COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP971-CR **Cir. Ct. No. 2011CF4696**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA BERRIOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., and JONATHAN D. WATTS, Judges. *Affirmed*.

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

¶1 CURLEY, P.J. Joshua Berrios appeals the judgment convicting him of one count of first-degree reckless injury and one count of being a felon in possession of a firearm, both as a repeat offender, contrary to WIS. STAT.

§§ 940.23(1)(a), 941.29(2)(a) & 939.62(1)(b) (2011-12).[1] He also appeals the order denying his postconviction motion.[2] On appeal, Berrios argues that we ought to grant him a new trial in the interest of justice because the real controversy was not fully tried; alternatively, he argues that we must grant him a ***Machner***[3] hearing because his postconviction motion sufficiently alleged that trial counsel was ineffective. We disagree and affirm.

BACKGROUND

¶2 Berrios was charged in September 2011 with one count of first-degree reckless injury while armed, one count of first-degree recklessly endangering safety while armed, and one count of being a felon in possession of a firearm—all as a repeat offender.

¶3 According to the complaint and other record documents, the charges stemmed from a fistfight that escalated into a shooting. Berrios, who was eighteen at the time, got into a fight with fifteen-year-old Andrew H. on the porch of a house on South 22nd Street in Milwaukee. Andrew H., his sister Elisandra H., and their cousin Dora T. fled to their aunt's house located about a block away, and returned with approximately thirty[4] relatives, including Helen Sada, Martin Garcia, and Abimael Trevino, who asked Berrios "why he was beating up on

[1] The Honorable Charles F. Kahn, Jr., presided over trial and entered the judgment of conviction. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable Jonathan D. Watts entered the order denying the postconviction motion.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[4] Andrew H.'s thirty or so relatives were, before the confrontation, at their aunt's house because she had recently passed away.

younger people." Berrios, who was now armed with a shotgun, pointed the gun at Garcia and said that he did not want any problems. Shortly thereafter, gunshots came from the alley, causing many people to turn and run. Many of Andrew H.'s relatives ran away, and Trevino got into the truck he had arrived in. At this point, Garcia saw Berrios fire the shotgun towards Trevino. Afterward, Milwaukee police observed that Trevino "appeared to have been shot with bird-shot" and that Sada had been shot in the back by a shotgun pellet. Berrios pled not guilty to the charges and the case was set for trial.

¶4 At trial, three witnesses—Andrew H., Elisandra H., and Garcia—testified to seeing Berrios on the porch with a shotgun on the day of the shooting. Andrew H. testified that after he and Berrios had gotten into the fistfight, and after his family had arrived to confront Berrios, he saw Berrios standing on the porch with a shotgun. Andrew H. did not see Berrios shoot the gun, but heard him cock it, heard the gun go off, and saw both Trevino and his truck get hit. Elisandra H. testified that she too saw Berrios on the porch with a shotgun. She saw Berrios with the gun after she, her brother, and her cousin Dora T. had gotten into a fight involving Berrios, and after she had returned with their family. Elisandra H. further testified she heard gunshots coming from the alley, which caused people to run. She then saw Berrios start shooting, and took off after he shot the first shot. Garcia also saw Berrios holding a shotgun. Garcia testified that he was arguing with Berrios on the porch when three men came from the alley and started shooting from handguns. Garcia further testified that after the men from the alley started shooting, he saw Berrios shoot the shotgun from the porch and saw Trevino get hit.

¶5 Trevino also testified. Before trial, the trial court had granted Berrios' motion to prohibit Trevino from testifying that Berrios shot him due to

the fact that Trevino earlier had been unable to identify Berrios in a photo array. Nevertheless, the prosecutor asked Trevino whether he recalled what the man who shot him looked like, and whether that man was in the courtroom. Trevino said he did recall what the "guy with the shotgun" looked like; but before he could answer whether that man was in the courtroom, defense counsel objected, and that particular line of questioning immediately ceased.

¶6 While Trevino was prevented from identifying Berrios as the shooter during the prosecutor's direct examination, he later identified Berrios as the shooter while being cross-examined by defense counsel. Specifically, when defense counsel asked Trevino to identify an exhibit, Trevino, without any prompting, responded, "That's Joshua [Berrios]," and "That's Joshua[']s house, in front of his house." When defense counsel asked who "Joshua" was, Trevino answered, "The man sitting right there in front of me." Trevino then mentioned Berrios by name a few more times.

¶7 As soon as Trevino made his unexpected in-court identification, however, defense counsel began to impeach Trevino with details from his statement made to police on the day of the incident, including the fact that Trevino never told police that he saw anyone shooting from the porch and instead told police that he was shot by the three individuals in the alley. When Trevino insisted it was Berrios who shot him, defense counsel elicited testimony in which Trevino admitted that he actually did not know Berrios. Defense counsel also explored Trevino's motive for the identification: specifically, that Trevino was angry at Berrios for beating up one of his relatives.

¶8 Berrios did not testify; the only defense witness was his sister, Martha Rojas. While Rojas testified that she did not see Berrios with a gun at any

point when he was standing on the porch, she also testified that she did not see any of the guns that were fired that day, and did not know where any of the shots came from. Rojas further testified that she had stepped inside the house before the shots were fired. Moreover, Rojas, like Dora T. and Elisandra H., testified that Berrios was wearing a striped shirt on the day of the shooting.

¶9 After all of the testimony was heard and the jury began to deliberate, the jury asked whether it could have a copy of the police report that was marked as Exhibit 13. The parties stipulated to allowing the jury to see the report again, and also stipulated to a "cautionary reminder" "for completeness" that Detective Herb Glidewell, who had dictated the report, had testified at trial that when he interviewed Trevino, Trevino was in extreme pain and asking whether he was going to die:

> THE COURT: …. So I've discussed this with the lawyers … and after our discussion, [defense counsel] went to speak with Mr. Berrios about it and got his consent. And we agreed to the following, that we would send to the jury a copy of the Milwaukee police incident report … regarding this event….
>
> We also, at the request of the district attorney, and for completeness, sent an additional page to the jury which included a cautionary reminder of some additional testimony of Detective Glidewell besides what was in the report; and the testimony was that Mr. Trevino was in extreme pain in the hospital trauma room and was asking the detective if he was going to die. [District attorney], is this what we agreed on?
>
> [DISTRICT ATTORNEY]: Yes, Your Honor.
>
> THE COURT: [Defense counsel], is this what we agreed on?
>
> [DEFENSE COUNSEL]: It is.
>
> THE COURT: And is this what we agreed on after you consulted with your client?

> [DEFENSE COUNSEL]: I did. And for the record, he's currently in the courtroom.

¶10 After the jury received the police report and the reminder that when Detective Glidewell interviewed Trevino, Trevino was in extreme pain, it deliberated further and ultimately returned guilty verdicts on the reckless injury and felon in possession charges.[5]

¶11 Berrios now appeals. Additional facts will be developed below.

ANALYSIS

¶12 On appeal, Berrios argues that we ought to grant him a new trial in the interest of justice because the real controversy was not fully tried; alternatively, he argues that we must grant him a ***Machner*** hearing because his postconviction motion sufficiently alleged that trial counsel was ineffective. We consider each argument in turn.

(1) A new trial in the interest of justice is not warranted because Berrios' case is not "exceptional."

¶13 Berrios' first argument on appeal is that we should grant him a new trial in the interest of justice. He claims that the jury had before it evidence not properly admitted—specifically, Trevino's testimony that Berrios was the shooter—which clouded the crucial issue of identification. He also claims that the jury was not given the opportunity to hear that Trevino failed to identify Berrios in a photo array and that Trevino only identified Berrios as the shooter after seeing that Berrios was the defendant in the State's case. In addition, Berrios claims that

[5] The first-degree recklessly endangering safety charge was dismissed on the prosecutor's motion.

the trial court erroneously exercised its discretion, and thus clouded an important issue before the jury, by giving a follow-up reminder to the jury that Trevino was in extreme pain when interviewed by police. Finally, he claims that a ***United States v. Telfaire***, 469 F.2d 552, 555 (D.C. Cir. 1972) ("point[ing] out the importance of and need for a special instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt") instruction "might have added perspective—at least to the incomplete knowledge the jury had about problems with Mr. Trevino's ability to identify Mr. Berrios."

¶14 Berrios argues that his claimed errors require a new trial in the interest of justice because they impermissibly tipped the weight of the evidence in the State's favor in a case where evidence of guilt was far from overwhelming. He also argues in his reply that we should consider his arguments under an "interest of justice" framework rather than the ineffective-assistance-of-counsel framework because "an argument that can be framed under ineffective assistance of counsel may also support a motion for a new trial because the real controversy was not fully tried." *See* ***State v. Williams***, 2006 WI App 212, ¶¶14-17, 296 Wis. 2d 834, 723 N.W.2d 719 (rejecting State's contention that appellant's claim for new trial in the interest of justice must be analyzed under ineffective-assistance-of-counsel framework, following supreme court's decision in ***State v. Hicks***, 202 Wis. 2d 150, 549 N.W.2d 435 (1996)).

¶15 The State, on the other hand, contends that Berrios' claims for a new trial in the interest of justice are inappropriate because many of the claimed errors were not objected to at trial. The State points out that defense counsel decided to impeach Trevino rather than request a mistrial after Trevino testified, and that both parties stipulated to the aforementioned follow-up reminder to the jury regarding

the police report and Detective Glidewell's testimony. Thus, argues the State, the claim should instead be analyzed under the ineffective-assistance-of-counsel framework. *See* ***State v. Ndina***, 2007 WI App 268, ¶12, 306 Wis. 2d 706, 743 N.W.2d 722 (unobjected-to constitutional errors must be analyzed under ineffective-assistance-of-counsel standards).

¶16 While we acknowledge that "an argument that can be framed under ineffective assistance of counsel may also support a motion for a new trial because the real controversy was not fully tried," *see* ***Williams***, 296 Wis. 2d 834, ¶17, we agree with the State that the waiver rule is not to be set aside lightly:

> The long-established general rule is that an appellate court does not review an error unless it has been properly preserved. We have recognized some of the many reasons for the general rule. It gives attorneys an incentive to diligently try the case at trial because of the threat of waiver. It emphasizes the need for objections, which brings an issue to the judge's attention and allows him or her to correct errors. When trial judges take the opportunity to correct an error, the general rule functions to reduce the need for appeals. The general rule also preserves for the court of appeals the role of corrector of errors actually made by trial courts, rather than addressing issues not even raised in the trial court.

See ***State v. Bannister***, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W.2d 892 (citations omitted).

¶17 Moreover, "[a]lthough the court has exercised its power of discretionary reversal in numerous different situations, it does so only in exceptional cases." ***Id.*** A case in which the evidence of guilt was strong is not exceptional. *See generally* ***id.***, ¶¶43-51. Our review of the evidence convinces us that this is not an exceptional case.

¶18 We first note that Trevino's testimony identifying Berrios as the shooter had numerous weaknesses that defense counsel highlighted during cross-examination. Indeed, as soon as Trevino identified Berrios as the shooter, trial counsel impeached him, eliciting the fact that Trevino never told police that he saw anyone shooting from the porch and instead told police that he was shot by the three individuals in the alley. Moreover, when Trevino insisted later in his cross-examination that Berrios shot him, defense counsel immediately elicited testimony in which Trevino admitted that he actually did not know Berrios. Defense counsel also explored Trevino's motives for the identification—specifically, that Trevino was angry at Berrios for beating up one of his relatives. Trevino's identification testimony, when considered in the context of his entire cross-examination, is simply not as detrimental as Berrios makes it out to be.

¶19 In addition, three witnesses besides Trevino saw Berrios with a shotgun on the day of the incident. Andrew H. testified he saw Berrios standing on the porch with a shotgun, and heard the gun go off shortly after Trevino pulled up in his truck. Elisandra H. testified she too saw Berrios on the porch with a shotgun. She also saw Berrios start shooting. In addition, Garcia testified that he saw Berrios shoot the shotgun from the porch and saw Trevino get hit. Berrios makes much of the apparent weaknesses of the testimony of State's witnesses: for example, Andrew H. saw a shotgun with a strap but Elisandra H. did not remember seeing a strap; and Andrew H. and Elisandra H. talked about what happened with some of the other witnesses before trial. But the fact remains that three other witnesses besides Trevino saw Berrios on the porch with a shotgun, and one of those witnesses saw him fire the gun and hit the victim. Consequently, we cannot conclude that Trevino's testimony "so clouded a crucial issue that it

may be fairly said that the real controversy was not fully tried." *See* ***Hicks***, 202 Wis. 2d at 160.

¶20 Moreover, several other witnesses testified about physical evidence linking Berrios to the shooting. Dora T., Elisandra H., and Rojas all testified that Berrios was wearing a striped shirt on the day of the shooting. Given that Elisandra H. saw Berrios shoot a shotgun and both Elisandra H. and Rojas, Berrios' sister, saw Berrios wearing a striped shirt, the jury could have deduced that Berrios shot Trevino. Moreover, Milwaukee Police Detective Gilbert Carrasco testified that shotgun pellet spray hit Trevino's truck on the top of the driver's-side door frame, and came from an elevated position that went towards the dashboard—not straight through the back or the side of the vehicle. Given this testimony, the jury could have concluded that the shots that hit Trevino came from the elevated porch where Berrios was standing, rather than from the alley or the street.

¶21 Therefore, for all of the foregoing reasons, we conclude that this case was not exceptional, and we decline to exercise our power to reverse Berrios' conviction in the interest of justice. *See* WIS. STAT. § 752.35 (The court of appeals has the discretionary power to reverse a conviction in the interest of justice.); ***State v. Armstrong***, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98. We will instead consider Berrios' claimed errors under the ineffective-assistance-of-counsel framework.

(2) Trial counsel was not ineffective.

¶22 In arguing that the trial court erred in denying his postconviction request for a ***Machner*** hearing, Berrios highlights many of the same errors discussed in his interest-of-justice argument:

> [C]ounsel should have moved for a mistrial, to strike Mr. Trevino's testimony, or to obtain a limiting instruction when the prosecutor violated the pretrial order. Counsel should not have cemented the violation by permitting Mr. Trevino to repeatedly identify Mr. Berrios. And counsel should not have agreed to the "cautionary reminder" suggesting the jury limit the importance it attached to the police report.

We also consider Berrios' earlier claim that the jury was not given the opportunity to hear that Trevino failed to identify Berrios in a photo array and that Trevino only identified Berrios as the shooter after seeing that Berrios was the defendant in the State's case. And we briefly address Berrios' argument that a ***Telfaire*** instruction should have been requested.

¶23 "Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***Id.***, ¶14. This is a question of law subject to *de novo* review. *See* ***id.***, ¶9. "If the motion raises such facts, the [trial] court must hold an evidentiary hearing." ***Id.*** If, on the other hand, "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***Id.*** We review the trial court's discretionary decisions under an erroneous exercise of discretion standard, *see* ***id.***, upholding the trial court's decisions "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion," *see* ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

¶24 To sufficiently allege that trial counsel was ineffective, Berrios must set forth facts showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Berrios must allege facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel'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." *See* ***Strickland***, 466 U.S. at 694. The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶25 With the proper standards in mind, we consider Berrios' arguments.

¶26 First, trial counsel was not ineffective for failing to move for a mistrial or for failing to obtain a limiting instruction after the prosecutor violated the trial court's order prohibiting Trevino from identifying Berrios as the shooter. As noted, immediately after the prosecutor asked Trevino whether he recalled what the man who shot him looked like and whether that man was in the courtroom, defense counsel objected, and that particular line of questioning ceased. Given that trial counsel properly objected and Trevino was prohibited from testifying, Berrios cannot argue that counsel's performance was deficient,

nor that it prejudiced him in any way. *See* ***Strickland***, 466 U.S. at 687. Berrios' argument fails.

¶27 Second, trial counsel was not ineffective in his handling of Trevino's cross-examination. As noted, trial counsel decided to impeach Trevino during cross-examination rather than ask for a curative instruction or a mistrial. Indeed, trial counsel told the court that he discussed the possibility of a mistrial with Berrios, but Berrios did not want that:

> [TRIAL COUNSEL]: I did talk to [Berrios] about the possibility of a mistrial. He's asked me not to ask for that. I wasn't inclined to do so anyway. I think that's a rational thing not do and I'm not doing it.

In other words, counsel's decision to impeach Trevino on cross-examination rather than pursue other means of diminishing Trevino's credibility was a reasonable, strategic decision that Berrios endorsed. *See* ***State v. Leighton***, 2000 WI App 156, ¶40, 237 Wis. 2d 709, 616 N.W.2d 126 (reasonableness of counsel's actions may be substantially influenced by client); *see also* ***State v. Oswald***, 2000 WI App 3, ¶50 n.7, 232 Wis. 2d 103, 606 N.W.2d 238 (if a decision was made by the defendant himself, defendant cannot be prejudiced by counsel's advice). Therefore, we cannot conclude trial counsel's representation was deficient or prejudicial. This is especially true given the strength of the eyewitness testimony besides Trevino's.

¶28 Third, we conclude that Berrios was not prejudiced by the fact that the jury was not given the opportunity to hear that Trevino failed to identify Berrios in a photo array and that Trevino only identified Berrios as the shooter after seeing that Berrios was the defendant in the State's case. As noted, trial counsel's cross-examination more than adequately highlighted the weaknesses in

Trevino's identification testimony. Also, as noted, there was plenty of evidence from which a reasonable jury could have found Berrios guilty even if Trevino had not identified Berrios as the man who shot him. Consequently, trial counsel was not ineffective for failing to cast further doubt on Trevino's testimony. *See* ***Strickland***, 466 U.S. at 687, 697 (defendant alleging ineffective assistance of counsel must show *both* deficient performance and prejudice, and the claim fails if a showing cannot be made as to either prong of the analysis).

¶29 Fourth, we must reject Berrios' argument that a ***Telfaire*** instruction should have been requested. Notably, Berrios does not argue that trial counsel acted deficiently in failing to request the instruction, nor does Berrios argue that he suffered prejudice due to this omission. Rather, he simply argues that a ***Telfaire*** instruction "might have added perspective" for the jury. This argument does not meet the rigorous standards set forth in ***Strickland***, *see* ***id.***, 466 U.S. at 687, and we will not consider it further, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider insufficiently-developed arguments).

¶30 Finally, trial counsel was not ineffective in stipulating to the follow-up reminder to the jury that Trevino was in extreme pain when interviewed by police. According to Berrios, the reminder unfairly emphasized portions of Detective Glidewell's testimony that were helpful to the State while simultaneously diminishing the importance of the police report, which he claims had information more helpful to his case. We disagree. As the trial court found, "the court merely summarized testimony the jury had already heard when Detective Glidewell testified." Furthermore, given the overwhelming evidence of guilt given by the other trial witnesses, we cannot say that the follow-up reminder

regarding Glidewell's testimony prejudiced Berrios. *See* ***Strickland***, 466 U.S. at 694. Therefore, we conclude that trial counsel was not ineffective. *See* ***id.*** at 697.

¶31 In sum, our review of the trial evidence and trial counsel's decisions require us to conclude that trial counsel provided Berrios with effective representation. Consequently, we affirm the trial court's decision to deny Berrios a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.