome of the trial.

We turn next to Shelton's third and fourth claims, that trial counsel should have moved for a change of venue and sought to strike a number of jurors for cause, citing significant pre-trial publicity and the number of jurors who knew the prosecutor or state witnesses. However, the transcript of voir dire shows that trial counsel did, in fact, individually question potential jurors about what they had heard about the case, as well as their associations with anyone involved in it. The circuit court struck for cause all those who indicated that they had formed opinions of the case based on things they had heard about the case or about Shelton, or had strong emotions regarding harm to children, which they would have difficulty putting aside. Therefore, we are not persuaded that either of these claims is clearly stronger than the other-acts-evidence claims that postconviction and appellate counsel chose to pursue.

Finally, Shelton's fourteenth claim regarding the cumulative effect of the alleged errors is insufficient to warrant a hearing when all of his claims of error are procedurally barred.

IT IS ORDERED that the order denying Shelton's second postconviction motion is summarily affirmed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*