COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1814-CR **Cir. Ct. No. 2008CF3041**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEON BANKS,

DEFENDANT-APPELLANT.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ

¶1 PER CURIAM. Leon Banks, *pro se*, appeals the judgment entered on a jury verdict convicting him of second-degree recklessly endangering safety while armed, contrary to WIS. STAT. § 941.30(2) and 939.63. He also appeals the order denying his postconviction claims. Banks argues that in determining that his

trial lawyer did not give him constitutionally deficient representation, the trial court committed clear error when it considered a letter Banks wrote at the time of his sentencing admitting his guilt and expressing his remorse. Additionally, Banks argues that the trial court erred when it denied his request for a new trial based on newly discovered evidence. Finally, Banks submits that he should be granted a new trial in the interest of justice. We affirm.

I. BACKGROUND

¶2 Banks initially was charged with one count of first-degree reckless injury while armed for allegedly shooting a man in the leg after an argument about damage to Banks's car.[1] The case proceeded to a jury trial where three eyewitnesses identified Banks as the shooter.

¶3 The victim, Tyran Holland, testified that he and his girlfriend, Derricka Love, encountered Banks as they were leaving Love's home. Holland said that he stood "face-to-face" with Banks, who asked Holland to pay him for damage to his car. According to Holland, during the exchange, Love was standing next to him holding her one-year-old cousin and facing Banks. As Holland and Banks argued about the car accident, Banks reached in his back pocket, grabbed a gun, and shot Holland in the leg.

¶4 Love testified consistently with Holland. She explained that she stood face-to-face with Banks, who asked her whether she had talked with Holland about paying for the damage to Banks's car. Love identified Banks as the shooter

[1] The State later filed an amended information charging Banks with one count of first-degree recklessly endangering safety while armed.

when she viewed a photo array shortly after the shooting and further testified that she recognized him from her neighborhood. Love testified that Banks "definitely" was the person who shot Holland.

¶5 Love's mother, Marbdean Brown, also testified and identified Banks as the shooter. She also identified Banks as the shooter when viewing a photo array shortly after the shooting occurred. Brown likewise knew Banks, although not as well as her daughter.

¶6 Banks did not testify or call any witnesses.

¶7 The jury returned a verdict of guilty as to the lesser-included offense of second-degree recklessly endangering safety while armed. Banks was sentenced to ten years of imprisonment comprised of seven years of initial confinement and three years of extended supervision.

¶8 Banks sought postconviction relief. As relevant for purposes of this appeal, he argued that his lawyer gave him constitutionally deficient representation when he failed to call alibi witnesses. Specifically, Banks claimed that his lawyer failed to investigate and obtain alibi testimony from his sister, Tasha Banks, and his grandmother, Mary Gant.

¶9 The trial court held a ***Machner*** hearing at which Banks's trial lawyer testified.[2] After listening to the testimony, the trial court allowed further briefing, and Banks raised an additional claim. He argued that newly discovered evidence indicated that Love had misidentified him as the shooter.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶10 Another evidentiary hearing was held at which Love testified. She changed her testimony from what she stated at Banks's preliminary hearing and trial. At the evidentiary hearing, Love testified that she thought Banks was the shooter at the time of his trial, but she ran into the real shooter in her neighborhood two years later. She claimed that she saw the real shooter again just before the evidentiary hearing.

¶11 The trial court, in preparing to decide Banks's postconviction motions, reviewed the sentencing hearing transcript to see whether the alibi witnesses had testified or commented on the claimed alibi. The transcript revealed that Banks had submitted a letter to the trial court in which he took responsibility for the shooting; Banks also repeated his apology in his sentencing remarks.

¶12 The trial court invited the parties to comment on the letter, explaining that it seemed Banks's admissions would foreclose the possibility that he could ever prevail on an alibi defense or that Love was mistaken in identifying him. Despite a reminder from the trial court's clerk, neither party submitted any comments.

¶13 In its decision denying Banks's postconviction claims, the trial court explained that Banks's claim of constitutionally deficient representation failed because Banks could not establish prejudice:

> What does settle the question [of whether counsel's representation was constitutionally deficient], however, is Mr. Banks's own statement about a possible alibi. The record of the sentencing hearing, at which Mr. Banks admitted the shooting and apologized for it, contradicts any alibi claim that might be made on his behalf, and because it comes from the horse's mouth, it nullifies any reasonable probability that a jury would be persuaded instead by the proposed alibi testimony.

> Accordingly, even if Mr. Banks could demonstrate that Mr. Sargent's performance was deficient, Mr. Banks cannot demonstrate that he was prejudiced, and therefore his ineffective assistance claim fails.

¶14 The trial court also denied Banks's claim that he was entitled to a new trial based on Love's conclusion that she had misidentified him as the shooter:

> I must also reject Mr. Banks's newly discovered evidence claim, for two reasons. First, Mr. Banks's statements at the sentencing hearing contradict the version of events Ms. Love now recounts. If a jury was presented with the two, I strongly doubt a jury would accept Ms. Love's testimony over the admissions of Mr. Banks himself.
>
> Second, even in the absence of Mr. Banks's admissions, I do not believe there is a reasonable probability that a jury would believe Ms. Love. She says she identified the wrong person at trial, yet: (a) she was only three feet away from the shooter at the time of the shooting; (b) she knew him from the neighborhood and she knew him by name; (c) she actually had a conversation with him moments after he shot her boyfriend; and (d) she picked him out of a line up within hours after the shooting. It is simply not credible that nearly three years after the trial she would have two chance and distant encounters with a stranger and conclude he was a better match to her recollection than the person she talked to and identified right after the shooting.
>
> Because Mr. Banks cannot demonstrate all five of the factors requisite to a new trial on newly discovered evidence, I must deny his motion.

II. DISCUSSION

¶15 Banks argues that the trial court erred when—based on admissions of guilt and expressions of remorse found in a letter Banks wrote to the court prior to his sentencing—it concluded that Banks was not prejudiced by the alleged

constitutionally deficient representation of his trial lawyer.[3] Banks also argues that the trial court erred when it denied him a new trial based on newly discovered evidence. We address these claims in turn.

A. *Alleged Constitutionally Deficient Representation*

¶16 Banks asserts that a letter that he wrote after the trial proceedings was "not a part of the trial [R]ecord" and should not have been considered by the trial court in denying his postconviction motion alleging that his lawyer gave him constitutionally deficient representation. He asserts that the trial court's review should have been limited to what was before the jury. To decide this appeal, we need not address whether the trial court erred when it considered Banks's letter. Instead, we conclude that there was no prejudice based on the overwhelming evidence of guilt presented at trial. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 219, 768 N.W.2d 53, 55 (appellate court may affirm trial court on different grounds).

¶17 In order to show constitutionally ineffective representation, Banks must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance." *See* ***id.***, 466 U.S. at 690. Further, "strategic decisions by a lawyer are virtually invulnerable to

[3] Banks did not make this argument when the trial court invited the parties to comment on the effect of Banks's admissions in the letter he submitted prior to his sentencing. The State does not, however, ask us to apply a waiver or forfeiture doctrine against this claim. *See, e.g.*, ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 384–385, 671 N.W.2d 692, 699–700.

second-guessing." ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 439, 744 N.W.2d 919, 924. In order to prove resulting prejudice, he must show that his lawyer's errors were so serious that he was deprived of a fair trial and reliable outcome. *See* ***Strickland***, 466 U.S. at 687. Thus, "[t]he defendant must show that there is a reasonable probability that, but for [the lawyer'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.

¶18 We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. *See* ***id.***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim is mixed. ***State v. Ward***, 2011 WI App 151, ¶9, 337 Wis. 2d 655, 663–664, 807 N.W.2d 23, 28. "A [trial] court's findings of fact will not be disturbed unless they are clearly erroneous. Its legal conclusions as to whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*." ***Ibid.*** (internal citation omitted).

¶19 Here, even if we assume without deciding that Banks's lawyer gave him deficient representation when he failed to call alibi witnesses, we nevertheless conclude that Banks has not made the required showing of prejudice: that the "'[lawyer]'s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'"[4] *See* ***State v. Jenkins***, 2014 WI 59, ¶37, ___ Wis. 2d

[4] We will also assume without deciding that Banks did, in fact, tell his lawyer about Gant. In its decision, the trial court set forth the following, which is supported by the Record:

(continued)

___, ___, 848 N.W.2d 786, ___ (citation omitted). Given the consistent testimony of three eyewitnesses identifying Banks as the shooter, there is no reasonable probability that, but for Banks's lawyer's failure to present Banks's sister and grandmother as alibi witnesses, the result of the proceeding would have been different. Banks has not shown a probability sufficient to undermine this court's confidence in the outcome of his trial.

B. ***Newly Discovered Evidence***

¶20 Banks argues that the trial court erred when it denied his motion for a new trial based on newly discovered evidence. He asserts that the trial court

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> Mr. Banks was represented by Stephen Sargent, a seasoned assistant state public defender. Mr. Sargent recounted from his notes that Mr. Banks told him that his sister, Portiricia Banks (who is also known as Tasha), could support an alibi for him. She would have testified that at the time of the shooting he was at home with her. Mr. Sargent met Mr. Banks's sister briefly outside the preliminary hearing courtroom. He evaluated an alibi defense, but based on the impression he formed of her at the preliminary hearing court he decided not to pursue it. In his notes, he wrote to himself "bad alibi [–] family lying." He explained at the ***Machner*** hearing that he recalled her "having a particularly bad demeanor toward me and having a very poor attitude." He went on to explain, "I just felt her demeanor would not be good in cross" and that his impression was that she would not make a credible witness. Nevertheless, he asked an investigator to contact Ms. Banks, but the investigator made only a single unsuccessful attempt to reach her.
>
> Mr. Banks says he also told Mr. Sargent to call his grandmother, Mary Gant, as an alibi witness. She would have testified that Mr. Banks was at home with her and Tasha Banks at the time of the shooting. Mr. Sargent testified that he had no recollection of Mr. Banks identifying Ms. Gant as an alibi witness, nor any indication in his notes that Ms. Gant had been mentioned.

(Brackets in trial court order; record citations omitted.)

improperly made a credibility determination regarding Love's misidentification testimony. We disagree.

¶21 To obtain a new trial based on newly discovered evidence, a "defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707, 710–711 (1997). If the defendant makes this showing, the trial court must determine whether there is a reasonable probability that a new trial would produce a different result. ***Id.***, 208 Wis. 2d at 473, 561 N.W.2d at 711. "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis. 2d 28, 48–49, 750 N.W.2d 42, 52 (citations and one set of quotation marks omitted; brackets in ***Plude***). This final determination presents a question of law that we review *de novo*. *See* ***id.***, 2008 WI 58, ¶33, 310 Wis. 2d at 49, 750 N.W.2d at 53.

¶22 Here, the trial court properly found that there was no reasonable probability that a jury looking at the old evidence and the new evidence—which would include both Banks's voluntary admission of guilt in connection with sentencing, *see* ***State v. Greve***, 2004 WI 69, ¶40, 272 Wis. 2d 444, 471, 681 N.W.2d 479, 492, and Love's misidentification testimony—would have a reasonable doubt as to Banks's guilt. Because the trial court's decision on this issue as set forth above is well reasoned and clearly articulated, we adopt it by reference. *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2013) ("When the trial court's decision was based upon a written opinion ... of its grounds for decision that

adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion.").

C. *New Trial in the Interest of Justice*

¶23 Banks alternatively seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Banks contends the real controversy has not been tried, "i.e., whether Banks was at home at the time of the shooting, and whether witnesses correctly identified Banks as the shooter."

¶24 An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797, 802 (1990) (emphasizing that our power of discretionary reversal is reserved for only the exceptional case). This matter does not constitute such a case.

By the Court.—Judgment and order affirmed.

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