COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP425-CR **Cir. Ct. No. 2000CF76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARLAN M. SCHWARTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Harlan Schwartz appeals an order denying his postconviction motion.[1] He argues he is entitled to a new trial because his counsel

[1] The court denied Schwartz's motion except for his request for additional sentence credit and correction of his judgment of conviction. Those issues are not before us on appeal.

was ineffective and the real controversy was not fully tried. He also argues the court erred when it refused to order the Department of Corrections to allow his investigator to interview a witness who did not testify at trial. We reject his arguments and affirm the order.

BACKGROUND

¶2 In March 2000, Schwartz was charged with two counts of arson and one count of possession of a firebomb. *See* WIS. STAT. §§ 943.02(1)(a), 943.06 (1999-2000).[2] The complaint alleged Schwartz and a co-defendant, William Teas, were responsible for two separate fires at property owned by Daniel Blank, the Douglas County District Attorney. The first fire, in December 1999, caused minor damage to Blank's garage. The second fire, in February 2000, caused extensive damage to Blank's home. It was set by a firebomb thrown through Blank's living room window in the early morning hours. Blank, his wife, and his young daughter were home asleep but escaped without injury. In May 2000, the State filed an Information that included the three charges in the complaint and an additional charge of first-degree recklessly endangering safety. *See* WIS. STAT. § 941.30(1) (1999-2000).

¶3 Schwartz and Teas were tried together in September 2000. The State's theory of the case was that Schwartz and Teas had been hired to commit the two arsons by a local gang leader, Alejandro Rivera. Schwartz and Teas admitted involvement in the fires, but said they had been involved only because

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Rivera threatened to kill them and their families, not for any payment. They argued for acquittal based on coercion.

¶4 The jury was instructed on the four charges and Schwartz's coercion defense. The jury convicted Schwartz of the two arson charges and possession of a firebomb, but acquitted him of reckless endangerment. Schwartz, still represented by his trial attorney, appealed the conviction, and we affirmed. ***State v. Schwartz***, No. 2002AP161-CR, unpublished slip op. (WI App. Sept. 17, 2002).

¶5 Schwartz retained new counsel, and in September 2006 he filed a postconviction motion under WIS. STAT. § 974.06. In the motion, Schwartz alleged, among other things, that his trial counsel was ineffective for failing to call several character witnesses, and requested a ***Machner***[3] hearing. He also argued he was entitled to a new trial in the interests of justice, and asked the court to order the Department of Corrections to allow his investigator to meet with Rivera. The court denied the motion as to those issues.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

I. The character witnesses

¶6 Schwartz first argues his counsel was ineffective for failing to call witnesses to his good character. He points to five witnesses who were on his witness list but not called by trial counsel. Schwartz claims these witnesses would have testified he was not "the type of person who would harm another person or their property for money."

¶7 To prove ineffective assistance, a defendant must show that "counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. If the defendant's motion does not allege facts showing both deficient performance and prejudice, the court may deny the motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether a motion alleges facts sufficient to require a hearing is a question of law reviewed without deference to the circuit court. ***Id.***

¶8 In order to show prejudice, the defendant must show an error or errors by counsel that deprived him of a fair trial. ***State v. Tomlinson***, 2001 WI App 212, ¶40, 247 Wis. 2d 682, 635 N.W.2d 201, *aff'd*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367. To do so, he must show a "reasonable probability" of a different result absent the errors. ***Id.*** "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** In this case, then, Schwartz is entitled to a ***Machner*** hearing only if there is a "reasonable probability" of a different result had the character evidence been admitted. *See* ***id.***

¶9 We conclude no such probability exists here. Even with the character evidence, Schwartz did not establish all of the elements of coercion. Therefore, the additional evidence would not have changed the result.

¶10 A person's actions are privileged under the defense of coercion if: (1) there is a threat by a person who is not a co-conspirator; (2) the threat causes the defendant to believe the criminal act is the only means of preventing imminent death or great bodily harm to himself or a third party; (3) the defendant's belief is objectively reasonable; and (4) the threat causes the defendant to commit the criminal act. WIS. STAT. § 939.46(1); *see also* ***State v. Amundson***, 69 Wis. 2d 554, 568, 230 N.W.2d 775 (1975). A defendant is entitled to a coercion instruction only if he or she produces evidence on each of these elements. ***Moes v. State***, 91 Wis. 2d 756, 766, 284 N.W.2d 66 (1979).

¶11 This case closely parallels ***State v. Keeran***, 2004 WI App 4, 268 Wis. 2d 761, 674 N.W.2d 570. Keeran was charged with first-degree intentional homicide after he and an accomplice beat a man to death during a robbery. ***Id.***, ¶2. The circuit court concluded Keeran was not entitled to a coercion instruction because he failed to produce evidence that the murder was the only means of preventing imminent harm to himself. ***Id.***, ¶7.

¶12 We affirmed. We noted that the first threat occurred in the afternoon, and the murder occurred in the evening. ***Id.***, ¶9. Keeran testified the time between the threat and the murder included some time waiting for a ride to Madison, a car ride with a stop for gas, and two hours in which Keeran and his accomplice walked the streets of Madison. ***Id.*** We concluded no coercion instruction was warranted because Keeran never provided any explanation for his failure to take these opportunities to avoid participating in the crimes:

> There is no explanation as to why, prior to leaving Monroe for Madison, Keeran could not have gone into his home and telephoned the police or run out the back door; no explanation as to why Keeran could not have excused himself to use the bathroom at the gasoline station and then taken refuge in that station with witnesses present; no explanation as to why Keeran could not have fled the car at a busy intersection in Madison; and no explanation as to why Keeran could not have fled from [his accomplice] while walking for two hours. Was [Keeran's accomplice] faster or stronger than Keeran? Keeran did not assert either.

Id., ¶12 (footnotes omitted).

¶13 This analysis is equally applicable here. Schwartz first became aware of the threats to Teas and Teas's family several days before the garage arson, and over a month before the firebombing. He learned of the threats to himself and his family three days before the firebombing. Yet he never attempted to contact police or take other steps to avoid committing either crime.

¶14 The record shows Schwartz had numerous opportunities to avoid committing the arsons. To name only a few examples, Schwartz testified he went to high school wrestling practices and traveled to wrestling events during the time between the first threats and the firebombing. Nothing in his testimony explains why he did not contact police or the threatened family members by making a phone call from a school office, using a cell phone while on a wrestling trip, sending a message through a school colleague, or even writing a letter and mailing it while at the high school or a wrestling event. Schwartz also discussed the situation with his roommates on numerous occasions, yet he never asked any of them to pass a message to police or warn the threatened family members. Finally, on the night of the firebombing, Schwartz was in a nightclub after closing time, and a police officer came in while only Schwartz, one of his roommates, and club employees were present. Schwartz did not explain why he went ahead with the bombing at that point instead of alerting the officer.

¶15 Schwartz argues ***Keeran*** is distinguishable because Keeran faced an identifiable threat from a single individual, while Schwartz faced an amorphous threat from "an entire gang of violent but unidentifiable criminals." However, while a gang might have more ability to carry out a threat than an individual, its reach is not without limits. The only information Schwartz had indicating Rivera might actually have been able to carry out his threat was that Rivera was able to discover addresses for the two defendants' families, knew Schwartz's whereabouts on one afternoon and evening, and perhaps had Schwartz followed on another occasion. While this information was no doubt disconcerting, it did not indicate that Rivera would have found out if Schwartz had called the police from home, much less if he had contacted the police in any of the more discreet ways discussed above.

¶16 Instead, like Keeran, Schwartz failed to provide details explaining why he failed to seize any of his numerous opportunities to avoid committing a crime. Because he failed to do so, he should not have received a coercion instruction, and evidence of his good character would not have changed the result of his trial.

¶17 For the same reason, Schwartz is not entitled to a new trial in the interests of justice. *See* WIS. STAT. § 752.35. At trial, Schwartz had a full opportunity to produce evidence he believed excused his conduct. Even had he introduced his character evidence, he still should not have received a coercion instruction. The only remaining controversy, then, is whether Schwartz in fact committed the charged crimes. That controversy was fully tried.

II. Schwartz's investigator

¶18 Schwartz next argues the court should have ordered the Department of Corrections to allow a meeting between his investigator and Rivera, should Rivera consent. Rivera invoked his Fifth Amendment rights and did not testify at Schwartz's trial. We affirmed Rivera's conviction, which included a sentence of life without parole, after Schwartz's trial. ***State v. Rivera***, No. 2001AP1791-CRNM, unpublished slip op. (WI App. Feb. 12, 2002).

¶19 In 2004, Schwartz's investigator contacted prison staff to arrange a meeting with Rivera. According to the investigator, a prison official denied the request because the prison policy was that they "don't usually allow any investigators of any kind or attorneys to talk to an inmate that they are not representing."

¶20 Schwartz contends Rivera might now be willing to discuss his involvement in the case, and might testify he threatened Teas and Schwartz but did not promise them any payment. Schwartz argues this testimony might be newly discovered evidence, grounds for reversal in the interests of justice, or grounds for a sentence modification. *See* WIS. STAT. §§ 752.35, 805.15(3); ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶21 A person convicted of a crime has a due process right to postconviction discovery if "the desired evidence is relevant to an issue of consequence." ***State v. Ziebart***, 2003 WI App 258, ¶32, 268 Wis. 2d 468, 673 N.W.2d 369. Whether to grant a motion requesting postconviction discovery is committed to the circuit court's discretion. ***Id.***

¶22 In this case, the circuit court concluded it was simply "speculation" whether Rivera would testify as Schwartz suggested, and there was no indication Rivera would even agree to talk to Schwartz's investigator. The court noted there was no evidence Schwartz had made any efforts since the initial request in 2004 to contact Rivera. The court also concluded Rivera's testimony would not constitute newly discovered evidence and was not relevant to the current postconviction motion.

¶23 We see no error in this exercise of discretion. As the State points out in its brief, Schwartz has not pursued avenues by which he could have determined whether Rivera was willing to discuss the case, and if so, what he might say. For example, so far as the record indicates Schwartz's attorneys have not attempted to determine whether Rivera is represented by counsel. They have not written to Rivera. They have not attempted to contact Rivera by telephone. They have not administratively appealed the Department of Corrections' decision to deny the interview. While not all of these avenues would be suitable for a full discussion of Rivera's testimony, all could be used to establish whether he is willing to discuss the case or develop some basis for the motion beyond speculation. Because Schwartz has not done his part to develop any basis for his discovery motion beyond speculation, the court appropriately exercised its discretion in refusing to order the Department of Corrections to allow an interview.

By the Court.—Order affirmed.

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