COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0909-CR **Cir. Ct. No. 00CF006204**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH M. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kenneth M. Davis appeals from a judgment of conviction for felony murder (armed robbery) after a jury trial, and from an order denying his motion for postconviction relief. Davis argues that the postconviction court erred in denying his motion for a new trial based on newly discovered evidence, or, in the alternative, on ineffective assistance of counsel, without a

hearing. He also argues that the trial court erred in admitting evidence of a gun that was found at the scene of his arrest. We affirm.

I. BACKGROUND

¶2 On June 20, 2000, at approximately 11:36 p.m., Milwaukee police were dispatched to a "shots fired" complaint in the 2200 block of North 44th Street. On arrival, officers were directed to a duplex, where they found Henry Matthews, dead from a gunshot wound to the chest, and two other victims, Tony Harris and Thomas Monette, wounded from gunshots.

¶3 Witnesses told police that three armed men, later identified as Kenneth Davis, Roger Powell, and Armond Henderson, had approached the duplex and demanded money and drugs from Matthews, who was on the porch with Harris, Cynthia Mack, and Mack's infant. After receiving some items from Matthews, two of the armed men went to the upper residence, where they confronted Monette. A struggle ensued and after a number of shots were fired upstairs, the robber who had remained downstairs on the porch with Matthews shot him. The robbers then fled, firing shots as they left.

¶4 In December 2000, police received a tip from Shomar Lord, an acquaintance of the armed robbers, that Davis had admitted his involvement in the crime. On December 14, 2000, police apprehended Davis and seized a loaded handgun within Davis's reach.

¶5 On December 17, 2000, Davis made a custodial statement, admitting his involvement in the robbery of a "dope house," and expressing his feelings of guilt for what happened to Matthews. The criminal complaint charged Davis with felony murder (armed robbery), as a party to the crime.

¶6 Prior to trial, Davis moved in limine to exclude any reference to his being in possession of a handgun on arrest. The court rejected his request, concluding that because Davis was not charged with being a felon in possession of a firearm, he would suffer "no undue prejudice."

¶7 During the three-day trial, Armond Henderson, Davis's accomplice, testified that Davis decided to rob Matthews because Matthews was known to have a lot of marijuana. Henderson said, he, Davis, and Roger Powell armed themselves and went to Matthews's home to rob him. After Matthews told them he only had ten bags of marijuana and a small amount of money, Powell and Henderson went upstairs, leaving Davis behind to "take care of people on the porch." Henderson stated that when he and Powell arrived upstairs, someone grabbed his rifle, and they began wrestling. Powell and Henderson started firing their weapons and fled the duplex.

¶8 Henderson testified that after the crime, he and Davis hung out together, but when Davis started talking about killing Powell because he (Davis) believed him to be untrustworthy, Henderson decided to leave the state, moving first to Florida and then to Indiana.

¶9 On cross-examination, Henderson acknowledged telling defense investigator Sarah Decorah that he had committed the crime with Powell and Schomar Lord, not Davis. On redirect, however, Henderson testified that Lord was not involved; that he had told Decorah that Lord was involved because Davis told him to, promising to pay him $10,000.

¶10 The State also called Ricky Ringstad, Davis's cellmate. Ringstad testified that approximately ten days to two weeks before Davis's trial, Davis confessed his involvement in the shooting of Matthews. Ringstad offered some

details of Davis's crime, and acknowledged that he reported Davis's "confession" to a prison social worker because, he said, his conscience was bothering him. On cross-examination, Ringstad acknowledged taking medication for depression.

¶11 Moving for postconviction relief, Davis claimed to have evidence that his alleged accomplices had falsely implicated him. In support of his motion, he offered an affidavit of postconviction investigator William Garrott. According to Garrott's affidavit, Derrick Griffin claimed that, sometime after June 2000, Armond Henderson told him that it was he (Henderson), Roger Powell, and Shomar Lord who committed the armed robbery and homicide. Additionally, Garrott's affidavit states that Cornelius Reed, a Waupun Correctional Institution inmate, claimed that: (1) Powell had told him that he had falsely implicated Davis on a robbery/homicide to get him back for not looking out for him on another occasion; and (2) Reed had told Garrott that he met Henderson in prison and that Henderson had also told him that Davis was not involved in the robbery/homicide, but that he had implicated him because Powell had already done so. Davis did not submit affidavits from either Griffin or Reed. In addition, Davis's motion alleged that Ricky Ringstad was severely mentally ill.

¶12 The trial court denied Davis's postconviction motion without a hearing, concluding that no reasonable probability of acquittal existed at a new trial.

II. ANALYSIS

¶13 Davis first claims that the circuit court erred in denying his motion without a hearing. We disagree. A defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). In fact, an evidentiary hearing is required

only if the motion alleges facts which, if proven, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion on its face alleges facts that would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***Id.*** Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law we review *de novo*. ***Id.*** If the motion fails to allege sufficient facts, however, the circuit court has the discretion to deny a postconviction motion without a hearing. ***Id.*** at 310-11. Further, "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory 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 309-10 (citations omitted).

¶14 As applicable here, a new trial will be granted on the basis of newly discovered evidence only if the defendant establishes by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial. ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). Moreover, "[e]vidence which merely impeaches the credibility of a witness does not warrant a new trial on this ground alone." ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968). Under such circumstances, corroboration of the newly discovered evidence is required. ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997).

¶15 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was

deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶16 Ineffective-assistance-of-counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶17 Here, the postconviction court concluded that Davis's submission conclusively demonstrated that he was not entitled to relief. Specifically, the court noted that even if Griffin's and Reed's testimony were offered, it would not have altered the trial's result because Davis admitted his involvement.

¶18 Further, the court found that defense counsel's examination of Henderson was effective in its efforts to impeach his credibility. Thus, the court found that the jury could have reasonably believed defense investigator Sarah Decorah when she testified that Henderson told her that Shomar Lord, not Davis, was involved in the crimes. Apparently, however, the jury rejected that version.

In addition, the court implicitly concluded that even if the alleged newly discovered evidence had been available before trial, counsel's failure to use it was not prejudicial. Hence, the court denied Davis's motion without a hearing.

¶19 The court was correct. First, Griffin's statement to postconviction defense investigator Garrott about what Henderson had told him was vague. The affidavit does not specify the June 20, 2000 armed robbery and it does not indicate that Henderson expressly told him that Davis was not involved in that crime. Second, this proffered newly discovered evidence would have been cumulative. Henderson testified at trial that he had told Decorah that it was Lord, not Davis, who had been with them during the armed robbery that led to Matthews's death. But he admitted saying so at Davis's request. Hence, even if Griffin's testimony were offered to support Decorah's testimony about her conversation with Henderson, no reasonable probability exists that an acquittal would have followed, particularly in light of Davis's confession.

¶20 Reed's statement, like Griffin's, was also vague, failing to specify when the statement took place. Further, Reed's statement, like Griffin's, would not have changed the trial outcome in the face of Davis's confession. As the trial court recognized, Davis's admission was the most important evidence and would not have been undermined by any testimony from Griffin or Reed about what Henderson told them.

¶21 Finally, evidence of Ringstad's mental illness would not have changed the outcome of the trial. Consisting of affidavits and treatment notes, the evidence shows Ringstad had mental health issues, but the most recent document, dated January 1999, refers to treatment and diagnosis from previous years. Given that Ringstad testified at Davis's trial, in June 2001, about conversations that had

taken place just days before the trial commenced, the evidence of Ringstad's mental health history is relatively remote. Moreover, the evidence would have been cumulative. After all, Ringstad testified that he had seven prior convictions, had been incarcerated since 1995, and had been on medication for a variety of reasons, including depression. Consequently, we, like the postconviction court, conclude that the jury had ample reason to question Ringstad's credibility without the additional evidence of his mental health history. Accordingly, we conclude that the court properly denied the motion without a hearing.

¶22 Davis also claims that the trial court erroneously exercised discretion in admitting the evidence of the handgun. Whether the trial court erred in admitting physical evidence presents an evidentiary question, which is reviewed under the erroneous-exercise-of-discretion standard. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *See* WIS. STAT. §§ 904.01, 904.02, 904.03.[1] This court will uphold a trial court's decision

[1] These statutes provide:

> **904.01 Definition of "relevant evidence".** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> **904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible.** All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

(continued)

to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. ***LaCrosse County DHS v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194, *review denied,* 2002 WI 48, 252 Wis. 2d 152, 644 N.W.2d 688 (Wis. Apr. 22, 2002) (Nos. 01-3034, 01-3035).

¶23 The parties debate the admissibility of the gun. Davis maintains that the admission of testimony about the gun was irrelevant and "overly prejudicial." The State responds that the gun was relevant to the accuracy and validity of Davis's statements to police. The State explains:

> The evidence that a gun had been found when Davis was arrested was not being offered to prove Davis's character in order to show that he acted in conformity therewith. Rather, as the prosecutor explained, the reference to a gun was contained in one of the statements that the police had taken from Davis because it was a subject of questioning, and Davis had challenged those statements in a suppression hearing and could be expected to challenge them at trial. The prosecutor wanted the jury to have the complete context of the statements of Davis in order to evaluate whether to believe the story of Davis or the police regarding the statements.

In reply, Davis disagrees, arguing that the gun evidence was clearly other-acts evidence and impermissibly implicated his status as a felon in possession.

¶24 While both arguments are intriguing, we need not address them because, we conclude, even if the court erred in admitting this evidence, the error

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> **904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

was harmless. *See* ***State v. Harvey***, 2002 WI 93, ¶44, 254 Wis. 2d 442, 647 N.W.2d 189 (An error is harmless if "it appears 'beyond a reasonable doubt that the error … did not contribute to the verdict obtained.'") (citation omitted).

¶25 Trial testimony established that Davis had admitted his involvement in the crime. The jury also heard Henderson's testimony that Davis was involved in the crime, and that he had given a statement to the police implicating Davis. Finally, the jury heard testimony from Ringstad that Davis had made inculpatory statements to him in prison. Given this evidence, a rational jury would have found him guilty of the charges even if it had not heard about the gun.

By the Court.—Judgment and order affirmed.

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