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DISTRICT II

July 18, 2018

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

2016AP733

State of Wisconsin v. Lengeorge M. Burns (L.C. #2007CF1230)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lengeorge M. Burns appeals from orders denying his motions for postconviction relief and reconsideration. 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 We affirm the orders of the circuit court.

In 2008, a jury convicted Burns of armed robbery, first-degree reckless injury, and three counts of false imprisonment. The crimes arose from the robbery of a tavern. Burns was charged as a habitual offender who acted as a party to the crimes and while using a dangerous weapon.

In 2013, this court affirmed Burns' convictions. *State v. Burns*, No. 2011AP2273-CR, unpublished slip op. (WI App Feb. 20, 2013). In doing so, we rejected challenges to the sufficiency of the evidence and the assistance rendered by trial counsel. In particular, Burns had faulted counsel for (1) failing to call a co-actor to testify, (2) failing to object to the use of a jury instruction, and (3) failing to object to a portion of the prosecutor's closing argument.

In 2014, Burns filed a lengthy motion for postconviction relief pursuant to WIS. STAT. § 974.06. In it, he accused his postconviction counsel of ineffective assistance for failing to bring certain viable claims. The claims included new allegations of ineffective assistance of trial counsel for (1) failing to move for a mistrial or make argument when certain statements in the prosecutor's opening statement were not proven at trial and (2) not renewing a motion for a mistrial on the ground that a juror had seen an armed deputy guarding Burns during deliberations. The circuit court denied Burns' motion without an evidentiary hearing. Burns moved for reconsideration of that decision, which the court also denied. This appeal follows.

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

A motion brought under WIS. STAT. § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the matter in a motion preceding the first appeal. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise an available claim on direct appeal. *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668.

To establish a claim of ineffective assistance, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant who alleges that postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he or she wishes to bring are clearly stronger than those actually brought. *Romero-Georgana*, 360 Wis. 2d 522, ¶4.

To earn an evidentiary hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, a hearing is required. *Id.* If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. *Id.* We review the court's discretionary decision under the deferential erroneous exercise of discretion standard. *Id.*

On appeal, Burns contends that the circuit court erred in denying his motions for postconviction relief and reconsideration. He renews his new allegations of ineffective assistance of trial counsel and maintains that he was entitled to an evidentiary hearing on them.

We are not persuaded that Burns was entitled to an evidentiary hearing on his first new allegation of ineffective assistance. The fact that certain statements in the prosecutor's opening statement were not proven at trial is not, by itself, automatic grounds for a mistrial.² Moreover, the circuit court instructed the jury that if an attorney's remarks suggested facts that were not in evidence, the jury had to disregard that suggestion. Because we presume that the jury followed that instruction, *see State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780, we conclude that Burns was not prejudiced by his counsel's failure to argue the issue. Accordingly, we are not convinced that Burns has shown ineffective assistance of trial counsel or that such a claim was clearly stronger than those actually brought by postconviction counsel.

We are also not persuaded that Burns was entitled to an evidentiary hearing on his second new allegation of ineffective assistance. During deliberations, defense counsel moved for a mistrial on the ground that a juror had entered a room in the courthouse and seen an armed deputy guarding Burns.³ The circuit court deferred ruling on the motion at that time. After the jury rendered its verdicts, the court and the parties examined the juror about what he had seen and done. Ultimately, the court implicitly denied the motion by excusing the juror and entering the judgment of conviction.

² There is no evidence that the prosecutor's opening statement was the result of misconduct. As the prosecutor later explained, his opening statement was based upon the good faith belief that the defense would call certain witnesses (Burns and a co-actor) to testify and he would rebut them with another witness (another co-actor). In the end, none of the contemplated witnesses testified, and the prosecutor acknowledged during his closing argument that some of the evidence he had referred to had not been presented.

³ The juror was looking for the bailiff, as the jury wanted to give the circuit court a note.

Although Burns faults trial counsel for not renewing the motion for a mistrial after the juror's testimony, there was no reason to do so. The juror indicated that his observation was brief and inadvertent. The juror also said that he did not see any handcuffs or ankle bracelets on Burns and told the other jurors only that he had seen Burns and the deputy in a room. On this record, there is no evidence of prejudice, and no basis to believe that a renewed motion for a mistrial would have been granted. Again, we are not convinced that Burns has shown ineffective assistance of trial counsel or that such a claim was clearly stronger than those actually brought by postconviction counsel.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals