COURT OF APPEALS DECISION DATED AND FILED

November 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 03-3212

Cir. Ct. No. 94CF941771

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR MARSHALL KENNEDY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed*.

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

¶1 FINE, J. Victor Marshall Kennedy appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 motion for postconviction relief. In his § 974.06 motion, Kennedy claimed that his trial counsel and postconviction counsel were

ineffective.[1] Kennedy's ineffective-assistance-of-trial-counsel claims are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157, 162 (1994) (issues not raised on direct appeal cannot be raised in a § 974.06 motion absent a "sufficient reason" for the failure to do so), and ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) (defendant may not relitigate issue decided in a prior postconviction proceeding). Only Kennedy's ineffective-assistance-of-postconviction-counsel claims survive. We affirm.

I.

¶2 Victor Marshall Kennedy was charged with first-degree intentional homicide for shooting and killing Keywarner Young on May 16, 1994. Kennedy pled not guilty and went to trial. At the trial, Kennedy testified that the shooting occurred while he was an inmate at the Abode, a community-based pre-release correctional facility. On the morning of May 16, instead of going to work, Kennedy met up with Young to get his car from her. During the next several hours, Kennedy and Young argued about, looked for, and eventually found the car. At some point during the day, Shewaunee Edwards joined them, and Kennedy and Edwards went off together, leaving Young at Kennedy's aunt's house.

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[1] Kennedy also alleges that his appellate counsel was ineffective for not raising the ineffective-assistance-of-trial and postconviction-counsel claims in his direct appeal. A claim of ineffective assistance of appellate counsel is generally raised by filing a habeas petition with the appellate court that heard the appeal, *see* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992), while a claim of ineffective assistance of postconviction counsel is raised in the trial court either by filing a habeas petition or by WIS. STAT. § 974.06, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996). Because Kennedy has pursued the latter option, we construe his claim as one of ineffective assistance of postconviction counsel.

¶3 Kennedy testified that around 10:30 p.m., Young who, by this time, was carrying a gun, found him and Edwards. All three went in Kennedy's car, where Kennedy and Young were arguing. Kennedy tried to force Young out of the car. The struggle took them outside the car where a gun fell from Young's purse. Both Kennedy and Young tried to get the gun, and, when Kennedy got it, Young jumped back into the car and locked the doors, leaving Kennedy in the street. While this was happening, Edwards got out of the car. Kennedy claimed that Young then said, "'I'm gonna kill you,'" and drove the car directly at him. Kennedy testified that he then fired the gun. Young died from a gunshot wound to her chest.

¶4 Kennedy's theory of defense was that he shot Young in self-defense. Several witnesses, including Michael Evans and Fernando Wilburn, testified at the trial that Young was driving the car away from Kennedy when he shot at it. A jury found Kennedy guilty of first-degree reckless homicide, and the trial court sentenced him to forty years in prison.

¶5 With a new lawyer, Kennedy filed a postconviction motion in November of 1995, seeking a new trial, based on, among other things, the alleged ineffective assistance of his trial counsel. The trial court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied Kennedy's motion.[2]

¶6 We affirmed Kennedy's direct appeal in an unpublished opinion, *see* ***State v. Kennedy***, No. 96-2241-CR, unpublished slip op. (Wis. Ct. App. Jan. 27,

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[2] Kennedy filed several postconviction motions. The trial court decided the case based on Kennedy's second amended postconviction motion.

1998), and the Wisconsin Supreme Court denied his petition for review on July 24, 1998.

II.

¶7 To prove ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶8 To prove prejudice, a defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

¶9 Our standard for reviewing this claim involves mixed questions of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Ibid.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

A. Incident Report

¶10 The day before the shooting, Young had visited Kennedy at the Abode. According to an incident report prepared by Officer Arnold Schoenheit, Young told Kennedy, "[i]f I see you on Monday, I am going to blow your mother fucking head off your shoulders." At the trial, Kennedy's lawyer called Sergeant Michael Claus to testify about the incident. Claus mistakenly attributed Young's threat to Edwards.

¶11 Kennedy alleges that his trial lawyer was ineffective for failing to introduce the incident report at trial through the testimony of Schoenheit. He contends that he was prejudiced because Claus attributed the threat to the wrong person, undermining his self-defense claim. This allegation is procedurally barred.

¶12 A defendant may not raise issues that have already been determined on appeal. *See* ***Witkowski***, 163 Wis. 2d at 990, 473 N.W.2d at 514 ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). Kennedy's lawyer raised, and we rejected this claim in Kennedy's direct appeal:

> Testimony at the postconviction hearing on Kennedy's ineffective assistance claim established: (1) that although Officer Schoenheit had heard the comment, he had not observed Young making it; and (2) that Sergeant Claus had been in a better position to observe the person making the threat and, therefore, Officer Schoenheit believed Sergeant Claus probably had more complete knowledge of the incident at the Abode. Moreover, trial evidence established that Sergeant Claus and Kennedy had a subsequent discussion in which Kennedy explained that the problem leading to the woman's threat related to an argument over his car, thus clarifying that the threatening comments were made by Young.

> Thus, because it was undisputed that Kennedy's argument about a car was with Young, not Edwards, the jury understood that Young made the threat. As a result, defense counsel was able to and did clarify in closing argument Sergeant Claus had mistakenly attributed the threat to Edwards. Therefore, we conclude, because defense counsel called the witness he reasonably believed was most likely to have knowledge of the threat, and because the jury learned that the threat was from Young, not Edwards, counsel's failure to call Officer Schoenheit to introduce his report was neither deficient nor prejudicial.

Kennedy, No. 96-2241-CR, unpublished slip op. at 4–5 (footnotes omitted). Having already addressed this claim, we will not consider it again.

B. Arlanda Jones

¶13 Kennedy and Young were at Arlanda Jones's apartment on the day of the shooting. In his postconviction motion, Kennedy claimed that his trial lawyer was ineffective for not calling Jones as a witness at the trial. At the ***Machner*** hearing, Kennedy's trial lawyer testified that he made a strategic decision not to call Jones because:

> [b]oth the police report, which was a brief summary of a police interview with Arlanda Jones, and my investigator's more exhaustive report of his interview with Arlanda Jones indicated that she would have testified to the effect that, in fact, Mr. Kennedy had struck, physically hit Arlanda Jones [sic – should be Keywarner Young] and that he had thrown her down onto a sofa and threatened to hurt her.
>
> ….
>
> It would have also indicated that Mr. Kennedy came over to Arlanda Jones' apartment so upset that she threatened her children to get the keys to the Chevrolet Camaro. Therefore, I made the decision that based on the motivation that the assistant district attorney was trying to get across to the jury -- that being that Mr. Kennedy had an abusive relationship with the victim and the fact that he was extremely upset over her having his automobile in her possession -- the testimony given by Arlanda Jones could

> have done as much if not more to further the State's case against Mr. Kennedy.

Kennedy's trial lawyer further explained: "Ms. Jones would have testified that my client physically abused Keywarner Young; that he was upset over Keywarner Young having his automobile in her possession; and that both Ms. Jones and -- especially Ms. Jones was concerned that Mr. Kennedy might hurt Keywarner Young."

¶14 Kennedy alleges that his postconviction lawyer should have impeached his trial lawyer's testimony at the ***Machner*** hearing with a statement Jones made to the police and a private investigator's report. He claims that these materials would have shown that the trial lawyer's testimony "had no foundation [in] the record. … Both of Ms. Jones statements clearly contradict trial counsel['s] testimony." We disagree.

¶15 Kennedy does not point to anything in the police report or the private investigator's report that shows his trial lawyer testified falsely. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who alleges a failure to investigate must "allege with specificity" what the investigation would have revealed and how it would have altered the outcome). In the police report, Jones told the police that Kennedy came over to her apartment looking for Young, was "upset" about his car keys and, "became involved in a physical struggle in which [he] struck [Young]."

¶16 In the private investigator's report, Jones told the investigator that Kennedy came over to her apartment to ask for the car keys. According to Jones, while Kennedy and Young were "arguing" about the keys, they began to "wrestl[e]" and Kennedy picked up Young and threw her on the couch. Jones told

the investigator that she then heard a “pow, like [Kennedy] just hit [Young].” The facts in the police report and the private investigator’s report are consistent with Kennedy’s trial lawyer’s testimony at the ***Machner*** hearing. Accordingly, Kennedy has failed to establish that his postconviction lawyer’s failure to impeach his trial lawyer was deficient.

C. Alleged Failure to Inspect Car

¶17 Before his trial, Kennedy filed two motions, *pro se*, protesting the sale of his car. The trial court held a hearing on August 15, 1994. At the hearing, Kennedy’s trial lawyer told the trial court that he and a private investigator had inspected the car and confirmed that there was physical damage to it. Kennedy’s trial lawyer said that he did not think that there were any tests that could have been performed on the car, and that he told this to Kennedy when he visited Kennedy in prison that afternoon.

¶18 Kennedy’s lawyer also told the trial court that he thought Kennedy’s car was going to be sold the day after he and the private investigator had inspected it. The lawyer indicated that, after he inspected the car, he asked his secretary and a detective to give an oral release to the assistant district attorney and tell Kennedy’s family that the car could be sold. Kennedy’s lawyer further told the trial court that, on July 18, he authorized release of the car in a letter sent to the assistant district attorney. The trial court denied Kennedy’s motions, finding that, based on the evidence it had at that time, the car did not have any evidentiary value.

¶19 At the ***Machner*** hearing, Kennedy’s trial lawyer testified that he and a private investigator examined the car and photographed it on July 7, 1994. He testified that the driver’s side window had been “totally blown away,” making it

impossible to determine bullet trajectory. Kennedy's lawyer further testified that he looked at the front of the car for bullet holes, but did not see any. When asked about the weather on the day of the inspection, he testified, "it was a bright -- I'm not sure how bright it was. I know it was not raining. It was at the very least partly sunny."

¶20 Kennedy contends that his trial lawyer's testimony that he inspected the car was false, and that his postconviction lawyer was ineffective because he failed to present "critical evidence" that allegedly shows that his trial lawyer did not inspect the car. Kennedy appears to rely on four pieces of evidence: (1) his trial lawyer's time sheet, which he claims is "void of any documentation indicating" that the lawyer inspected the car; (2) a vehicle transfer certification and application for title and registration showing that the car was sold on July 7, 1994; (3) a certified meteorological record for July 7, 1994, indicating that it rained that day; and (4) his trial lawyer's statements at the August 15, 1994, hearing, which he claims are inconsistent with the assistant district attorney's statements. This evidence, however, does not show that Kennedy's postconviction lawyer performed deficiently.

¶21 Kennedy's lawyer's time sheet shows that Kennedy's trial lawyer performed one and one-half hours of "trial preparation" on July 7, 1994. The transfer certification and application for title and registration showing that Kennedy's car was sold on July 7, 1994, are not inconsistent with Kennedy's trial lawyer's testimony that he inspected the car before he visited Kennedy in prison, and that he knew the car was going to be sold. The meteorological record indicates that it was foggy and hazy on July 7, 1994, with 400 minutes of sunshine, and rain at 6:00 p.m. This is not inconsistent with Kennedy's lawyer's testimony that it was partly sunny when he examined the car. Finally, Kennedy's

trial lawyer's statement at the August 15, 1994, hearing that he released Kennedy's car in writing on July 18, 1994, is not inconsistent with the assistant district attorney's statement that the car "wasn't sold and it wasn't disposed of until after [Kennedy's trial lawyer] had an opportunity to examine it." Because none of the evidence is inconsistent with Kennedy's trial lawyer's testimony at the ***Machner*** hearing, Kennedy has again failed to show that his postconviction lawyer performed deficiently.

D. Shewaunee Edwards

¶22 Shewaunee Edwards was subpoenaed to testify at Kennedy's trial. During the afternoon session of the trial, on August 16, 1994, while discussing the admissibility of an out-of-court statement from Edwards, the assistant district attorney told the court that he had spoken to Edwards about her Fifth-Amendment right against possible self-incrimination:

> based on what the witnesses said in court today, it's my belief that should [Edwards], under cross-examination, say things that were different than what she said in her statement, she could be subject to criminal prosecution, and I felt that counsel had an ethical obligation to do that or I had an ethical obligation to do that.
>
> ….
>
> Then counsel apparently had [Edwards] come here today and didn't want to talk to her and wanted me to explain to her the situation. So what I did was explain to her her rights against self-incrimination and her right to talk with a lawyer because of things that had taken place in the courtroom. And I felt that it was appropriate because she was subpoenaed by defense counsel[] to be here and was forced by legal process to be here that she be advised of her constitutional rights.
>
> And so based on that statement, she went to the public defender's office and obtained counsel who does indicate that she's going to take the 5th [A]mendment.

¶23 The next morning, Edwards appeared in court with a lawyer from the Public Defender's Office and invoked her right against self-incrimination. At that point, Kennedy claimed that Edwards had been intimidated by the assistant district attorney. Edwards's lawyer responded that he had spoken with the assistant district attorney, believed that there was a legitimate basis for potential charges, and saw no signs that the assistant district attorney intimidated Edwards. The trial court ruled that Edwards had a right to invoke the privilege against self-incrimination and that there was no evidence that the State had pressured her not to testify.

¶24 In his postconviction motion, Kennedy claimed that his trial lawyer was ineffective because he did not call Edwards to testify. He further claimed that the assistant district attorney committed misconduct because he intimidated Edwards so that she would not testify.[3]

¶25 At the ***Machner*** hearing, Kennedy's postconviction lawyer told the trial court that he had trouble contacting Edwards, but that he was finally able to speak with her on the morning of the hearing. According to postconviction counsel, Edwards had told him that the assistant district attorney "spoke to her and said that if she testified, … he would be bringing charges against her depending on what her testimony was." He then moved to postpone the hearing so that Edwards could testify. To avoid an adjournment, the State stipulated that, "[Edwards] spoke with [the assistant district attorney] and he said that if she testified, he

[3] Kennedy did not raise a prosecutorial-misconduct claim on direct appeal. Accordingly, it is waived. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157, 162 (1994).

would bring the charges against her." At the end of the hearing, the trial court found that Edwards was not intimidated by the assistant district attorney.

¶26 Kennedy alleges that his postconviction counsel was ineffective because he did not request a continuance so that Edwards could testify at the ***Machner*** hearing. He contends that Edwards's testimony would have established that the assistant district attorney's alleged threats were the reason she did not testify. Kennedy does not indicate, however: (1) what Edwards would have testified to; or (2) how a difference between the stipulation and any testimony that Edwards might have given would have affected the outcome of the ***Machner*** hearing. Without more, Kennedy's contention fails to rise above the level of mere speculation, *see* ***Flynn***, 190 Wis. 2d at 48, 527 N.W.2d at 349–350, and we conclude that Kennedy has not shown how he was prejudiced.

E. Allegedly False Evidence

1. Michael Evans

¶27 Michael Evans witnessed the shooting and testified at Kennedy's trial. Kennedy alleges that the assistant district attorney and his trial lawyer knew that Evans was an "incorrigible witness, who actively demonstrated his propensity to repeatedly make fallacious statements about his alleged knowledge of the shooting death of Ms. Young." He thus claims that his postconviction lawyer was ineffective for failing to show that the State presented false testimony at trial. We disagree.

¶28 The day after the shooting, Evans gave a statement to the police, in which he claimed that he heard the shooting. Evans told the police that he then went out on the top porch and saw a man standing in the middle of the street near

the driver's side door of a Camaro with a gun in his hand. At the trial, Evans, who was then fourteen years old, testified that he saw the shooting from the front porch of his house. He claimed that the man, who was standing by the side of a car, pointed a gun at the driver's side window and shot twice.

¶29 Evans admitted that he told a police detective that he heard the shooting. He claimed that he did not want to tell the detective what he saw because a woman, who was later identified as Edwards, told him not to talk to the police, and because he was scared. Evans testified that his testimony at the trial was the truth. During cross-examination, Kennedy's lawyer asked Evans if he remembered testifying at the preliminary hearing that the streetlight under which the man and the woman were standing was off. Evans responded that the light "wasn't off … it was dim. That's what I told them."

¶30 Kennedy claims that his postconviction lawyer should have argued that Evans testified falsely at trial when he claimed that he saw the shooting, and that he "perjured himself when questioned during trial regarding his preliminary hearing testimony" about the lighting conditions. We disagree.

¶31 "In the majority of cases in which the credibility of evidence is questioned, this court has refused to upset the determination of the fact finder, whether it be the trial court, or the jury." ***Pappas v. Jack O. A. Nelsen Agency, Inc.***, 81 Wis. 2d 363, 368, 260 N.W.2d 721, 724 (1978) (citations omitted). "This is true even though the witness whose credibility is challenged testified at trial in a manner which was inconsistent with previous statements made during discovery." ***Ibid.***

> Discrepancies in the testimony of a witness do not necessarily render it so incredible that it is unworthy of belief as a matter of law. Testimony may be so confused,

> inconsistent, or contradictory as to impair credibility as to parts of the testimony without being so incredible that all of it must be rejected as a matter of law. It is the function of the jury to determine where the truth lies in a normal case of confusion, discrepancies, and contradictions in testimony of a witness.

State ex rel. Brajdic v. Seber, 53 Wis. 2d 446, 450, 193 N.W.2d 43, 46 (1972). Only when the testimony of a witness is inherently or patently incredible can an appellate court substitute its judgment for that of the jury. ***Thomas v. State***, 92 Wis. 2d 372, 382, 284 N.W.2d 917, 923 (1979). Inherently or patently incredible evidence is that which conflicts with nature or fully established or conceded facts. ***Ibid.***

¶32 Here, Kennedy presents no evidence that Evans's testimony at the trial was in conflict with irrefutable physical evidence. Rather, this is a situation where one witness' testimony is internally contradictory on some matters. As we have seen, "[i]t is the function of the jury to determine where the truth lies in a normal case of confusion, discrepancies, and contradictions in the testimony of witnesses." ***Brajdic***, 53 Wis. 2d at 450, 193 N.W.2d at 46. Moreover, the discrepancy in Evans's testimony about whether he heard or saw the shooting was fully explored at the trial, and any discrepancy in Evans's testimony about the lighting conditions on the night of the shooting is *de minimis*. Thus, Kennedy has not shown that the contradictions in Evans's testimony would have affected the outcome of the ***Machner*** hearing, *i.e.*, he has not shown that Evans's testimony was incredible as a matter of law.

2. Fernando Wilburn

¶33 Fernando Wilburn also saw the shooting and testified at Kennedy's trial. Kennedy appears to allege that his postconviction counsel was ineffective

because he failed to show that his trial counsel was ineffective when his trial counsel failed to impeach Wilburn with a prior statement Wilburn made to the police. We disagree.

¶34 The day after the shooting, Wilburn gave a statement to the police, in which he indicated that he saw a man standing "'approximately at the rear of'" a car fire three shots at a woman driving the car. Wilburn described the man as a black male, approximately twenty-five years old, five feet eleven inches tall, with a medium build and a shoulder length jheri curl hairstyle, but could not describe the man's face due to distance and the lack of proper lighting. The police showed a photographic array to Wilburn, but he could not pick out the man who shot at the car.

¶35 At Kennedy's trial, Wilburn, who was then sixteen years old, testified that, when he looked outside, he saw a man standing by the driver's side door of a car, yelling at a woman to get out of the car. According to Wilburn, the man began to shoot at the car as the woman drove it away. During cross-examination, Wilburn admitted that he had not been able to pick Kennedy's photograph out of a photographic array.

¶36 Kennedy alleges that, at the ***Machner*** hearing, his postconviction lawyer should have shown that his trial lawyer was ineffective for failing to establish at the trial that Wilburn: (1) could not "accurately describe the vehicle involved in the shooting"; (2) could not "identify Mr. Kennedy"; and (3) originally told the police that "at the time the shots were fired the person firing the shots ... was at the rear of the vehicle." We disagree.

¶37 This claim fails for several reasons. At the outset, we note that Kennedy's trial lawyer did establish at the trial that Wilburn could not identify Kennedy in a photographic array:

> Q. Were you ever shown pictures by the police?
>
> A. Yes.
>
> Q. And you were not able to pick out any picture as being the individual who fired the shots; is that correct?
>
> A. Correct.

Moreover, Kennedy does not explain how Wilburn's description of the car was inaccurate. Finally, the difference between Wilburn's statement to the police that a man was standing "approximately" at the rear of a car when he fired the shots, and Wilburn's trial testimony that he saw the man standing by the driver's side door is *de minimis* in light of Wilburn's testimony that the man began to shoot at the car as the woman drove it away. Thus, Kennedy fails to show that his postconviction lawyer was ineffective.[4]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] Kennedy also argues that he was prejudiced by the aggregate of his postconviction attorney's alleged errors. As noted, Kennedy's ineffective-assistance-of-postconviction-counsel claims fail on the merits. That ends our inquiry. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 606, 665 N.W.2d 305, 322–323 ("each act or omission must fall below an objective standard of reasonableness … in order to be included in the calculus for prejudice").