COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1792-CR **Cir. Ct. No. 2009CF1992**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAE R. RIVERA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Rae R. Rivera appeals a judgment, entered upon a jury's verdict, convicting him of first-degree reckless injury. He also appeals orders rejecting his claims that he is entitled to postconviction relief because he received allegedly ineffective assistance from his trial counsel. We affirm.

BACKGROUND

¶2 The evidence presented at trial revealed that a fight broke out early one morning between two groups of men who were gathered outside of a Milwaukee tavern. Rivera and Jorge Franco were members of one group; Robert Radke was a member of the other group. The parties agreed at trial that Franco hit Radke in the head with a bat during the melee. The State contended, however, that Radke received a second blow from the bat and that Rivera delivered that second blow. The State's evidence included: (1) testimony from an eyewitness, Steven Tokarski, who identified Rivera as the second person to hit Radke with a bat; (2) Radke's testimony identifying Rivera by his neck tattoo as a person Radke saw holding a bat on the night of the attack; (3) expert testimony that Rivera's DNA was on the bat used in the fight; (4) testimony from various people present at the scene that two different people struck Radke with a bat; and (5) testimony from witnesses who had been part of Rivera's group that Rivera boasted after the fight about hitting someone in the head with a bat.

¶3 Rivera testified and denied hitting Radke with the bat. The jury, however, found Rivera guilty of first-degree reckless injury.

¶4 After sentencing, Rivera filed a postconviction motion seeking a new trial on the ground that his trial counsel was allegedly ineffective in various ways. The circuit court rejected most of his claims after reviewing the parties' briefs, and the circuit court denied Rivera's motion to reconsider that decision. The circuit court then held an evidentiary hearing to permit Rivera to develop his remaining contentions: that his trial counsel failed to examine Radke's medical records and, relatedly, that his trial counsel failed to present exculpatory medical evidence that Radke received only one blow from a bat.

¶5 Two witnesses testified at the hearing. Dr. Kenneth Siegesmund, a retired professor of neuroanatomy, testified on Rivera's behalf. Siegesmund discussed his opinion that Radke received one blow to the head with "a hard object like a bat." Siegesmund conceded during cross-examination, however, that "there could have been two hits from the baseball bat." Dr. Brian Peterson, the chief medical examiner for Milwaukee County, testified on behalf of the State. He opined that Radke received two direct blows to the head.

¶6 At the conclusion of the hearing, the circuit court determined that no reasonable probability existed that the outcome of the trial would have been different had the jury heard Siegesmund's testimony. The circuit court rejected Rivera's remaining allegations without hearing additional testimony, and this appeal followed.

DISCUSSION

¶7 "Both the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution afford a criminal defendant the right to counsel. This right to counsel includes the right to the effective assistance of counsel." ***State v. Trawitzki***, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801. A convicted defendant such as Rivera who claims that his trial counsel was ineffective must satisfy the two-prong test pronounced by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***Trawitzki***, 244 Wis. 2d 523, ¶¶39-40. The test requires the defendant to prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland***, 466 U.S. at 687. To demonstrate deficient performance, the defendant must show that counsel's actions or omissions fell "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate

prejudice, "[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." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A reviewing court may approach an ineffectiveness claim by first considering either the performance component or the prejudice component, and if a defendant fails to satisfy one component of the analysis, the court need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶8 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nonetheless, a defendant is not automatically entitled to a ***Machner*** hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents an additional question of law for our independent review. *See* ***id.*** If, however, the petitioner does not allege sufficient material facts that, if true, warrant relief, or if the allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** Additionally, the circuit court has discretion to enter a preliminary order requiring the defendant "to submit more specific evidence regarding his [or her] motion."

See ***id.***, ¶15. We review a circuit court's discretionary decisions with deference. ***Id.***, ¶9.

1. *Failure to examine medical records and present an expert medical witness to discuss them*

¶9 Rivera claims that his trial counsel was constitutionally ineffective for failing to examine Radke's medical records and for failing to present an expert witness to testify that those records, properly understood, showed that Radke received only one blow to the head from a bat. Rivera contends that these steps would have fatally undermined the State's theory that the victim received two blows from the bat and that Rivera delivered the second blow.

¶10 The circuit court conducted a postconviction hearing for the limited purpose of assessing the medical evidence. *See* ***id.*** At the hearing, Rivera's expert witness, Siegesmund, opined that Radke received injuries to the right side of his brain from one "very hard" blow with a bat to the right side of the head, and that Radke received injuries to the left side of his brain when his head hit the ground. That opinion, however, was coupled with Siegesmund's concessions on cross-examination that: (1) a light blow with a bat to the left side of the head could cause the type of injuries that Radke sustained on the left side of his brain; and (2) "there could have been two hits from the baseball bat, one very lightly [sic] and one very heavily [sic]."

¶11 We are able to resolve this issue by considering only whether Rivera demonstrated prejudice to his defense from the lack of expert testimony. *See* ***Strickland***, 466 U.S. at 697. When we assess prejudice, we do so in light of the totality of the evidence presented at trial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶26, 286 Wis. 2d 721, 703 N.W.2d 694. The jury in this case heard that

Rivera's DNA was on the bat used in the attack on Radke, that eyewitnesses saw two different assailants hit the victim with a bat, and that Rivera boasted after the incident that he "hit that nigga in the head with the bat." Additionally, Tokarski told the jury that he saw Rivera hit Radke with a bat and that Rivera was the second attacker.[1] No reasonable probability exists that Siegesmund's proffered testimony, with its key concessions, would have affected the verdict. Because Rivera failed to show that he was prejudiced by trial counsel's alleged failure to examine medical records or his failure to present expert testimony, the circuit court properly exercised its discretion to reject these claims without hearing testimony from trial counsel.

[1] Rivera's appellate counsel contends that "no one actually saw Rivera hit Radke with the bat." In fact, Tokarski testified in response to questions submitted by jurors that he saw Rivera hit Radke with the bat:

> THE COURT: Sir, did you see the defendant, Mr. Rivera, with the bat at all that night?
>
> THE WITNESS: I did see him with the bat.
>
> TRIAL COUNSEL: What was the answer?
>
> THE COURT: He said, I did see him with the bat. Did you see him hit Mr. Radke with the bat?
>
> THE WITNESS: I did see him swing the bat and hit Rob [Radke] with it, yes.

After Tokarski answered follow-up questions from the parties, the circuit court next asked him:

> THE COURT: At what point in this incident did you see Mr. Rivera hit Mr. Radke with the bat?
>
> THE WITNESS: He was the second attacker.

2. *Failure to call Franco as a witness*

¶12 Rivera next claims that his trial counsel was ineffective for failing to call Franco to testify.[2] In support of this claim, Rivera alleges that Franco made out-of-court statements before trial that would have supported the defense theory that only Franco hit Radke with a bat. Rivera admits, however, that he "was unable to present any affidavits or statements from Franco because Franco was unwilling to speak to postconviction counsel."

¶13 "When a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what the particular witness would have said if called to testify." ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647. Rivera has failed to shoulder this burden. Instead, Rivera argues that the circuit court should have scheduled a ***Machner*** hearing so that Rivera could "subpoena Franco and find out what his testimony at trial would have been." Rivera is wrong. An "evidentiary hearing is not a fishing expedition." ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334. Rivera may hope that Franco would testify in accord with the out-of-court statements that Rivera alleges Franco made, but a defendant's obligation is to demonstrate in the postconviction motion that the missing witness would have given the testimony that the defendant claims trial counsel should have secured. *See* ***Arredondo***, 269 Wis. 2d 369, ¶40. Because Rivera fails to show that his trial counsel performed deficiently by not calling Franco to testify, we need not

[2] Franco was not a defendant in the case, and he did not testify at trial for either the State or Rivera.

consider the prejudice prong of the ***Strickland*** analysis as to this issue. *See* ***id.***, 466 U.S. at 697.

3. *Other claims that trial counsel was ineffective*

¶14 Rivera describes two other claims of trial counsel's ineffectiveness: (1) trial counsel exhibited confusion during closing argument; and (2) trial counsel should have objected to a portion of the self-defense instruction. Rivera characterizes these alleged errors as "serious mistakes" and "apparent deficiencies" in trial counsel's representation, but Rivera fails to include any analysis or legal citation showing why the acts and omissions are prejudicial; that is, Rivera does not "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694. Instead, he "urges this court to read the closing argument made by trial counsel" and to "read an excerpt of the court's instructions to the jury on self-defense to which no objection was made." Similarly, Rivera reminds us that he raised additional claims of trial counsel's ineffectiveness in his postconviction motion and in his motion to reconsider, but he asserts that "there is no reason for counsel to repeat separately each of the allegations of the thirty-two pages of motions. The facts alleged are there; Rivera urges this court to read these motions carefully."

¶15 We decline to examine any additional claims that Rivera may have presented in his circuit court motions. The claims are inadequately briefed in this court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶16 The rules of appellate procedure require that the argument portions of an appellant's brief "contain the contention[s] of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied

on." *See* WIS. STAT. RULE 809.19(1)(e). Our rules thus ensure that the appellant, not this court, will choose the theories to pursue on appeal and select the arguments to present in support of those theories; "[w]e cannot serve as both advocate and judge." ***Pettit***, 171 Wis. 2d at 647. Further, our rules limit the number of words and pages permitted in an appellate brief. *See* RULE 809.19(8). We do not permit parties to circumvent those briefing requirements by simply incorporating by reference contentions found elsewhere. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994) (stating that we consider only issues developed in the appellate brief).

¶17 Moreover, we indulge a strong presumption that trial counsel acted reasonably and afforded Rivera constitutionally sufficient representation. *See* ***Balliette***, 336 Wis. 2d 358, ¶25. The requirement is that trial counsel's performance be "adequate." *See* ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 677, 526 N.W.2d 144 (1995). Without intending any implication here, we observe that "counsel's performance need not be perfect, nor even very good, to be constitutionally adequate." *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. Thus, Rivera must explain to us why the things that his trial counsel did or did not do are constitutionally ineffective under the circumstances of his case. Rivera's conclusory assertions that the record warrants relief will not suffice.

By the Court.—Judgment and orders affirmed.

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