**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 11, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP1217-CR** **Cir. Ct. No. 2009CF113**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NICKOLE ELAINE PERGANDE,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard, J., and Charles P. Dykman, Reserve Judge.

¶1 PER CURIAM. Nickole Pergande appeals a circuit court order denying her postconviction motion for a new trial following her conviction for attempted first-degree intentional homicide of her husband, Jaymie Pergande.[1] Nickole contends that: (1) she was denied the effective assistance of counsel when her attorney failed to hire an investigator to interview the State's expert witnesses or hire defense expert witnesses; (2) the real controversy was not fully tried because her counsel did not present expert testimony to support her defense that the victim's injury could have been self-inflicted; and (3) proffered defense expert testimony stating that the victim's injury could have been self-inflicted is newly discovered evidence establishing a reasonable probability that a jury would have a reasonable doubt as to Nickole's guilt. We reject these contentions, and affirm.

*Background*

¶2 The State charged Nickole with attempted first-degree intentional homicide based on information police obtained in response to a 9-1-1 call from the Pergande residence. When police arrived, they observed that Jaymie was covered in blood and was holding a towel to his neck. Jaymie told police that he was in the shower when Nickole entered the bathroom and told him he had soap in his eyes, and that when Jaymie closed his eyes and leaned into the water to rinse out the soap, he felt a pain in his neck and blood started spurting out.

¶3 At trial, Jaymie testified consistently with his initial reports to police. Jaymie also testified that, several months before the incident, he and

[1] Because the appellant and the victim share a surname, we refer to them by their first names for clarity and ease of reading.

Nickole had filed for legal separation. He stated that, the day before his injury, he had just returned from a trip and discovered that more than $4,000 was missing from his savings account and that his gun safe was missing. Nickole initially denied any knowledge of the missing money or items, but admitted taking them after Jaymie threatened to pursue legal action against her. The State also presented testimony by two treating medical expert witnesses, who opined that Jaymie's neck injury was not self-inflicted.

¶4 Nickole testified in her own defense that she had discovered Jaymie with the injury to his neck. The jury returned a guilty verdict, and the court sentenced Nickole to forty years of imprisonment, with twenty-five years of initial confinement.

¶5 Nickole moved for a new trial, arguing that she did not receive effective assistance of counsel and the full controversy was not tried because her attorney failed to hire an investigator or a defense expert witness, and failed to speak to the State's expert witness until less than two weeks from trial. At a motion hearing, a new defense medical expert witness testified that she believed that Jaymie's injury could have been self-inflicted, and that she disagreed with the State's expert witness testimony that Jaymie's injury would have been difficult to self-inflict. Nickole's trial counsel testified that he knew the State intended to call medical experts at trial, that he spoke to one of the experts but was unable to reach the other expert, and that he did not feel it was necessary to retain an investigator or a defense expert. He explained that he based that decision on his conversation with the State's expert witness, who told him that there would be no way to form an opinion as to whether Jaymie's injury was self-inflicted. Counsel acknowledged that the expert did not testify consistently with counsel's

expectations, and that counsel did not have a witness to call to establish a prior inconsistent statement.

¶6 The court denied the motion for a new trial based on ineffective assistance or that the real controversy was not fully tried. Nickole then orally moved for a new trial based on the new factor of the new defense expert medical witness testimony. After briefing and another motion hearing, the court issued an order denying Nickole's motion for a new trial on all grounds. Nickole appeals.

*Standard of Review*

¶7 We review claims of ineffective assistance of counsel under a two-part standard of review. ***State v. Manuel***, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811. We uphold the circuit court's factual findings unless clearly erroneous, but we review the legal standards for ineffective assistance de novo. ***Id.*** We have discretionary authority to reverse a conviction when the real controversy has not been fully tried. *See* ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. We review a circuit court's decision denying a motion for a new trial based on newly discovered evidence for an erroneous exercise of discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42.

*Discussion*

¶8 Nickole contends that her trial counsel was ineffective by failing to hire an investigator to talk with the State's medical expert witnesses, failing to talk to either of the State witness experts until about a week before trial, and failing to hire a defense medical expert witness. She contends that, had a private investigator spoken with the State's medical expert witnesses well in advance of

trial, counsel would have had an available witness to call when the witness allegedly changed his testimony at trial. Nickole also argues that expert medical testimony was available to support the defense theory that Jaymie's injury could have been self-inflicted, as was testified to at the postconviction motion hearing, and that counsel was ineffective by failing to present that evidence at trial. Nickole argues that the failure to present defense medical expert testimony was the result of counsel's deficient performance of failing to timely prepare for trial. She contends that the defense was prejudiced because counsel left the State's medical expert testimony that the injury could not have been self-inflicted unopposed, negating the only viable defense.

¶9 An appellant claiming ineffective assistance of trial counsel must establish that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel is deficient if counsel's acts or omissions fell outside the wide range of professionally competent assistance. ***Id.*** at 690. Deficient performance is prejudicial if there is a reasonable probability that, absent counsel's errors, the result of the trial would have been different. ***Id.*** at 694. If the appellant fails to establish one of the prongs, we need not address the other. ***Id.*** at 697.

¶10 At the postconviction motion hearing, Nickole's trial counsel testified that he did not hire an investigator to interview the State's expert medical witnesses because he did not believe it was necessary, and that he prefers to speak to witnesses personally rather than have an investigator do so. Counsel did not remember the exact date he spoke with the State's expert, and no testimony was elicited to explain why counsel did not contact the witness until about a week before trial. Counsel explained that he did not attempt to hire a defense expert because he did not believe it was necessary, and that he intended to rely on the

State's expert witness testifying that it was not possible to form a medical opinion as to whether or not Jaymie's injury was self-inflicted.

¶11 We assume, for purposes of this opinion, that counsel's performance was deficient. We conclude that counsel's deficient performance did not prejudice the defense.

¶12 In addition to the expert witnesses, the State also presented testimony by Jaymie as to how his injury occurred. Jaymie testified that, while he was in the shower, Nickole told him he had soap in his eyes, and then when he closed his eyes and leaned into the water, he felt a pain in his neck and saw blood spurting from his neck. Jaymie also testified that he and Nickole had filed for legal separation several months before the incident. He testified that, the night before the incident, he returned from a trip, confronted Nickole about missing money and a gun safe, threatened legal action against Nickole, and told her that he was moving out and they were getting divorced.

¶13 At the postconviction motion hearing, the proffered defense expert witness testified that she had reviewed Jaymie's medical records, and it was her opinion to a reasonable degree of medical certainty that Jaymie's injury could have been self-inflicted. The expert stated that she disagreed with the State's experts' testimony that it would be extremely difficult to self-inflict that type of injury, or that the characteristics of the injury made it unreasonable to conclude it was self-inflicted. The expert did not give an opinion as to whether Jaymie's injury was actually self-inflicted.

¶14 The proffered defense expert testimony, then, would have informed the jury that an injury of the type Jaymie sustained *could* have been self-inflicted, in contrast to the State's expert testimony that the injury would have been

extremely difficult to self-inflict and that it was unreasonable to conclude it was self-inflicted. However, Nickole does not point to any evidence in the record supporting a theory that Jaymie was suicidal or had any other motivation to inflict the injury on himself. Thus, in light of Jaymie's testimony that Nickole actually inflicted the injury and the marital conflict that would have motivated her to do so, and the lack of any evidence that Jaymie was motivated to inflict the injury on himself, we conclude that there is not a reasonable probability that the proffered defense expert testimony would have resulted in a different result at trial. That is, assuming without deciding that counsel's performance was deficient in failing to obtain expert testimony that Jaymie's injury *could* have been self-inflicted, there is no reasonable probability that, had counsel presented that testimony, the result of the trial would have been different. To the extent that counsel's performance was otherwise deficient, Nickole has not established that her defense was in any other way prejudiced; for example, she does not set forth any other theories as to what evidence counsel could have obtained in support of her defense had he acted in a more timely fashion. Because Nickole has not established prejudice based on counsel's deficient performance, we reject her claim of ineffective assistance of counsel.

¶15 Next, Nickole seeks to have this court grant a new trial in the interest of justice, contending that justice has miscarried and the real controversy was not fully tried. *See* ***Cleveland***, 237 Wis. 2d 558, ¶21. She argues that counsel's failure to present evidence that Jaymie's injury could have been self-inflicted left the State's expert testimony that the injury was not self-inflicted unopposed, precluding the jury from reaching the real issue—whether Jaymie or Nickole caused Jaymie's injury. Nickole contends that her attorney's failure to present evidence that Jaymie's injury could have been self-inflicted resulted in a

miscarriage of justice by eliminating her only possible defense. However, we conclude that Nickole fully presented her defense by testifying that she did not inflict Jaymie's injury, and failure to present expert testimony that the injury could have been self-inflicted did not prevent the real controversy from being fully tried. Additionally, as explained above, expert testimony that the injury *could* have been self-inflicted would not have reasonably affected the outcome, in light of the other evidence presented at trial. Because we are not convinced that there is a substantial probability that a new trial would result in a different outcome, we conclude that this is not one of the exceptional cases in which we should exercise our discretion to grant a new trial in the interest of justice. *See* ***id.***

¶16 Finally, Nickole contends that, if counsel was not negligent in failing to present expert testimony, her proffered expert testimony is newly discovered evidence. She asserts the testimony was discovered after conviction, counsel was not negligent in failing to discover it, it is highly material to an issue in the case, and it is not merely cumulative. *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590. She also asserts that there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to her guilt. ***Id.*** However, as we have explained, we conclude that the expert testimony does not establish a reasonable probability that a jury would have a reasonable doubt as to Nickole's guilt. We affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).