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

2020AP259-CR

State of Wisconsin v. James Michael Love, Jr.
(L.C. # 2016CF5122)

Before Dugan, Donald and White, JJ.

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).

James Michael Love, Jr., appeals a judgment, entered upon a jury's verdict, convicting him of first-degree reckless homicide and felony bail jumping. He also appeals an order denying postconviction relief. He claims that he received ineffective assistance from his trial counsel because, during cross-examination of a State's witness, trial counsel did not move to strike, seek

a mistrial, or otherwise object when the witness testified that she “knew [Love] to do burglaries.” He also claims that the witness’s testimony warrants a new trial in the interest of justice. Based upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

According to the criminal complaint, T.L. called 911 on October 23, 2016, and reported in a “hushed voice” that she was hiding in the basement of her residence in the 3800 block of North 38th Street, Milwaukee, because Love was shooting a gun inside the home. When police arrived at the residence, T.L. told them that she hid from Love in the basement because he had a gun and that while she was hiding, she heard Love arguing with her boyfriend, Sidney Smith. She said that she then heard three or four gunshots, and that someone “may have been shot but had left the house.” A few blocks from the residence, an officer found Smith’s body lying in the grass with gunshot wounds in the chest and neck. Finally, the complaint alleged that two months before the shooting incident, the State had charged Love with burglary and that on October 23, 2016, he was out of custody in that matter after signing a personal recognizance bond that included a condition that he not commit any new crimes. The State charged Love in the instant matter with first-degree reckless homicide and felony bail jumping. He pled not guilty and requested a jury trial.

At trial, several law enforcement officers testified that they responded to T.L.’s residence on October 23, 2016, following a report of a shooting. These officers described finding spent casings and bullets on the residence floor and blood on the basement stairs. Another officer

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

described finding Smith's body several blocks from the residence. Smith appeared to have been shot, and he was clutching a set of keys. He was not wearing shoes or pants.

A forensic pathologist testified that Smith's death was caused by gunshot wounds to the chest and neck and that the death was a homicide. A forensic investigator who examined the clothing that Love wore on the day of the shooting testified that his sweatshirt had blood on the upper left sleeve and on the sleeve cuff. The investigator determined that the blood was Smith's.

T.L. was also a witness for the State. She testified that she had an intimate relationship with Smith, that Love was a family friend whom she had known since his birth, and that in October 2016, the three were housemates. According to T.L., Smith discovered that some of his personal belongings were missing from his room, and he accused Love of the thefts. On the night of October 23, 2016, T.L. opened the door of the home to admit Love, who did not have a key, and she observed that he "was not looking normal. He was mad, upset because he was being accused of taking something." She also saw that he was holding a gun.

T.L. tried to keep Love out of the house, but he forced his way in, and T.L. testified that she "ran for [her] life," and hid in the basement. While hiding, T.L. could hear the sound of tussling, and she recognized the voices of Smith and Love. She testified that Love said, "I'm not going to let no hoe ass N word do nothing to me," and Smith swore at Love in return. Then she heard the sound of gunshots. T.L. said that she next saw Love in the basement, and she believed that he was looking for her. He had a gun in one hand and a phone in the other, and he was talking to someone, saying "come and get me, come back, pick me up, bro. I got that n*." T.L. said that she called 911 from the basement, and the State played a recording of the 911 call for

the jury. T.L. identified her voice describing Love's clothing and reporting that she was hiding in the basement.

During cross-examination, T.L. testified in part:

Q: So you didn't necessarily believe that [Love] took any property from [Smith].

A: No. No I'm not going to say that, no.

Q: You've known [Love] your whole life correct?

A: Yes.

Q: Or his whole life?

A: Yeah, I knew him to do burglaries, so I know he can take things yes.

Q: No, listen to what I'm asking you, you've known him his whole life, correct?

A: Yes.

Q: And you weren't accusing him of anything, correct? It was [Smith] that was accusing him, true?

A: I wasn't home.

Q: Right.

A: Yes, I never accused him, no.

Love stipulated that on October 23, 2016, he was facing a felony charge and was out of custody on bond with a condition that he not commit any new crimes. He also elected to testify on his own behalf.

Love told the jury that he and T.L. returned to their home together on the evening of October 23, 2016, after a trip to a convenience store. He said that when he entered the home,

four people attacked him but he could not identify the assailants in the dark. He testified that they punched him and kicked him and hit him in the head multiple times with a metal object, causing a “split” in his head. Next, he heard gunshots, and then he realized that the four assailants were fleeing through the back door. He said that he too then fled the home because T.L. had been “egging on” the attackers, and he did not know if he was still in danger. Love surmised that he had Smith’s blood on his clothing because he rubbed against the wall in the residence.

On cross-examination, Love denied that he had attacked Smith. Love also denied that he had removed Smith’s pants during or after the alleged attack that Love had described.

The State presented a detective in rebuttal. The detective testified about his recorded interview with Love approximately two weeks after the October 23, 2016 incident. A portion of the interview was played in the courtroom, and the jury heard Love deny that he had been attacked in any way. The detective went on to identify pictures of Love that police took at the time of the interview, and the detective testified that the pictures accurately reflected the absence of bruises on Love’s body or any other signs of a struggle.

The jury found Love guilty as charged, and he moved for postconviction relief. He alleged that his trial counsel was ineffective for failing to object, move for a mistrial, move to strike, or seek a limiting instruction in response to T.L.’s testimony that she “knew him to do

burglaries.” He also sought a new trial in the interest of justice. The circuit court denied the motion without a hearing, and he appeals.²

A defendant who alleges ineffective assistance of counsel must prove both that trial counsel’s performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel’s actions or omissions “fell below an objective standard of reasonableness.” *See id.* at 688. To demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. Whether counsel’s performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. *See Strickland*, 466 U.S. at 697.

The circuit court must hold an evidentiary hearing on a defendant’s postconviction claim of ineffective assistance of counsel only if the defendant’s motion includes allegations of material fact that, if true, would entitle the defendant to relief. *See State v. Allen*, 2004 WI 106, ¶¶9, 13, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion is sufficient to earn an evidentiary hearing is another question of law for our independent review. *See id.*, ¶9. If the defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the

² After this appeal was fully briefed, Love’s appellate counsel moved to withdraw, advising us that Love wished to represent himself. We entered an order advising Love about the risks and disadvantages of proceeding *pro se* and directing him to file a response reflecting that he understood those matters if in fact he wished to represent himself. Love’s subsequent submissions to this court were not responsive to our order. We therefore denied appellate counsel’s motion to withdraw.

allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny the claim without a hearing. *See id.* We review a circuit court’s discretionary decisions with deference. *See id.*

Love contends that the testimony by T.L. that she “knew him to do burglaries” constituted evidence of other crimes, wrongs, or acts. Such evidence may be admitted pursuant to WIS. STAT. § 904.04(2), only if the circuit court concludes that the evidence is offered for a proper purpose, is relevant, and has probative value that substantially outweighs the prejudicial effect. *See State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). Love argues that the testimony did not satisfy the three-step *Sullivan* test and that his trial counsel was therefore ineffective for failing to object to the testimony, move to strike it, request a limiting instruction, or seek a mistrial.

We assume without so holding that trial counsel performed deficiently by failing to object or otherwise move for relief in response to T.L.’s testimony. We turn to the prejudice prong of the *Strickland* analysis.

Love first argues that erroneous admission of other acts evidence “is prejudicial as a matter of law.” We disagree. “Error in admitting other acts evidence is subject to harmless error analysis.” *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). Accordingly, our inquiry is whether Love demonstrates that he suffered prejudice in fact as a consequence of trial counsel’s failure to object to or seek a remedy for T.L.’s testimony.

Anticipating that we would conduct such an inquiry, Love offers an alternative argument that he was prejudiced by the other acts evidence because the State’s remaining evidence was

“thinly circumstantial,” and because the allegation of his involvement in burglaries unfairly undermined his credibility. We are not persuaded.

First, we agree with the State that the evidence was not “thinly circumstantial” but rather was robust and direct. T.L. identified Love as the person who entered her home armed with a gun on October 23, 2016. She was able to identify him because she knew him from birth and because he was her housemate. She fled to the basement where she was an ear witness to the sound of Love arguing with Smith, whose voice she recognized because she had an intimate relationship with him. She was also an ear witness to the sound of gunshots in the home while the argument was underway. She next saw Love searching for her in the basement, holding a gun and talking on the phone asking someone to come get him because he had “got that n*.” She testified:

Q: Who’s the only person who you saw with a firearm that day?

A: James.

Q: Who’s the person who forced his way in and had a gun?

A: James Love

Q: Who’s the person whose voice you heard in a tussling conversation with the victim that night?

A: James Love

Q: Who’s the person you saw go down into the basement with a firearm in his hand?

A: James Love.

Additional evidence showed that when police arrived at the North 38th Street residence, T.L. was in the basement, and she did not have a gun. No guns were found elsewhere in the home, but spent cartridges and unfired ammunition were found on the floor of the home. Smith

was found dead of gunshot wounds a few blocks away. He was not wearing shoes or pants, suggesting that he fled without an opportunity to dress.

Love testified and admitted that on October 23, 2016, he was involved in a physical confrontation in the home. The clothing that he wore that night had Smith's blood on it. Photographs of Love taken approximately two weeks after the incident showed no sign that he had been attacked, and when he spoke to police at that time he denied that he had recently been involved in any kind of struggle.

Based on the foregoing, we reject Love's characterization of the evidence as "thinly circumstantial." The evidence against Love was overwhelming.

Love also fails to persuade us that T.L.'s reference to burglaries undermined his credibility. Love emphasizes that he had no prior convictions with which the State could impeach him.³ Love stipulated, however, that he was charged with a felony prior to the shooting and that he was out of custody on bond on October 23, 2016. The circuit court read that stipulation to the jury. Love therefore fails to show a reasonable probability that T.L.'s testimony tarnished an otherwise spotless image of Love as a person with no prior involvement with the criminal justice system.

In light of the quantity and quality of the evidence against Love, we unhesitatingly agree with the circuit court that T.L.'s vague and fleeting statement regarding burglaries did not

³ WISCONSIN STAT. § 906.09(1), permits impeachment of a witness by asking the witness whether he or she has ever been convicted of a crime and, if so, how many times.

contribute to the verdict or affect the jury's assessment of the evidence.⁴ Accordingly, we conclude that no reasonable probability exists that the jury would have reached a different verdict if trial counsel had sought to prevent or limit the jury's consideration of T.L.'s testimony.

We similarly conclude that Love was not prejudiced by trial counsel's failure to seek a mistrial in response to T.L.'s testimony. The decision to grant a motion for mistrial lies in the circuit court's discretion, and a circuit court should grant such a motion only if a reasonable probability exists that the jury would have delivered a different verdict absent trial errors. *See State v. Albright*, 98 Wis. 2d 663, 677, 298 N.W.2d 196 (Ct. App. 1980). As we have already explained, however, in this case no reasonable probability exists that the jury would have acquitted Love if T.L. had not said that she "knew him to do burglaries." Moreover, in postconviction proceedings, the circuit court explicitly determined that "[h]ad trial counsel moved for a mistrial, there is no reasonable probability that the [circuit] court would have granted such drastic relief." Love therefore suffered no prejudice when his trial counsel failed to move for a mistrial in response to T.L.'s testimony. *See State v. Giebel*, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (concluding, in the context of a sentencing challenge, that the defendant did not prove prejudice where the circuit court found it would not have exercised its discretion any differently if trial counsel had performed as defendant suggested).

⁴ Love's reply brief does not respond directly to the State's thorough examination of the evidence against Love or to the State's accompanying conclusion that Love therefore was not prejudiced by T.L.'s testimony regarding burglaries. Although we could reject the claim of ineffective assistance of counsel for this reason alone, *see State v. Dieter*, 2020 WI App 49, ¶10 n.3, 393 Wis. 2d 796, 948 N.W.2d 431, we have elected to proceed to the merits.

In sum, the record shows that Love was not prejudiced by trial counsel's response to T.L.'s testimony. The circuit court therefore properly denied his ineffective assistance of counsel claim without a hearing. *See Allen*, 274 Wis. 2d 568, ¶9.

We turn to Love's claim for a new trial in the interest of justice. Pursuant to WIS. STAT. § 752.35, we may order a new trial in the interest of justice if the record indicates that the real controversy has not been fully tried. *See State v. Sugden*, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456. When the request for discretionary reversal is based on evidence improperly admitted without objection, courts may grant relief if the "evidence not properly admitted ... so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *Id.* (citation omitted). We exercise our authority under the statute only rarely and only in exceptional circumstances. *See id.* We will not do so here. The rule is long settled that WIS. STAT. § 752.35 was not intended to empower this court to grant discretionary reversal on a theory that we have rejected as inadequate to support a claim of ineffective assistance of counsel. *See State v. Flynn*, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994). Love, however, seeks discretionary reversal on precisely such a basis.

Moreover, Love asserts that the real controversy was not fully tried because the jury heard improperly admitted evidence that fatally clouded the issue of his credibility. The circuit court found, however, that the testimony at issue was minimal. We agree with that characterization. T.L.'s passing reference to Love's alleged prior acts did not obscure the key question in this case, namely, whether Love was the person who shot and killed Smith. For all the foregoing reasons, we affirm.

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