

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2005

Cornelia G. Clark
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. 2004AP2452

Cir. Ct. No. 2001CF4739

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY V. MONTGOMERY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEAN W. DIMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timothy V. Montgomery appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)¹ motion. Montgomery claims:

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

(1) the evidence was insufficient to support the “while armed” element of the charges against him; (2) his trial counsel was ineffective for failing to argue that the charges against him were multiplicitous; and (3) he was denied his right to counsel. Because Montgomery’s claims are meritless, we affirm.

BACKGROUND

¶2 A jury found Montgomery guilty of second-degree recklessly endangering safety, endangering safety by use of a dangerous weapon, disorderly conduct, operating a vehicle to flee an officer and being a felon in possession of a firearm.

¶3 Following the trial, Montgomery filed a direct appeal challenging the sufficiency of the evidence on the fleeing count and arguing that the trial court erroneously exercised its sentencing discretion. We affirmed by summary disposition in November 2003.

¶4 In August 2004, Montgomery filed a postconviction motion in the trial court arguing that there was no evidence to support the “while armed” portion of the crimes and that his appellate attorney was ineffective for failing to raise this claim. The trial court summarily rejected Montgomery’s motion, ruling that the claims were frivolous. Montgomery appeals from the trial court’s order.

DISCUSSION

¶5 Montgomery’s first argument is that there was insufficient evidence to uphold the jury’s finding that he was in possession of a firearm or a dangerous weapon. We reject his claim. Our review of a sufficiency of the evidence claim is limited. We will “not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and

force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The record here reflects that Montgomery’s claim has no basis. Eyewitness Stacia Reed testified that she saw Montgomery with a gun and that he fired a shot toward her while she was standing in her bedroom window. This alone is sufficient to support the jury’s verdict that Montgomery was armed with a dangerous weapon and was a felon in possession of a firearm.

¶6 Montgomery next claims that his trial counsel provided ineffective assistance of counsel for failing to argue that the multiple counts violated the double jeopardy clause. This claim was not raised in the trial court and therefore need not be considered on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. It is clear from the record, nonetheless, that the offenses with which Montgomery was charged and convicted were separate and distinct acts. Thus, any claim of multiplicity is without merit.

¶7 Finally, Montgomery argues that he was denied the right to counsel on his WIS. STAT. § 974.06 motion. We reject his claim. An indigent defendant has a constitutional right to the effective assistance of counsel on his first direct appeal as of right. There is no constitutional requirement to provide an indigent defendant with counsel for a collateral attack on a conviction under § 974.06 or any appeal generated therefrom. *See State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 648-49, 579 N.W.2d 698 (1998); *State v. Ray*, 166 Wis. 2d 855, 875 n.11, 481 N.W.2d 288 (Ct. App. 1992); *State v. Alston*, 92 Wis. 2d 893, 895, 288 N.W.2d 866 (Ct. App. 1979).

¶8 Based on the foregoing, we reject Montgomery's arguments and affirm the order of the trial court.

By the Court.—Order affirmed.

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

