COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1336 **Cir. Ct. No. 1993CF934594**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY TERRELL MORGAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Timothy Terrell Morgan appeals an order denying his motion for postconviction relief. His motion was based on the alleged ineffectiveness of his trial and postconviction counsel. The postconviction court denied Morgan's motion after an evidentiary hearing. We affirm.

BACKGROUND

¶2 Morgan was waived into adult court and charged with first-degree intentional homicide while armed arising out of an incident that occurred in 1993. The jury found Morgan guilty and he was sentenced to life imprisonment with a parole eligibility date of April 27, 2019.

¶3 As background to this appeal, we repeat some of the facts from our 1995 opinion following Morgan's direct appeal. *See* ***State v. Morgan***, No. 95-0257-CR, unpublished slip op. (Wis. Ct. App. Nov. 7, 1995).

> Morgan, age sixteen at the time of the crime, killed fifteen-year-old Jeffrey Griffin in what appeared to be a senseless, gang-related retaliation. Jerald Jenkins[1], a State's witness, testified that he and Morgan were members of the Vice Lords. He testified that Griffin belonged to a gang, the "McKinley Street Players," and that a couple of weeks before the shooting, there had been a confrontation between a group of youths that included Griffin and a group of youths that included Morgan. Jenkins testified that the confrontation so angered Morgan that he (Morgan) "said he was going to pop them before they pop him." Jenkins stated that he saw Morgan shoot Griffin once, causing him to fall, and two more times as Griffin lay on the ground.
>
> Morgan did not deny shooting Griffin, but maintained that he acted in self-defense when he panicked in response to Griffin making a gesture toward his (Griffin's) pocket. This theory of defense, however, was offered only in defense counsel's opening statement. Counsel stated:
>
> > [I]t is very likely that [Morgan] will take the stand and tell you ... that when he saw Jeffrey Griffin's hands coming out of his pocket, he realized that this is the real thing. There is no place to go anymore. There is no place to hide, and he pulled out his gun and he started firing. And when the gun ran

[1] The record reveals that the proper spelling of Jenkins's first name is Jearld.

> out of bullets, he ran away because he was scared to death.
>
> Evidence supporting this theory, however, was not introduced. Morgan never testified, and none of the defense's five witnesses saw the shooting.

Id. at 2-3.

¶4 In 2008, Morgan, *pro se*, filed a postconviction motion, pursuant to WIS. STAT. § 974.06 (2007-08) and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), requesting that the court vacate the judgment of conviction and order a new trial.[2] Morgan argued that his postconviction counsel rendered ineffective assistance when he failed to argue that Morgan's trial counsel was ineffective: (1) for failing to investigate self-defense and for failing to present any evidence of self-defense; (2) for failing to fulfill promises made during his opening statement; and (3) for failing to use available evidence to impeach Jenkins, the State's key witness. The court denied Morgan's motion after hearing testimony from his trial and postconviction counsel. Morgan now appeals. Additional facts relevant to his arguments are provided below.

DISCUSSION

¶5 When a defendant files a WIS. STAT. § 974.06 motion after he has already filed a previous motion or direct appeal, a sufficient reason must be shown for failure to raise the new issues. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); § 974.06(4). A possible justification for belatedly raising a new issue is ineffective assistance of the attorney who represented the defendant in those proceedings. ***Rothering***, 205 Wis. 2d at 681-82.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To prevail on a claim of ineffective assistance of trial counsel, Morgan must show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115.

¶7 Ineffective assistance claims present us with mixed questions of fact and law. *See* ***id.***, ¶32. The trial court's findings of historical fact will be upheld unless clearly erroneous; whether those facts constitute a deficiency or amount to prejudice are determinations we review *de novo*. *See* ***id.***

I. Trial counsel's alleged failure to investigate and present evidence of self-defense.

¶8 Morgan first contends that his trial counsel was ineffective for failing to investigate a self-defense theory and for failing to present any evidence to support such a defense. In his appellate brief, Morgan sets forth the law on self-defense. He does not, however, explain how his counsel failed to adequately investigate a self-defense claim or what counsel would have discovered had he better investigated such a claim. Similarly, although Morgan argues that his trial counsel was ineffective because he failed to present evidence of self-defense, Morgan has not identified what evidence counsel should have presented.

¶9 When a defendant claims that his attorney did not present evidence, and therefore gave him ineffective representation, the defendant must allege with specificity what that evidence would have been and how it would have affected the proceedings. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct.

App. 1994). Morgan has failed to meet his burden. Furthermore, because Morgan has not shown what further investigation would have revealed or how it would have helped him, his allegations of deficient investigation amount to speculation. We do not decide cases on speculative assertions. *See* ***State v. Howell***, 2007 WI 75, ¶48, 301 Wis. 2d 350, 734 N.W.2d 48. Accordingly, we affirm on this issue, albeit on a different basis than that relied on by the postconviction court. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm on grounds different than those relied on by the trial court).

II. Trial counsel's alleged failure to fulfill promises made during his opening statement.

¶10 Morgan next contends that his trial counsel rendered ineffective assistance when he "made Morgan's testimony the centerpiece of the defense" while "simultaneously advising Morgan not to testify on his own behalf" both before and during trial.

¶11 The postconviction court made the following factual findings, which are not clearly erroneous:

- In his opening statement, Morgan's trial counsel said that it was *very likely* Morgan would testify; he did not *promise* Morgan would testify.

- Morgan's trial counsel observed Morgan testify at a ***Miranda-Goodchild***[3] hearing and "[b]ased on his evaluation of [Morgan]'s prior testimony, [Morgan]'s age, educational deficits, demeanor, and total lack of remorse or sympathy for the victim, [counsel] believed [Morgan] would present himself poorly before the jury."

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

- Morgan's trial counsel anticipated a damaging statement Morgan made to detectives would come into evidence during trial but the State unexpectedly rested its case without introducing it. Counsel considered that if Morgan testified, the statement he made would be used to impeach him and that by not testifying, the jury would not hear Morgan's prior statement to the detectives.

- Rather than have Morgan testify, his trial counsel made a strategic decision to challenge the credibility of a witness who told police that Morgan confessed to the shooting.

¶12 In resolving this issue, we adopt as our own the postconviction court's reasoning found in its detailed decision denying Morgan's motion. *See* WIS. CT. APP. IOP VI.(5)(a) (Oct. 22, 2010). The postconviction court concluded that trial counsel's decision not to call Morgan as a witness and to advise him not to testify "was a strategic choice based on his assessment of the state of the evidence and the defendant's deficits in testifying. He made a rational strategic choice that did not constitute deficient performance." We agree. Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable" and do not constitute ineffective assistance. ***Strickland v. Washington***, 466 U.S. 668, 690-91(1984).

III. Trial counsel's alleged failure to use available evidence to impeach the State's key witness.

¶13 Next, Morgan claims that his trial counsel provided ineffective assistance when he failed to adequately impeach Jearld Jenkins, a witness for the State, who testified during trial that he saw Morgan shoot Griffin once, causing him to fall, and two more times as Griffin lay on the ground. Morgan claims his

attorney should have impeached Jenkins's testimony by calling as witnesses a defense investigator and Jenkins's mother and stepfather. According to Morgan, these individuals were present during a pretrial interview trial counsel conducted with Jenkins and heard Jenkins admit that he did not actually see the shooting, that he had lied to police about seeing Morgan shoot Griffin, and that he received threats from Griffin's friends after testifying at Morgan's waiver hearing. Morgan contends that based on the testimony of these individuals, the jury could have concluded that Jenkins's trial testimony was the result of threats he received.

¶14 On this issue, the postconviction court made the following finding:

> At trial, on cross-examination, [Morgan's trial counsel] got Jenkins to admit that contrary to his trial testimony, he had testified under oath at the waiver hearing that he did not see the shooting, but saw the victim falling and [Morgan] running away. Jenkins admitted that he changed his testimony from the waiver hearing. He explained that he changed his testimony because he had received threats from friends of the victim.

The record supports this finding.

¶15 Again, on this issue, we adopt as our own the postconviction court's reasoning found in its decision. The court concluded that Morgan's trial counsel's performance was not deficient based on its findings that trial counsel took steps to undermine Jenkins's credibility and demonstrate that Jenkins would lie under oath and accomplished this objective without having to call his investigator as a witness. In addition, trial counsel ensured that the jury was aware of the threats to

Jenkins from the victim's friends and that Jenkins had motives for testifying falsely against Morgan.

¶16 As for Morgan's contention that trial counsel was ineffective for failing to call Jenkins's mother and stepfather as witnesses, it is not clear what additional information these individuals would have offered beyond what was presented through counsel's cross-examination. In this regard, Morgan's argument is undeveloped, and we do not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review inadequately developed issues); *see also* ***Flynn***, 190 Wis. 2d at 48.

¶17 Lastly, Morgan claims that even if we are not inclined to hold that his trial counsel was ineffective in each of the areas he argues, the cumulative effect of these errors should form the basis for us to determine that he was prejudiced. We are not convinced. Combining Morgan's unsuccessful claims does not construct a successful consolidated claim. Stated otherwise, "[a]dding them together adds nothing. Zero plus zero equals zero." *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

IV. Postconviction counsel's alleged ineffectiveness.

¶18 Because Morgan's ineffective assistance of postconviction counsel claim is premised on the alleged ineffective assistance of trial counsel, this claim fails. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

By the Court.—Order affirmed.

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