COURT OF APPEALS DECISION DATED AND FILED

April 8, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1658-CR — **Cir. Ct. No. 2005CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA A. O'GRADY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Judgment affirmed; order affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 HOOVER, P.J. Joshua O'Grady appeals a judgment of conviction, entered upon a jury's verdict, convicting him of one count of manufacturing or delivery of THC, as well as an order denying his motion for postconviction relief.

O'Grady argues the trial court made erroneous evidentiary determinations, he is entitled to a new trial in the interests of justice, and newly discovered evidence warrants a new trial. We conclude his evidentiary complaints are waived, and this case is not one of the exceptional cases compelling us to exercise our discretionary reversal power. However, we conclude the trial court applied the wrong standard in assessing the newly discovered evidence and, accordingly, we reverse in part the order denying postconviction relief and remand with directions for the court to apply the correct standard.

Background

¶2 As a child, O'Grady never knew his father, Sean O'Grady (Sean). When O'Grady turned eighteen, he persuaded his mother to provide him more information about Sean. O'Grady contacted Sean, then traveled to Wisconsin from his home in California to visit and eventually came to live with Sean. Shortly after moving in, O'Grady learned that Sean was involved with drug dealing, including growing marijuana in the house. As O'Grady and the trial court characterized it, before O'Grady could extricate himself from the situation, police raided Sean's home.

¶3 O'Grady was charged with five felonies: three different manufacturing or delivery charges, one count of maintaining a drug place, and one count of possession with intent to deliver as party to a crime. The State later dismissed two of the counts, one prior to and one during trial.

¶4 The State's case hinged on the testimony of a teenager named Ryan Krueger, who testified he bought three ounces of marijuana from O'Grady at Sean's home before selling an ounce of it to a confidential informant. An officer surveilling Krueger testified that, just before the sale to the informant, Krueger left

the front of Sean's home. While the sale purportedly occurred at 4:30 p.m., O'Grady testified he was bowling with friends from 3 to 6 p.m. that day. O'Grady did not present any witnesses to corroborate this alibi.

¶5 The jury acquitted O'Grady of two counts but convicted him on one count of manufacture or delivery of THC. O'Grady then filed a postconviction motion seeking a new trial. He offered as newly discovered evidence a witness who would testify O'Grady did not sell to Krueger but, rather, Krueger kept his own drug stash inside Sean's home. Further, this witness—Sean's live-in girlfriend, Phyllis Buckley—would testify O'Grady was not home at the time Krueger came to the house, although she was.

¶6 O'Grady also raised ineffective assistance of counsel issues regarding evidentiary rulings. He argued counsel should have objected when Krueger testified that he had made the academic honor roll at his school five times. O'Grady also argued counsel should have cross-examined Krueger about four charges the State dismissed in exchange for Krueger's testimony.

¶7 The court denied the postconviction motion, finding Buckley's testimony not likely to be true. As to ineffective assistance, the court concluded that any basis for objection to the honor roll testimony would have been meritless, as it did not constitute inadmissible character evidence. As to the cross-examination concern, the court noted that it, the State, and defense counsel had discussed at length the appropriate scope of Krueger's questioning. Counsel was merely following the court's order not to ask about the unrelated, dismissed charges. O'Grady appeals.

Discussion

I. Evidentiary Issues

¶8 We first address O'Grady's claims related to the honor roll and dismissed charge evidence. O'Grady's postconviction motion characterized these errors as ineffective assistance of counsel, for failure to object to the State's line of questioning and failure to properly cross-examine Krueger. On appeal, however, O'Grady claims it was *trial court* error to permit Krueger to testify he made the honor roll, arguing it was inadmissible character evidence under WIS. STAT. § 906.08. O'Grady also claims it was error for the court to limit the scope of questioning regarding the number and nature of the charges the State dropped against Krueger.

¶9 A defendant must raise all grounds for relief in his original postconviction motion. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Raising issues at the trial court level permits the court to avoid or correct the error, avoiding the need for appeal, and gives both parties notice of the issue and an opportunity to address the objection. ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727. Issues not raised first in the trial court will generally not be properly preserved for appeal. ***Id.***, ¶10. Because O'Grady's postconviction motion made no claim the trial court erred, those claims of trial court error are first raised on appeal and are waived.[1]

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[1] In any event, O'Grady's challenges would fail. Evidence regarding Krueger making honor roll is not character evidence. It is evidence relating to a specific temporal event, not character, and was used here to demonstrate Krueger's compliance with probation terms. Because it was not character evidence, the trial court did not err in permitting it.

(continued)

¶10 O'Grady nevertheless insists, in his reply brief, that he "did not abandon his ineffective assistance of counsel claims, nor did he waive any claims by failing to raise them in his post-conviction motion." This statement is evidently in response to the State's waiver argument. O'Grady appears to have confused his claims.

¶11 It is clear to us that O'Grady challenges the trial court's evidentiary decisions for the first time on appeal. Further, he does not dispute the State's argument that he waived his trial court error complaints. Instead, he only responds that he did not waive his ineffective assistance complaints. But O'Grady's appellate claims of ineffective assistance are relegated to a single paragraph at the end of the trial court error analysis. The claims are far too conclusory and underdeveloped. We will not abandon our neutrality to better develop them.[2] *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

II. Interests of Justice

¶12 O'Grady also contends he is entitled to a new trial in the interests of justice. We disagree. Our discretionary reversal power under WIS. STAT.

As for the court limiting the evidence regarding dismissed charges, there would be no prejudice, making the alleged error harmless. The jury was well aware that Krueger had made a deal in exchange for his testimony, and it heard that he had two felony convictions and a dismissed charge. Hearing there were four more dismissed charges would not have significantly altered the jury's impression of him.

[2] For the same reason claims of trial court error fail, the ineffective assistance of counsel arguments would fail, even if they had been properly raised. The honor roll evidence was not character evidence. Counsel was therefore not deficient for failing to object. The evidence about the dismissed charges against Krueger was deemed inadmissible by the court, so counsel was not deficient for failing to disregard the court's order in that regard. Further, there was no prejudice resulting from the court's suppression of the other charges, so counsel was not deficient for failing to challenge the ruling.

§ 752.35[3] is formidable and should be exercised sparingly and with great caution. ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We are reluctant to grant new trials in the interest of justice and exercise our discretion to do so "only in exceptional cases." *See* ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶13 O'Grady argues cumulative error warrants a new trial but he bases this claim, in part, on the errors discussed above. Because we conclude those arguments are not only waived but meritless, a claim for a new trial based on cumulative error fails. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). This is simply not one of those "exceptional" cases compelling reversal.

III. Newly Discovered Evidence

¶14 The final issue is the newly discovered evidence. O'Grady wanted to offer Buckley's testimony because it would suggest the marijuana was not his, would corroborate his testimony he was not home when Krueger came to the house, and would further impugn Krueger's credibility.

¶15 The decision whether to grant a new trial on the basis of newly discovered evidence is committed to the trial court's discretion. *See* ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152. A defendant arguing for new proceedings based on newly discovered evidence must show that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case;

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

and (4) the evidence is not merely cumulative." ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62. For the purposes of appeal, the State does not dispute that Buckley's proffered testimony fulfills this test. Once this showing has been made, the trial court must determine whether "a reasonable probability exists that a different result would be reached" with the new evidence. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

¶16 The court here denied the motion for a new trial because it concluded "there is not a reasonable probability that this testimony would lead to a different result…." It based this conclusion on its assessment that Buckley's testimony "would likely be perjured," that she should not be a credible witness because her testimony would be self-serving, and that jurors who did not believe O'Grady would not believe Buckley, either. However, it "does not necessarily follow that a finding of 'less credible' must lead to a conclusion of 'no reasonable probability of a different outcome.'" ***Id.*** at 475.

¶17 In ***McCallum***, the newly discovered evidence was recantation testimony. The trial court denied the motion for a new trial because it determined that the witness's recantation was less credible than her initial accusation. ***Id.*** at 474. The supreme court held the trial court had applied an inappropriate standard. ***Id.*** The appropriate test, the supreme court stated, is whether there is a reasonable probability that the jury, looking at the initial evidence and the newly discovered evidence, would have a reasonable doubt as to the defendant's guilt. ***Id.***

¶18 As Justice Abrahamson explained in her concurrence, this determination involves a two-step process. ***Id.*** at 487 (Abrahamson, J., concurring). "First, the circuit court makes a preliminary threshold determination about the credibility of the … witness, that is, whether the witness is worthy of

belief by the jury." ***Id.*** However, the circuit court does not determine whether the new testimony is true or false. The circuit court merely determines whether the witness is worthy of belief, whether he or she is within the realm of believability, whether the testimony has any indicia of credibility persuasive to a reasonable juror if presented at a new trial. ***Id.*** After making this initial credibility assessment, the trial court determines whether there is a reasonable probability of a different result at a new trial by assessing whether the jury, looking at both the new evidence and what was already presented, might have a reasonable doubt. ***Id.*** at 475.

¶19 Contrary to the State's argument, we do not believe the trial court implicitly followed ***McCallum***. Although it appears the trial court began with a credibility assessment, it appears to have decided that Buckley's testimony would be false and noted it would be against the weight of the evidence. But the initial determination asks only whether there might be "any indicia of credibility persuasive to a reasonable juror."[4] *See* ***id.*** at 487.

¶20 Thus, O'Grady is not presently entitled to a new trial. He is, however, entitled to reconsideration of Buckley's testimony. On remand, the court shall apply the ***McCallum*** standard when determining whether O'Grady should be granted a new trial on the basis of newly discovered evidence in the guise of Buckley's testimony.

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[4] We note, however, that if the court determines the witness is incredible as a matter of law, then this would be "sufficient to support its conclusion that no reasonable probability exists of a different result at a new trial." ***State v. McCallum***, 208 Wis. 2d 463, 487-88, 561 N.W.2d 707 (1997) (Abrahamson, J., concurring).

By the Court.—Judgment affirmed; order affirmed in part; reversed in part and cause remanded with directions.

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