COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2016

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. 2015AP731 **Cir. Ct. No. 1990CF226**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK H. PRICE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Mark H. Price appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2013-14)[1] motion seeking a new trial due to prosecutorial misconduct.

¶2 A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

> The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted). Whether the motion alleges sufficient facts to entitle the defendant to relief is a question of law that we review de novo. ***Id.***, ¶9. "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process. When reviewing a trial court's exercise of discretion, we are permitted to search the record for reasons to sustain such a determination." ***State v. Sulla***, 2016 WI 46, ¶23, 369 Wis. 2d 225, 880 N.W.2d 659 (citations omitted).

¶3 In 1994, we affirmed Price's 1991 convictions for endangering safety by conduct regardless of life and of being party to the crimes of first-degree intentional homicide, kidnapping, pointing a firearm, and false imprisonment in the death of Michael Fitzgibbon. ***State v. Price***, Nos. 1992AP65-CR and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

1992AP976-CR, unpublished slip op. (WI App Mar. 9, 1994). Our opinion discussed the testimony of the prosecution's main witness, Todd Crawford:

> Crawford testified that on the night of the murder he went to Joseph Pease's residence between 5:30 and 6:00 p.m. Within thirty to forty-five minutes, Price and Richard Pease, Joseph's brother, arrived. Approximately thirty minutes later, Fitzgibbon arrived and began talking with Price. An altercation ensued and Price began beating Fitzgibbon. Price then told Fitzgibbon "I should kill you," drew a gun and fired it just over Fitzgibbon's head. Price picked up a steak knife and he, Crawford and Richard Pease left the residence with Fitzgibbon, whom Price forced into a car. Crawford rode in the back seat with Fitzgibbon, and Price threatened to kill Crawford if he let Fitzgibbon out of the car. Price leaned over the front seat to hit Fitzgibbon while Richard Pease was driving.
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> Upon arriving at Lake Butte des Morts, Pease ordered everyone out of the car. Price dragged Fitzgibbon out of the car, hitting him until he fell face first onto the frozen lake. Pease then shot Fitzgibbon in the back of the head at close range and demanded that Crawford also shoot Fitzgibbon. Crawford did so out of fear for his own life. Price then took the gun and shot Fitzgibbon in the back of the head. Price and Crawford loaded Fitzgibbon into the trunk of the car and left the lake to get warmer clothes and a chain saw. Upon returning to the lake, Pease cut a hole in the ice with the chain saw and directed Price and Crawford to remove Fitzgibbon's body from the trunk. Price dropped Fitzgibbon's body through the hole and threatened Crawford with the gun as they were leaving the lake.

Id. at 2.

¶4 This appeal arises from the circuit court's denial of Price's 2014 WIS. STAT. § 974.06 motion seeking a new trial.[2] Price's allegations were largely

[2] Price's WIS. STAT. § 974.06 motion was filed by counsel. Price appeals pro se.

based on the alleged misconduct of then-District Attorney, Joe Paulus.[3] In ruling on the motion, the court considered Price's trial testimony and the fact that he was charged as party to the crime. The court characterized Price's § 974.06 motion as presenting "unfounded conclusory allegations." The court found that Price had his day in court, had a fair trial, and the jury rejected his claim of innocence after assessing the credibility of the witnesses and weighing the evidence. The court stated that the district attorney's subsequent criminal convictions do not "mean that this case was not responsibly prosecuted." The court concluded that the "overwhelming evidence" demonstrated that Price "is neither entitled to a new trial based upon an alleged prosecutorial misconduct nor newly discovered evidence as well as in the interest of justice…. [T]here is no substantial probability that a new trial would produce a different result."

¶5 On appeal, Price argues that during his trial and postconviction proceedings, the State elicited perjured testimony from three witnesses: Coroner Michael Stelter, Officer Gerald Forseth, and Damon Hinkle, a fellow inmate of Richard Pease, one of Price's co-actors. Allegations of prosecutorial misconduct are reviewed in light of the entire record. ***State v. Lettice***, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996). Assuming that the allegations Price made in his WIS. STAT. § 974.06 motion are true, does the record nevertheless conclusively demonstrate that Price is not entitled to relief? ***Allen***, 274 Wis. 2d 568, ¶12. We conclude that it does, and the circuit court did not err in denying the motion without an evidentiary hearing.

[3] The district attorney's license to practice law was subsequently revoked. ***Office of Lawyer Regulation v. Paulus***, 2004 WI 71, 272 Wis. 2d 143, 682 N.W.2d 326 (consensual license revocation following criminal conviction for accepting bribes while in public office and filing false tax return).

¶6 We agree with the circuit court that Price's claims in his WIS. STAT. § 974.06 motion must be understood in the context of his trial testimony. We review Price's testimony as background for our discussion of Price's appellate issues.

¶7 Price admitted that he was armed on the night Fitzgibbons was murdered. The victim arrived at the apartment where Price was gathered with others, Price slapped the victim in the face during a dispute, Price and the victim fell on the kitchen floor as they fought, Price threatened the victim with a gun and fired it into the wall over the victim's head, another person in the apartment punched the victim, and Price heard what sounded like Crawford punching the victim as they traveled to the lake. On the lake, Richard Pease shot the victim first and then Crawford shot the victim.[4] Price assisted in placing the body in the trunk of the car and later assisted in disposing the body under the lake ice.

¶8 We address Price's complaints about the coroner's trial testimony. The coroner's evidence related to (1) the condition of the victim's body at the time the coroner examined it and (2) whether the coroner noticed trauma to the body, signs of foul play or a wound behind the victim's left ear. Price argues that the coroner's evidence was important to the case because Crawford and others testified that the victim was beaten severely before he was shot, so the body should have borne evidence of such an assault. Price theorizes that if the coroner did not notice assault-type injuries, the injuries were likely absent, which would

[4] Crawford testified that the order of shooting was: Richard Pease, himself, and then Price.

have undermined Crawford's credibility as the State's main witness and the ability of the jury to determine that Price was guilty.

¶9 The condition of the victim's body was before the jury. The coroner testified that he did not examine the body thoroughly, but the funeral director, Kevin Arne, reported to him that he noticed an injury behind the victim's left ear. Regardless of whether the coroner did or did not view the body a second time or did or did not notice an injury behind the left ear, the jury heard Arne's testimony about his observations of the body. A second funeral director, Gary Derksen, testified that Arne showed him a wound behind the victim's left ear. Price testified that the victim was shot in the back of the head. Given the evidence before the jury about the condition of the victim's body and the wound behind the left ear and Price's own testimony about what happened to the victim, the record refutes the effect, if any, of any inconsistent testimony by the coroner about his assessment of the body. We so hold, regardless of how the coroner's testimony occurred and even if that testimony resulted from prosecutorial misconduct, which we need not decide. ***Lettice***, 205 Wis. 2d at 353 (allegations of prosecutorial misconduct are reviewed in light of the entire record).

¶10 Price next contends that on three occasions, the State elicited perjured testimony from Forseth relating to Crawford.

¶11 First, Price alleges that during trial, the State elicited perjured testimony from Forseth that Crawford cooperated during the investigation of the victim's death when there was evidence Crawford did not cooperate. We disagree with Price's characterization of Forseth's testimony. In response to a question from the State about the level of Crawford's cooperation "when he came into the office," Forseth testified that except for an initial uncooperative encounter with

officers described in a May 18, 1990 police report, Crawford cooperated in the investigation as evidenced by his May 24 and 25, 1990 statements to police about the events surrounding the victim's death. The record demonstrates Forseth's testimony about the evolution of Crawford's cooperation and conclusively refutes Price's claim that the State elicited perjured testimony from Forseth about the extent of Crawford's cooperation.

¶12 Second, Price complains about testimony he contends was elicited from Forseth by the State about a potential deal for Crawford in exchange for his testimony. The record citation offered by Price is to testimony elicited on cross-examination by Price's counsel, not to testimony elicited by the State. We will not search the record to support Price's argument. ***Fuller v. Riedel***, 159 Wis. 2d 323, 330 n.3, 464 N.W.2d 97 (Ct. App. 1990). Therefore, we address it no further.

¶13 Third, Price argues that the State elicited perjured testimony from Forseth at Price's 1991 postconviction motion hearing relating to a polygraph exam taken by Crawford. The record citation offered by Price is to testimony elicited on cross-examination by Price's counsel, not to testimony elicited by the State. We will not search the record to support Price's argument. ***Id.*** Therefore, we address it no further.

¶14 Price next argues that the State elicited perjured testimony from inmate Hinkle during Price's 1991 postconviction motion hearing on the question of whether Hinkle ever had a conversation with Richard Pease, one of Price's co-actors.[5] The record citation offered by Price is to testimony elicited on cross-

[5] The substance of this alleged conversation need not detain us because the brief is insufficient.

examination by Price's counsel during the postconviction motion hearing. The testimony was not elicited by the State. We will not search the record to support Price's argument. ***Id.*** Therefore, we address it no further.

¶15 We turn to Price's claims that the State failed to disclose exculpatory evidence: the State paid the rent of a witness, Vernon Wiegers, and Samuel Griffin contacted the State about Price's involvement in the murder. A defendant is prejudiced by the State's failure to disclose exculpatory or impeaching evidence if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***State v. Harris***, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted).

¶16 The State conceded in the circuit court that it paid Wiegers's rent as a relocation expense and that it failed to disclose this impeachment evidence. However, the State argued that the failure to disclose this evidence did not prejudice Price. We agree. The August 1990 rent payment was made after Wiegers gave a statement to police in May 1990. Wiegers's May 1990 statement was consistent with his January 1991 trial testimony and the trial testimony of Crawford and Price about how the victim's body ended up under the lake ice. Wiegers testified at trial that Price accompanied Richard Pease and Crawford to retrieve a chainsaw from Wiegers's garage. The next morning, Wiegers found the chainsaw iced over, and he noticed frozen blood on Pease's vehicle and on a nearby spare tire. We agree with the State that the rent payment could not "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***Harris***, 272 Wis. 2d 80, ¶15 (citation omitted).

¶17 Price next argues that the State withheld information that Samuel Griffin contacted law enforcement with information that Richard Pease told him Price did not shoot the victim. During his 1991 postconviction motion hearing, Price made a similar allegation about inmate Hinkle: Hinkle would say that Richard Pease told Hinkle that Price did not shoot the victim. Richard Pease rejected Price's claim on two occasions: Pease advised the court in 1991 that he did not absolve Price to Hinkle, and Pease testified at Price's 1991 postconviction motion hearing that he witnessed Price shoot the victim. The record refutes Price's general claim that Pease takes the position that Price did not shoot the victim. The State did not fail to disclose exculpatory or impeaching evidence. ***Harris***, 272 Wis. 2d 80, ¶15.

¶18 In addition to the fact that Griffin's statement about Pease was at odds with Pease's statements and testimony, Griffin's statement was essentially a recantation of his own testimony at Pease's trial. As such, Griffin's recantation had to be "corroborated by other newly-discovered evidence" and, if corroborated, had to create a "reasonable probability … that a different result would be reached in a trial." ***State v. Ferguson***, 2014 WI App 48, ¶24, 354 Wis. 2d 253, 847 N.W.2d 900 (citation omitted). Griffin's recantation is not corroborated by other newly discovered evidence.

¶19 The record either refutes or fails to support Price's claims that he was prejudiced by the State's alleged failure to disclose exculpatory or impeaching evidence. This evidence would not have "put the whole case in such a different light as to undermine confidence in the verdict." ***Harris***, 272 Wis. 2d 80, ¶15 (citation omitted).

¶20 We conclude that the record conclusively demonstrates that Price was not entitled to a new trial. The circuit court did not misuse its discretion when it denied Price's WIS. STAT. § 974.06 motion without a hearing. ***Allen***, 274 Wis. 2d 568, ¶12.

¶21 Having rejected Price's multiple claims of error, we also reject any request for discretionary reversal under WIS. STAT. § 752.35. ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992) (a final catchall plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed).[6]

By the Court.—Order affirmed.

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

[6] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").