**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 11, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP2235** **Cir. Ct. No. 1995CF955571**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KENDRIC JERMAINE WINTERS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Kendric Jermaine Winters appeals from an order summarily denying his motion for postconviction relief. The issue is whether postconviction counsel was ineffective for failing to raise trial counsel's alleged ineffectiveness for stipulating to the timeliness of Winters's ***Riverside*** hearing, and

for failing to object to several instances of allegedly improper closing argument.[1] We conclude that our decision rejecting Winters's ***Riverside*** challenge on direct appeal bars the former claim, and that he has failed to demonstrate ineffectiveness on the latter claim. Therefore, we affirm.

¶2 In 1996, a jury found Winters guilty of first-degree intentional homicide, as a party to the crime, and an attempt of that same offense. For the homicide, the trial court imposed a life sentence, with parole eligibility in sixty years, and for the attempted homicide, the trial court imposed a forty-year consecutive sentence. Winters sought a new trial for trial counsel's ineffectiveness, which the trial court denied. On direct appeal, we affirmed the judgment of conviction and the postconviction order. *See* ***State v. Winters***, No. 97-0944-CR, unpublished slip op. at 11 (Wis. Ct. App. May 26, 1998). On July 14, 2004, Winters moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2003-04). The trial court denied the motion on its merits. Winters appeals.

¶3 Winters characterizes both issues as postconviction counsel's ineffectiveness for failing to challenge trial counsel's effectiveness. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v.***

[1] *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56-57 (1991).

***McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

¶4 In his current postconviction motion, Winters contends that postconviction counsel was ineffective for failing to challenge trial counsel's stipulation to the timeliness of his ***Riverside*** hearing, which generally requires a judicial determination of probable cause within forty-eight hours of a warrantless arrest. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56-57 (1991). This issue was implicitly decided on direct appeal. "Winters was arrested on December 11, 1995, at 2 p.m. He was interviewed by police twice that same day. On December 12, Winters received a judicial 'probable cause' determination in compliance with ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991)." ***Winters***, No. 97-0944-CR, unpublished slip op. at 10. Although the precise issue on direct appeal was whether Winters's confession should have been suppressed as a "sew-up" confession, we will not revisit our decision on that interrelated issue. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a successive postconviction motion may not be used to resurrect a previously rejected issue).

¶5 Winters's second claim is the failure to challenge the absence of an objection to the prosecutor's closing argument when she allegedly interjected her personal opinion of Winters's guilt, and allegedly editorialized about the testimony of three witnesses. The objectionable comments regarding the prosecutor's allegedly personal opinion of Winters's guilt are italicized in the following paragraph:

> Now, *I think he is both. I think he is both an aider and abetter and co-conspirato*r and I will talk about that in a minute. But first let me talk about the crimes themselves. *I don't think that there can be any serious doubt* that these were first degree intentional homicide and attempt[ed] first degree intentional homicides that happened that night.

(Emphasis added.)

¶6 The prosecutor also told the jury that the victim of the attempted homicide survived only "by the grace of God," and that she suffered emotional scars; Winters claims there was no evidence to that effect. This victim testified in extensive detail how she and Al, the deceased victim, were being chased, and that she "heard a lot of shots which came from an automatic weapon, and they were coming quick, and after that I didn't hear Al anymore." She then "realized that they were still shooting at me." She testified: "I was in such a state of mind I wasn't sure if he [Al] was dead or not, but he was injured. They had definitely tried to shoot me, too, and I wanted to be able to come tell somebody what I had s[een]." She also testified that she had received threats "[i]n conjunction to [her] status as a witness on this case." Someone called her house more than five times to tell her that "if [she] come[s to] testify in court, [she] was dead."

¶7 The following were the prosecutor's comments:

> There can be no doubt as to what the intent of that shooter was that night. And there can be no doubt that Ms. Taylor survived not because of any lack of intent on the part of that shooter. She survived by the grace of God. You saw those holes in that car. You saw how some of those bullets dropped between the doors, were stopped apparently by the outer layer of the door, dropped between the door and were recovered between the inner and outer wall of the driver side door right in the door. Her driver[']s window was shattered. It was the grace of God and not any decision[-]making on the part of the defendant or his companion that caused her to survive that night.

¶8 Winters also criticizes the prosecutor's characterization of two other witnesses as "terrified [to testify] because of alleged threats made against them." Although one of the witnesses did not claim that she was "terrified" to testify because of threats, she testified that the evening of the incident Winters made "some violent threats" to her boyfriend, and that "[she] was scared." The other witness testified that she was called about "a week or two" before trial and told that "if [she] do[es]n't show up, then [she] do[es]n't have anything to worry about." She was also led to believe that if she did "show up," that "[t]hey w[ould] be looking for [her]." Trial counsel objected to this questioning, but his objection was overruled.

¶9 The supreme court has explained:

> [C]ounsel in closing argument should be allowed "considerable latitude," with discretion to be given to the trial court in determining the propriety of the argument. The prosecutor may "comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors."
>
> "The aim of the prosecutor in a judicial inquiry should be to analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions."
>
> The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.

***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citations omitted).

¶10 The prosecutor's comments, "I think" and "I don't think that there can be any serious doubt," are simply her "comment[s] on the evidence, detail[ing] the evidence, argu[ing] from [the evidence] to a conclusion and stat[ing] that the

evidence convinces h[er] and should convince the jurors." *See* ***id***. The victim's testimony supports the prosecutor's comments about the victim being spared "by the grace of God," and her being emotionally scarred. We do not fault postconviction or trial counsel for failing to quibble over the prosecutor's characterization of "terrified" and being threatened when that victim was scared and overheard violent threats to her boyfriend on the night of the shooting, if not necessarily prior to her testimony.[2] The other witness's testimony fully supports the prosecutor's characterization. These comments do not "go[] beyond reasoning from the evidence to … instead suggest[] that the jury arrive at a verdict by considering factors other than the evidence." *See* ***id.*** The prosecutor was telling the jurors the State's (arguably her) view of the evidence; she was not telling jurors to convict Winters on factors other than the evidence. Trial counsel's performance was not deficient for failing to object to the prosecutor's comments, summarizing the State's view of the evidence and characterizing several of the witnesses from their trial testimony.

¶11 Moreover, Winters has not shown the prejudice necessary to maintain an ineffective assistance claim. The trial court instructed the jury that the lawyers' closing arguments were not evidence, and that their verdict must be based on the evidence and the trial court's instructions, not the lawyers' arguments

[2] An objection during closing argument to the prosecutor's purported mischaracterization of this one witness's testimony would have been of questionable value to Winters. If the trial court sustained the objection, it would have provided the prosecutor with an additional opportunity to emphasize the repeated threats to the victim and the other witness. Matters of trial strategy are "virtually unchallengeable" in the ineffective assistance context. *See* ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984). Even if Winters had shown deficient performance in this one instance, he has not shown prejudice. Consequently, a remand for an evidentiary hearing to question trial counsel on this point would be an exercise in futility. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

or conclusions. The jury is presumed to have followed the court's instructions. ***State v. Williamson***, 84 Wis. 2d 370, 396, 267 N.W.2d 337 (1978), *declined to follow on a different ground than for the proposition cited here*, ***Manson v. State***, 101 Wis. 2d 413, 422, 304 N.W.2d 729 (1981). Winters has not persuaded us that the prosecutor's remarks, considered in their entirety, crossed the line into impermissible argument, much less that trial counsel was ineffective for failing to repeatedly object to proper closing argument, much less that postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).