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May 10, 2017

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

2016AP1199-CR State of Wisconsin v. DeMario Denell Jackson
(L.C. # 2013CF3419)

Before Kessler, Brash and Dugan, JJ.

DeMario Denell Jackson appeals from a judgment of conviction and an order denying his postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Background

On July 27, 2013, just after midnight, a fight broke out on North 12th Street. Milwaukee police responded to a complaint of multiple shots fired. When they arrived, one person was dead and three people were injured. Several witnesses identified Jackson as the shooter. According to the criminal complaint, one of these witnesses was Nicole Bush. She told police that Jackson had appeared with a long gun, firing seven times from the hip.

Jackson was charged with one count of first-degree reckless homicide, one count of possession with intent to deliver less than two hundred grams of tetrahydrocannabinols,[2] and three counts of first-degree recklessly endangering safety. Before trial, an amended information increased the homicide charge to one count of first-degree intentional homicide and added one count of possession of a firearm by a felon.

At trial, no fewer than six witnesses, not including Bush, testified that Jackson was the shooter. Bush was called in the State's rebuttal case, but gave evasive answers. She acknowledged telling police she saw Jackson with a long gun in both hands and firing seven times, but she testified that she did not actually see that happen. The jury convicted Jackson on all six counts. He was sentenced to life imprisonment with parole eligibility after fifty-six years for the homicide, a concurrent two years' imprisonment for the drug offense, and an additional twenty-five years' total imprisonment in consecutive sentences on the remaining four offenses.

[2] When Jackson was taken into custody, a search incident to his arrest uncovered a large quantity of marijuana on him.

Jackson filed a postconviction motion, alleging that: (1) he was entitled to a new trial based on newly discovered evidence; (2) the real controversy had not been fully tried; and (3) trial counsel was ineffective because he did not have enough time to prepare for trial and should have requested an adjournment. The "newly discovered evidence" was an affidavit from Bush in which, according to Jackson's motion, Bush "admitted that she lied under oath when she testified that she saw the shooting and that Jackson was the shooter."

The trial court denied the motion after briefing but without a hearing. It agreed with the State's argument that Bush's affidavit was not a recantation and, if it was, there was no other newly discovered evidence to corroborate it, so it could not form the basis for a new trial. It rejected the notion that the matter was not fully tried; the argument was based on Bush's affidavit, which merely rehashed her trial testimony. Finally, it determined that Jackson's claim of ineffective trial counsel was vague and speculative. Jackson appeals.

Discussion

I. Newly Discovered Evidence

We use five factors to determine whether newly discovered evidence warrants a new trial:

> (1) the evidence must have been discovered after the 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 at a new trial.

See ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996); ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). "A reasonable probability of a

different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60.

"If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial." ***Eckert***, 203 Wis. 2d at 516. Further, "[t]he rule has been, and remains, that recantation testimony must be corroborated by other newly discovered evidence." ***State v. McCallum***, 208 Wis. 2d 463, 477, 561 N.W.2d 707 (1997). Whether to grant a new trial is committed to the trial court's discretion. *See* ***Eckert***, 203 Wis. 2d at 516.

Jackson fails to satisfy the newly discovered evidence test on multiple grounds. First, we are not persuaded that this evidence was "discovered after conviction." True, Bush's affidavit itself is new, having been sworn well after Jackson's conviction. However, none of the evidence within the affidavit is new—the affidavit merely contains information Bush had already testified to at trial, including her claim that she did not see Jackson shooting despite telling police she had. Second, we agree that the affidavit is not a recantation of Bush's trial testimony because it does not contradict that testimony. Even if it is a recantation, it cannot justify a new trial because there is no newly discovered corroborating evidence. Finally, because the affidavit merely repeats Bush's trial testimony, it is utterly inconceivable that any jury considering the old evidence of Bush's trial testimony plus this new affidavit would have a reasonable doubt as to Jackson's guilt.[3] *See* ***Avery***, 345 Wis. 2d 407, ¶25.

[3] Additionally, as Jackson's appellate brief is essentially a re-creation of the postconviction motion, it fails to discuss whether the trial court erroneously exercised its discretion in denying a new trial.

II. Discretionary Reversal

Jackson contends that the real controversy was not fully tried because "one of the State's witnesses[, Bush,] did not tell the truth." On appeal, Jackson does not address the trial court's discretionary power to order a new trial when the real controversy has not been fully tried, *see* ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991), or the trial court's discretionary decision in this case to deny the request. Instead, he attempts to invoke this court's discretionary powers.

"In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried … the court may reverse the judgment or order appealed from[.]" WIS. STAT. § 752.35.

> [S]ituations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

We are unmoved. To the extent that Bush's untruthfulness is supposedly borne out by the affidavit, we reiterate that the affidavit is merely a repetition of her trial testimony. The jury heard all necessary and properly admitted testimony. We are satisfied that the real issue was fully tried.

III. Ineffective Assistance of Trial Counsel

To succeed on a claim of ineffective assistance of counsel, Jackson must show both that his attorney performed deficiently and that said deficiency was prejudicial. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. Proving deficient performance requires showing facts from which we can conclude that the attorney's representation fell below objective standards of reasonableness. *See* ***id.*** Proving prejudice requires showing "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *See* ***id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

A hearing on a postconviction motion is only required if "the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If the motion alleges sufficient facts, the trial court is required to hold a hearing, but if the motion is insufficient or conclusory, or is unsupported by the record, the decision whether to grant a hearing is left to the trial court's discretion. *See* ***id.***

Jackson's motion alleged that trial counsel, who was one in a series of attorneys, only had thirty-three days to prepare for trial and "should have requested an adjournment of the trial since he was not prepared." This claim is conclusory and unsupported by the record.

There is no minimum amount of time required for an attorney to properly prepare for trial. Further, at the start of trial, the trial court asked if trial counsel was "prepared to go ahead and proceed with this[.]" Trial counsel responded, "I would prefer to be more prepared than I

am, but I am prepared to go forward." The trial court asked what counsel needed more time for. Counsel indicated that he wanted more time to deal with witness statements, but "as far as proceeding with trial preparation-wise, I'm ready to start a trial." When the trial court asked, "There won't be ineffectiveness at all because you've prepared the case?" counsel responded, "That is correct."

Jackson does not allege with much specificity how trial counsel performed deficiently, why that was related to lack of preparation time, how additional time would have prevented that deficient performance, or how Jackson was prejudiced by such deficient performance. *See* ***Allen***, 274 Wis. 2d 568, ¶23 (explaining that adequate postconviction motions will allege who, what, where, when, why, and how). He does contend that trial counsel should have asked for more time to "potentially uncover the irregularities of Nicole Bush's involvement in this case which was presented in earlier sections" of the appellate brief. However, to the extent the "irregularities" are revealed by the affidavit, we have already noted that Bush's affidavit simply rehashes her trial testimony. Jackson does not specify any other irregularities trial counsel might have uncovered or any other problems with trial counsel's performance that stemmed from his preparation time. The conclusory motion did not warrant a hearing.[4]

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed.

[4] Again, because Jackson's appellate brief is not much more than a reformatting of his postconviction motion, he utterly fails to mention, much less analyze, whether the trial court properly exercised its discretion in denying a hearing on the postconviction motion.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals