COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1649 **Cir. Ct. No. 2004CF1891**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE ADAMS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Willie Adams, *pro se*, appeals an order dated June 13, 2013, denying his collateral motion for postconviction relief. He also appeals the circuit court's order of November 21, 2013, entered after we held this appeal in abeyance to allow the circuit court to consider Adams' supplemental

postconviction motion addressing a handwritten letter discovered after the appeal was filed from one of the State's witnesses, Paul Hnanicek, that was partially inconsistent with Hnanicek's trial testimony. The two appeals have been consolidated for disposition.

¶2 Adams contends that he received ineffective assistance of postconviction counsel during his direct appeal because his lawyer did not argue that his trial lawyers provided constitutionally ineffective representation to him by: (1) failing to call Barbara Benedetto as a defense witness; (2) failing to call Andre Taylor as a defense witness; (3) failing to challenge for cause or peremptorily strike two jurors; and (4) failing to impeach Hnanicek with partially inconsistent prior statements. We affirm.

¶3 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the 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.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

¶4 Adams first argues that the circuit court erred in denying, without a hearing, his argument that he received ineffective assistance of postconviction counsel because his lawyer failed to argue that his trial counsel was ineffective for failing to call Barbara Benedetto as a defense witness. We agree with the circuit

court analysis rejecting this argument and adopt it as our own. *See* WIS. CT. APP. IOP VI (5)(a) (Nov. 30, 2009) ("When the [circuit] court's decision was based upon a written opinion … the panel may … make reference thereto, and affirm on the basis of that opinion.").

> Mr. Adams accuses his trial lawyer of failing to call Barbara Benedetto, who, he says, could have further corroborated his defense. He accuses his post-conviction attorney of failing to pursue this lapse on appeal. However, Barbara Benedetto saw and heard too little to corroborate Mr. Adams' defense, and therefore he was not prejudiced by his trial lawyers' decision not to call Barbara Benedetto.
>
> We know what Ms. Benedetto would have had to say based on her statements to police on April 3, 2004, the day after the shooting. Mr. Adams submitted a police report containing her statement. She was interviewed by Milwaukee Police Department Detective David Chavez. She said that at about the time of the shooting she was on her back balcony overlooking the alley near the bar where the shooting occurred. According to the report, she said:
>
> > [S]he did hear a loud argument coming from the tavern area … [F]rom her vantage point she can observe the front entrance to the tavern. … [S]he did observe four (4) unknown individuals standing outside the front entrance to the tavern. … [S]he heard a lot of swearing, and that the argument was very loud. She states that the voices were all male, but was unable to identify the race or clothing of these individuals. She states that after smoking her cigarette she went inside her residence, and that the individuals were still arguing. … [S]everal minutes later she did hear five (5) gunshots, a short pause, then two (2) more gunshots. … [S]he did not look outside, and could provide no further information regarding this investigation.
>
> Mr. Adams contends that this testimony would have corroborated his testimony that Mr. Hayes swore at him before Mr. Adams shot him and would have contradicted the State's theory that Mr. Adams shot Mr. Hayes the moment he walked out of the bar. "The test[imony] [w]as

> crucial to prove there [was] no ambush, that Hayes did yell yeah mother F', and to discredit the state[']s witnesses."
>
> But Ms. Benedetto saw and heard to little to help Mr. Adams. Although she saw and heard people arguing, she could not say whether Mr. Hayes was among the people she saw and heard arguing. She could not say he was even outside the bar before he was shot. The inferences Mr. Adams would ask the jury to draw from her observations are too inconclusive and speculative to have probative value. *See* ***State v. Schael***, 131 Wis. 2d 405, 412[, 388 N.W.2d 641] (Ct. App. 1986). Because Ms. Benedetto's testimony is so unhelpful, Mr. Adams cannot blame his attorneys for not calling her to the stand. Nor has Mr. Adams demonstrated any reasonable probability that the result of the trial would have been different had the jury heard Ms. Benedetto. Accordingly, my confidence in the outcomes of the trial is not diminished, *see Strickland*, 466 U.S. at 694, and this claim of ineffective assistance must be rejected.

(Record citation omitted; bolding added.)

¶5 Adams next argues that he received ineffective assistance of postconviction counsel because his lawyer failed to argue that his trial counsel was ineffective for failing to call Andre Taylor as a defense witness to corroborate his claim of self-defense. The circuit court denied this claim after an evidentiary hearing. We agree with and adopt the circuit court's conclusion that Adams' claim of ineffective assistance of counsel fails because he cannot show that he was prejudiced by his lawyers' failure to call Taylor as a witness. *See* WIS. CT. APP. IOP VI (5)(a).

> Mr. Taylor did not see the shooting, but would have corroborated other parts of Mr. Adams's testimony, which Mr. Adams believes would have helped him fend off the State's attack on his credibility. Mr. Taylor would have testified that before Mr. Adams returned to the tavern where the shooting took place, Mr. Adams said he was returning to pick up a friend, Charnaye Vogelmann, whose safety he believed was in jeopardy.
>
> ….

Mr. Adams believes that if his case were to be tried again, Mr. Taylor's testimony could be pivotal, for at least two reasons. First, Mr. Adams believes that the case came down to a credibility battle and that his credibility was damaged by not having witnesses to corroborate his testimony. When Mr. Adams testified, he told the jury that Mr. Taylor could corroborate his version of events, especially Mr. Adams's belief that he needed to return to the bar where the shooting took place to pick up Charnaye Vogelmann. The prosecutor, during his closing argument, disparaged Mr. Adams's version of events, contending that Mr. Adams was making up portions of the story, including the existence of other people such as Mr. Taylor and his motive for returning to the bar.

Mr. Adams believes that if Mr. Taylor had testified it would have bolstered his credibility and the jury might have been persuaded that he was telling the truth when he told them he fired in self-defense. As Mr. Adams puts it, "The states [*sic*] whole closing argument was if the defendant lied about [Taylor] and he lied about [ ] going back for Char[naye t]han he was lying about Mr. Hayes pointing his gun at him."

The second reason Mr. Taylor's testimony would have been helpful, Mr. Adams contends, is that at the very least it might have helped him avoid a conviction for first degree reckless homicide by giving the jury a reason to opt for second degree reckless homicide. First degree reckless homicide requires proof of conduct showing utter disregard for human life. If Mr. Adams's only reason for returning to the bar that night was to shoot Mr. Hayes, perhaps that element is satisfied. But Mr. Adams argues that this element would have been defeated if Mr. Taylor had testified and told the jury Mr. Adams returned to the bar to rescue Ms. Vogelmann.

….

And thus I move to the second step of the analysis, whether Mr. Adams was prejudiced by his trial lawyers' failure to call Mr. Taylor. In addressing this issue, I assume that Mr. Taylor would cooperate and would testify consistently with the statement he gave before trial to Mr. Adams's trial attorneys' investigator.

Even if Mr. Adams had the advantage of Mr. Taylor's testimony at trial, I do not believe there is a reasonable probability that he would have been acquitted, nor that the jury would have convicted him of second

degree reckless homicide rather than first degree reckless homicide. There are four reasons:

First, Mr. Taylor had nothing to say about the fact dispute on which self-defense turned, whether Mr. Hayes' gun was drawn when Mr. Adams fired on him. Mr. Taylor was not at the scene, so he simply couldn't say. It is true that Mr. Taylor might have testified that at an earlier point in time at the bar "LaShaun [Hayes] kept displaying a nickel-plated, semi-automatic handgun that was tucked inside his left, inner jacket pocket, and [was] making comments about something happening, or what he would do" and that Mr. Hayes "kept flashing" the gun "while making reference to what he would do to somebody." But this testimony falls far short of establishing whether Mr. Hayes drew a gun on Mr. Adams, or even that Mr. Adams was the "somebody" to which Mr. Hayes had been referring earlier. Mr. Taylor's testimony might have been offered for the simple point that Mr. Hayes probably had a gun on his person when he was shot, but by the time the trial reached the closing arguments, the State more or less had conceded that point. ("Did Mr. Hayes have a gun? I say the best we can say is maybe[. C]ertainly some people said yes. Other people said they didn't see it in the bar. And of course, Pistol Pete, as brought up throughout this case, makes you believe he did").

Second, although Mr. Taylor's testimony would have backed up Mr. Adams's testimony about why he returned to the bar, his motive for returning to the bar has nothing to do with his theory of self-defense. A concern for Ms. Vogelmann's safety is no justification for shooting Mr. Hayes, unless Mr. Hayes was threatening some imminent unlawful interference with the person of Ms. Vogelmann such that Ms. Vogelmann herself was entitled to use deadly force. *See* WIS. STAT. § 939.48(4); Wis JI-Criminal 830. Mr. Adams offers no proof of this scenario, however.

Third, for the same reason[,] Mr. Taylor's testimony would not have helped the jury make a more favorable choice between first and second degree reckless homicide. Mr. Adams argues that if the jury was persuaded that he was returning to the bar to rescue Ms. Vogelmann, it might have concluded that his conduct was at least somewhat virtuous, which would have prevented it from making the required finding that separates first from second degree reckless homicide, that is, "circumstances which show utter disregard for human life." *See* WIS. STAT. § 940.02(1); Wis. JI-Crim 1020.

One can quibble over whether in fact Ms. Vogelmann needed rescuing, but even if she did need rescuing, that doesn't justify or even help the jury understand why Mr. Adams shot Mr. Hayes. The "conduct" that is the focus of the jury's inquiry into the circumstances of the shooting is not Mr. Adams's decision to return, it's Mr. Adams's decision to shoot, and the only explanation that Mr. Adams offers for shooting was that Mr. Hayes drew first – which has nothing to do with rescuing Ms. Vogelmann.

Fourth, even if Mr. Taylor's testimony about rescuing Ms. Vogelmann would have corroborated Mr. Adams's testimony generally, and even if it had some secondary effect of lending credibility to Mr. Adams's testimony that Mr. Hayes drew first, the effect is too insubstantial and too far beside the point to have helped. Mr. Adams contends that if his own testimony about returning to the bar to rescue Ms. Vogelmann had been corroborated by Mr. Taylor, it would have buoyed Mr. Adams's credibility generally, which might have bolstered Mr. Adams's testimony about who drew first.

But Mr. Taylor's corroborative testimony would not have lifted Mr. Adams's testimony far enough. Juries are choosy; they do not buy wholesale. It's quite possible the jury actually credited Mr. Adams's story about returning to the bar out of concern for Ms. Vogelmann. After all, that is what Mr. Adams told the police when he was arrested, and the prosecutor repeatedly invited the jury to rely on that statement. But even though the jury may have credited this part of Mr. Adams's testimony, it is clear that they rejected the other part, about Mr. Hayes drawing first. Because the two points are not integrally connected, it is unlikely that corroborating one point would serve to corroborate the other.

Furthermore, Mr. Adams so badly abused his own credibility that the corroborative lift from Mr. Taylor's testimony would not have been enough to save Mr. Adams from drowning in his own testimony. Mr. Adams's claim from the witness stand that Mr. Hayes drew first was sunk by his earlier admission to the police he never saw a gun and that he felt the need to "be the first one to draw." Mr. Adams had no reasonable explanation for why or how the police could have gotten that wrong. The explanation he did give – that the police wrote down the story they wanted, not the story he gave them, and that he repeatedly initialed and signed the statement without checking to see what they wrote, and that the police had him initial the statement in

> places where they intended to go back, after Mr. Adams was out of the interview room, and cross out and change portions of the statement – was so preposterous that it probably sunk him once and for all.
>
> Accordingly, I conclude that even if Mr. Adams's trial lawyers had called Mr. Taylor at trial, there is not a reasonable probability that Mr. Adams would have been acquitted, nor that the jury would have convicted him of second degree reckless homicide rather than first degree reckless homicide. Therefore, Mr. Adams cannot sustain an ineffective assistance claim against his trial counsel.
>
> Because I conclude that Mr. [Adams] was not prejudiced by his trial lawyers' failure to call Mr. Taylor as a witness, I must also reject his claim against his postconviction attorney, for failing to raise such a lapse in Mr. Adams's postconviction motion.

(Record citations omitted; footnote omitted; brackets in original.)

¶6 Adams next argues that the circuit court erred in denying, without a hearing, his argument that he received ineffective assistance of postconviction counsel because his lawyer failed to argue that trial counsel was ineffective for failing to challenge for cause or peremptorily strike two jurors. We agree with and adopt as our own the circuit court analysis rejecting this issue. *See* WIS. CT. APP. IOP VI(5)(a).

> Mr. Adams contends that his trial lawyers let him down by failing to ask the court to remove from the jury panel two jurors who, he argues, were unwilling to follow the court's instructions regarding the law of self-defense. He complains that his postconviction lawyer failed to pursue this issue on appeal. Because the record shows the contrary – that these jurors were *not* unwilling to follow the court's instructions – Mr. Adams' claim must be rejected.
>
> Here are the pertinent facts: During jury selection, one of Mr. Adams' lawyers asked the jury, "[I]s there anyone on the panel that feels that … the right to – to defend themselves shouldn't go to the extent of someone being killed?" One juror, Juror Miller, said that "I guess my thinking is, it depends on the situation, what would a person be doing with a gun outside of the home." Mr. Adams' lawyer attempted to confirm her understanding of

his answer: "[Y]our feeling is that – that people probably shouldn't have had a gun outside the home[?]" Juror Miller responded, "That's correct, and from my understanding, that's the law, too." He went on to add, "I don't have a problem with someone defending themselves, but if they're not in a legal position to defend themselves with a weapon outside of their home, my question, I guess, would have to be, well, what are they doing with a weapon outside the home, and what did they intend to do with that weapon in the first place?" Mr. Adams's lawyer attempted to clarify the matter, which led the judge to step in and explain:

> If self-defense is an issue in this case, you will be given the law on self-defense, and you will be able to evaluate the totality of the circumstances in evidence that either supports or discredits that particular claim of self-defense.
>
> Certainly, one thing that you can consider is the fact that someone – that it may come into evidence that someone was armed prior to the incident, and that's something that you can consider in evaluating the defense of self-defense.

Later, a second prospective juror seemed to express the same concern expressed by Juror Miller: "If he had the gun to begin with, what is his – you know, why did he have it, and if he didn't have it, it may not have occurred. So that – that would cloud my judgment I think."

A prospective juror's unwillingness to apply the law as instructed by the court would be grounds for removal. Mr. Adams would have a right to be concerned if the comments made by these prospective jurors demonstrated some "preconceived convictions of the accused['s] credibility and rights that were unwavering," or that Juror Miller in particular "was probably going to use the gun outside the home fact as a great weight unfavorably toward [Mr. Adams] regardless of any facts, evidence or circumstances yet to be produced, or any legal definition handed down by the courts." He also contends that the court had a duty *sua sponte* to question these jurors and remove them even if his attorney failed to remove them, although he cites no legal authority to support this proposition.

Mr. Adams' concerns are unfounded, however. At a later point in the jury selection process all of the

prospective jurors were asked whether they would set aside their personal opinions about the law and follow the court's instructions, and all but one agreed to do so. Neither Juror Miller nor Juror Immer suggested that he would cling to the legal notions he may have suggested earlier. Here is the pertinent portion of the exchange between the prosecutor and the jurors:

> ATTORNEY GRIFFIN … I believe it was Juror 35 who just mentioned self-defense, and that's one area that may or may not come up in this case.
>
> And one of the things that you have to do as jurors is, you have to follow the law the judge gives you.
>
> … But ultimately, whatever law the judge gives you is the law you have to follow.
>
> You know, I wish self-defense was different, or I wish murder was different, or I think this is something else, or I wish it was another way, are all fine things that as citizens of democracy we can think and write our legislators.
>
> But your job as a juror, there, – oath, you're going to take before the case starts is to follow the law that the judge gives you.
>
> And that may be different than what you think the law is or ought to be.
>
> But that's what you have to do, you have to follow the law the judge gives you.
>
> Is there anyone who, if the law is different, if what the judges says is different than you – what you thought the law was or ought to be, is there anyone who thinks they would have a difficult time following the law given to them by the judge and deciding whether or not Mr. Adams is guilty or not guilty? Anybody?

The only juror who expressed any difficulty with following the court's instructions was Juror No. 35, Juror Thomas, who was not ultimately a member of the jury.

> Consequently, I am satisfied that neither Juror Miller nor Juror Immer was unwilling to follow the court's instructions as to the law of self-defense. Therefore, I cannot find that Mr. Adams' lawyers were ineffective for failing to have these jurors removed.

(Record citations omitted; brackets and italics in original.)

¶7 Finally, Adams argues that the circuit court erred in denying, without a hearing, his argument that he received ineffective assistance of postconviction counsel because his lawyer failed to argue that trial counsel was ineffective for failing to impeach witness Hnanicek's trial testimony with: (1) a handwritten letter Hnanicek gave to Adams when they were in jail together; and (2) a statement Hnanicek gave to a defense investigator. We agree with the circuit court's conclusion that Adams' claim of ineffective assistance of trial counsel fails because the letter does not support Adams' self-defense claim and Adams cannot show that he was prejudiced by his lawyers' failure to impeach Hnanicek with either document.[1] *See* WIS. CT. APP. IOP VI(5)(a).

> First, the letter doesn't support Mr. Adams' claim that Mr. Hayes drew first. Although the letter clearly states that Mr. Hnanicek "observed [Mr. Hayes] r[a]ising the gun," it doesn't state that Mr. Hayes raised the gun before Mr. Adams raised or fired his own gun.
>
> Furthermore, the letter – at least as Mr. Adams reads it – strongly suggests the contrary: that Mr. Adams had begun firing even before Mr. Hayes raised his weapon. Mr. Hnanicek wrote,

[1] Adams explained in his postconviction motion that he did not have Hnanicek's handwritten letter because he gave it to his lawyer before trial, but his lawyer denied ever having received the letter. After the circuit court denied his postconviction motion and Adams appealed to this court, the State Public Defender's Officer located the original trial file, which included the letter. Because the circuit court had denied the postconviction motion in part based on the fact that Adams no longer had the letter, we remanded for the circuit court to consider Adams' claims in light of the fact that the letter had been found.

> I also observed [Mr. Hayes] walk out of the front door and heard shooting so I followed behind to see what was the problem[. A]s I made it to the door I observed him r[a]ising the gun.

Because Mr. Hnanicek heard the shooting start before Mr. Hayes raised his gun, it seems unlikely that Mr. Hayes was the one who provoked the shooting.

Now, it is quite possible that Mr. Adams has misread the Mr. Hnanicek's handwriting. As I read the letter, Mr. Hnanicek is saying that as Mr. Hayes was "walk[ing] out of the front door," Mr. Hnanicek was hearing "*shouting*," not "shooting." Mr. Adams thinks the letter says "shooting," not "shouting," but I disagree. Not only does the word appear as "shouting," but it makes more sense in context that Mr. Hnanicek would be drawn outside to "see what was the problem" if the problem consisted of shouting, not if what was going on out there was shooting.

But even if we discard whatever inference can be drawn from a reference in the letter to "shooting," there remains the fact that the letter doesn't state who drew first.

And there are two additional reasons why the Hnanicek letter doesn't help Mr. Adams. First, as I explained in the June 13, 2013 order, Mr. Hnanicek's testimony is simply too impeachable for a jury to give it much weight. In the space of about three years, Mr. Hnanicek gave four different and inconsistent versions of the events:

- In his 2004 letter to Mr. Adams he says he could see Mr. Hayes raising the gun, supposedly before gunshots erupted.

- On April 26, 2005, he told defense investigator Victor Jackson that he heard the gunshots before he even opened the door. ("by the time he opened the door, which had closed behind Lashaun [Hayes], he heard 4-5 gunshots…. Mr. Adams' paraphrase: "by the time he opened the door … he had already heard 4 shots and ran back in").

- At trial, Mr. Hnanicek told the jury that he followed Mr. Hayes out the door but could not see whether there was a gun in his hands.

> § On June 6, 2007, he told an investigator working for Mr. Adams's postconviction lawyer that he was inside the bar the entire time and saw nothing ("he did not see who did the shooting because he was inside the bar at the time").
>
> Mr. Adams himself acknowledges how impeachable Mr. Hnanicek's testimony is, and that he has a "propensity for lying."
>
> Second, whatever weight a jury might give to any of the versions of the story uttered by Mr. Hnanicek, that weight is minor compared to the weight the jury was likely to place on Mr. Adams' confession. Mr. Adams claims that Mr. Hnanicek was the "key witness and only eye-witness," that his testimony comprised the "central fact and strength of the State's case," that the State's case "weighed substantially on Mr. Hnanicek's testimony," and that his credibility "was 'central to the truth[.]'" The record does not bear out these claims. A review of the closing arguments demonstrates that Mr. Adams, not Mr. Hnanicek, was the key witness in the case, and the centerpiece of the State's case was his confession. ("That, ladies and gentlemen, is first-degree intentional homicide, and that's what this case is about"). The prosecutor mentions Mr. Hnanicek by name only a handful of times, and never repeats or refers the jury to his testimony about seeing or not seeing the shooting itself.
>
> In sum, Mr. Hnanicek would have nothing to offer in this case about who drew first, Mr. Hayes or Mr. Adams. He was a bit player in this tragedy. What dominates the case is Mr. Adams' own concession: "bullets kill and you know you gotta be the first one to draw."

(Record citations omitted; brackets and italics in original.)

By the Court.—Orders affirmed.

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