COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP195 **Cir. Ct. No. 2009CF1512**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARQUES D. ROUNDTREE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Marques D. Roundtree, *pro se*, appeals an order of the circuit court denying his postconviction motion without a hearing. The motion alleged that Roundtree's postconviction counsel was ineffective for failing to raise

three specific issues in Roundtree's original postconviction proceedings. We ultimately agree with the circuit court's decision, so we affirm the order.

BACKGROUND

¶2 Roundtree was accused of armed robbery and attempted first-degree intentional homicide while armed with a dangerous weapon. Danyell Johnson was sitting in his parked car when Roundtree approached, demanding money. *See* ***State v. Roundtree***, No. 2010AP2963-CR, unpublished slip op. at ¶4 (WI App Dec. 28, 2011). After Johnson handed over cash totaling about $400, Roundtree shot Johnson multiple times at close range. Johnson managed to get out of his car and call for help, but Roundtree fired more shots, shooting Johnson a total of thirteen times. ***Id.***

¶3 Johnson identified Roundtree as his assailant. He testified that Roundtree had been wearing a hooded shirt, but that Johnson recognized him when he pulled down the hood as he approached. Two people nearby had witnessed the shooting but could not identify the perpetrator; both testified that the individual never removed the hood. Roundtree testified in his own defense, stating he was in Chicago at the time of the shooting. ***Id.***, ¶5. Roundtree also suggested that Johnson had a motive for misidentifying him as the shooter: Roundtree had a past romantic relationship with Johnson's girlfriend. ***Id.*** In its closing argument, the State encouraged the jury to consider that Johnson had been face-to-face with the shooter and to consider the vantage point of the two witnesses in determining how much weight to give their testimony.

¶4 The jury convicted Roundtree, and the circuit court sentenced him to a total of thirty-five years' initial confinement and fifteen years' extended supervision. ***Id.***, ¶¶6-7. Roundtree filed a postconviction motion seeking

resentencing, but the motion was denied. ***Id.***, ¶8. Roundtree appealed, and we affirmed. *See* ***id.***, ¶1.

¶5 In October 2012, Roundtree filed a new postconviction motion, pursuant to WIS. STAT. § 974.06 (2011-12)[1] and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). He alleged that postconviction counsel was ineffective for failing to raise three issues in the original postconviction motion.[2] Specifically, he contends that postconviction counsel should have challenged: (1) Johnson's identification of Roundtree for being incredible as a matter of law; (2) the State's knowing use of false or perjured testimony to obtain a conviction; and (3) trial counsel's failure to obtain preliminary hearing transcripts to impeach Johnson's testimony and failure to impeach Johnson's identification testimony, which was "contradicted by corroborating State's witnesses." In a well-reasoned decision, the circuit court denied Roundtree's motion, explaining why each claim of error failed. Roundtree now appeals.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The circuit court's order contains a note that Roundtree submitted a handwritten letter in which he "states that he filed this section 974.06 motion because his former appellate counsel was ineffective for failing to raise these issues." In his brief on appeal, Roundtree also introduces his claims as a failure of appellate counsel. However, his postconviction motion notes that "post-conviction counsel's deficient conduct is not what occurred before the appellate court but what should have occurred before the trial court" and that the relief sought is not "a modification of the appellate court's mandate, but rather attack the proceedings in the trial court, and/or the lack of proceedings that should have been brought before the trial court[.]" Thus, the real issue raised by Roundtree's postconviction motion was postconviction counsel's performance, not appellate counsel's performance. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 679, 556 N.W.2d 136 (Ct. App. 1996). We limit our review accordingly.

DISCUSSION

¶6 "A defendant is not automatically entitled to a hearing on a postconviction motion." ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 673 N.W.2d 369. If the motion presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the motion on its face. *See* ***id.*** Sufficiency of the motion is a question of law we review *de novo*. *See* ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62. If the motion is insufficient, the decision to grant or deny a hearing is left to the circuit court's discretion, which we review only for an erroneous exercise of that discretion. *See* ***id.***

¶7 A motion brought under WIS. STAT. § 974.06 is typically barred if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may constitute a "sufficient reason" for not previously raising an issue. ***Rothering***, 205 Wis. 2d at 677-78. Thus, to obtain relief, Roundtree's new WIS. STAT. § 974.06 motion had to specifically and adequately allege ineffective assistance of postconviction counsel in failing to raise the three challenged issues in the first postconviction motion. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶8 To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *See* ***Love***, 284 Wis. 2d 111, ¶30. To prove deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** To

demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors the results of the proceeding would have been different. ***Id.*** If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

I. Single-Witness Identification

¶9 Johnson testified that his assailant was Roundtree, and he knew this once the man pulled down his hood as he approached. Of course, Johnson was also in close proximity to the shooter. Two nearby individuals saw the shooting but were unable to make a positive identification of the shooter, at least in part because, according to their testimony, he never removed his hood. Roundtree contends that Johnson's identification of him was incredible as a matter of law. The circuit court, in denying the WIS. STAT. § 974.06 motion, explained that "[a]lthough there was conflicting testimony about whether the shooter had his hoodie on or off, it does not render the victim's face-to-face identification of the defendant incredible as a matter of law…. Issues of witness credibility are for the jury to decide."

¶10 "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). Here, Johnson contends that "what makes the single-witness identification inherently or patently incredible is that it is directly contradicted by disinterested State's witnesses' to the very core of the offenses (i.e. the opportunity to view the suspect)." Further, Roundtree points out, those

two witnesses corroborate each other's testimony of a suspect firing multiple shots and never removing his hood.

¶11 Johnson's identification of Roundtree is, as the circuit court noted, solely a question for the jury. The jury is the sole arbiter of the credibility of witnesses and it alone is charged with the duty of weighing the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The jury, as the ultimate arbiter, may accept one portion of a witness's testimony and reject another portion. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988).

¶12 Thus, the jury could have placed no emphasis on Johnson's testimony that Roundtree removed his hood but, nevertheless, could have accepted Johnson's identification of Roundtree given that the shooter directly confronted Johnson. This face-to-face interaction gave Johnson a much better opportunity to identify the shooter than either of the other witnesses had, as each of them was fifteen to twenty feet away. The jury also could have downplayed the "disinterested" witnesses' testimony that the shooter never put his hood down. Either way, Johnson's identification of Roundtree is not inherently or patently incredible, and any challenge to that identification would have failed as specious. Neither trial nor postconviction counsel would have been ineffective for failing to pursue it. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

II. State's Use of "false or perjured" Testimony

¶13 Roundtree claims the State knowingly used perjured testimony to obtain his conviction. However, he does not identify any questionable testimony.

Instead, what he really challenges is the propriety of the State's closing argument.[3] Specifically, he contends that it was improper for the State to argue that "whether the suspect was hooded or not, it doesn't matter." He also complains that the State should not have asked the jury to consider the two witnesses' vantage points.

¶14 The circuit court, when it denied the motion, explained that Roundtree mischaracterized the State's closing argument: "the prosecutor's exact words were, 'Even if you think the hood was up or down….'" The circuit court then found "that the prosecutor's comment fell within the scope of acceptable argument" and that the argument regarding vantage points "was not evidence, and it certainly did not constitute the use of false or perjured testimony."

¶15 The State "may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury." ***State v. Lammers***, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463. That is all that happened here: the State downplayed discrepancies and highlighted favorable evidence, explaining to the jury what evidence was available to support a guilty verdict. There is absolutely no merit to a claim the State used false or perjured testimony, and no merit to a claim that it made any improper closing argument. Appellate counsel was, therefore, not ineffective for failing to raise the issue. *See* ***Harvey***, 139 Wis. 2d at 380.

[3] We will assume for argument's sake that the challenge was properly preserved. *See* ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717 (timely objection to prosecutor's closing remarks required or challenge is forfeited). Otherwise, Roundtree would have to argue that postconviction counsel was ineffective for failing to claim trial counsel was ineffective for failing to preserve the challenge.

III. Failure to Impeach Johnson

¶16 Roundtree also contends that trial counsel was ineffective for failing to obtain transcripts from the preliminary hearing to use at trial "in order to impeach inconsistencies" between Johnson's trial and preliminary-hearing testimony. Specifically, Roundtree contends that Johnson, at the preliminary examination, testified that he had been looking in a rear-view mirror when he saw the hooded suspect crossing the street, but at trial, he denied checking his mirrors and testified that he was getting out of his car when he identified the defendant. The circuit court concluded that Johnson's "preliminary hearing testimony was substantially consistent with his testimony at trial…. The court has reviewed the defendant's alleged 'major discrepancies' … and finds that there is not a reasonable [probability] that the outcome would have been different had trial counsel impeached him with this testimony."

¶17 We agree with the circuit court that there is no reasonable probability that counsel using the preliminary hearing transcript would have altered the verdict. *See* ***Love***, 284 Wis. 2d 111, ¶30. Trial counsel *did*, in fact, impeach Johnson's testimony, albeit not with a transcript. After trial counsel had Johnson confirm that he remembered giving a statement to police and had been truthful when doing so, trial counsel inquired, "Did you also tell the detective you saw Mr. Roundtree in your rearview mirror?" Johnson testified that he could not recall. Thus, trial counsel did, in fact, call the jury's attention to the "major discrepancy" that Roundtree highlights on appeal. Despite this, the jury convicted Roundtree. Thus, like the circuit court, we discern no prejudice in trial counsel's performance, so appellate counsel was not deficient for failing to challenge it.

¶18 The record in this matter conclusively shows Roundtree is not entitled to relief. Accordingly, the circuit court properly denied the WIS. STAT. § 974.06 motion without a hearing.

By the Court.—Order affirmed.

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