COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2769 **Cir. Ct. No. 1997CF546**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SILVESTER B. DONOE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Silvester Donoe appeals from the order denying his motion for postconviction relief. He argues on appeal that the circuit court erred in denying his motion because the State of Wisconsin lacked jurisdiction, two charges filed against him were multiplicitous, two jurors were improperly selected,

his inculpatory statement should not have been admitted into evidence, a wrench is not a dangerous weapon, and his two trial counsel were ineffective for a variety of reasons. Because we conclude that his arguments lack merit, we affirm.

¶2 Donoe was convicted after a jury trial of being a party to the crimes of first-degree intentional homicide, carjacking resulting in death, and kidnapping. Donoe, who was fifteen at the time of the crime, and another youth, carjacked the victim in Illinois, beat the victim with a pipe wrench as they drove, and eventually left him to die in a ditch in Wisconsin. At trial, Donoe admitted that he had killed the victim. The court sentenced him to life imprisonment on two of the charges and forty years in prison on the third. Eventually, Donoe filed the *pro se* motion for postconviction relief that is the subject of this appeal. He raised the same arguments in the circuit court that he raises here. The circuit court denied the motion without a hearing.

¶3 Although Donoe did not specifically raise this issue in his brief, we begin by noting that a circuit court may deny a postconviction motion without a hearing when the motion on its face shows no basis for relief, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62. For the reasons explained below, we conclude that Donoe's motion did not state a basis for relief, and consequently the circuit court did not err when it denied the motion without a hearing.

¶4 Donoe first argues that Wisconsin did not have jurisdiction to bring the criminal charges against him because all of the events leading to the victim's

death occurred in Illinois and that he did not know he was in Wisconsin when he left the victim to die. Under WIS. STAT. § 939.03(1)(a) (1995-96),[1] the State has jurisdiction over a crime if the person "commits a crime, any of the constituent elements of which takes place in this state." The constituent elements of an offense are those elements "that the State is required to prove beyond a reasonable doubt in the prosecution of the offense." ***State v. Anderson***, 2005 WI 54, ¶33, 280 Wis. 2d 104, 695 N.W.2d 731. Donoe's argument ignores the facts that a "constituent element" of each offense took place in Wisconsin.

¶5 One of the constituent elements of both first-degree intentional homicide and carjacking resulting in death is "causing death." *See* ***id.***, ¶34; WIS. STAT. §§ 940.01 and 943.23. The evidence at trial established that at least one of the blows that lead to the victim's death occurred in Wisconsin. Consequently, the State proved a constituent element of both of these offenses.

¶6 The evidence at trial also established that a number of the elements of kidnapping occurred in Wisconsin. The crime of kidnapping, WIS. STAT. § 940.31(1)(a), has four elements: (1) that defendant transported the victim from one place to another, (2) without the victim's consent, (3) forcibly, and (4) with the intent that the victim be secretly confined, secretly imprisoned, transported out of the state, or held to service against his will. WIS JI—CRIMINAL 1280 (2006). The evidence established that Donoe took the victim forcibly and without his consent from Illinois, transported him to Wisconsin where he was secretly confined when Donoe dragged him from the car and left him in a ditch. Because

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

the State proved a constituent element of each offense, Wisconsin had jurisdiction to prosecute Donoe for these crimes.

¶7 Donoe next argues that the charges of first-degree homicide and carjacking resulting in death, are multiplicitous, and consequently violate his double jeopardy rights. "[T]he imposition of cumulative punishments from different statutes in a single prosecution for 'the same offense' violates double jeopardy when the cumulative punishments are not intended by the legislature." ***State v. Davison***, 2003 WI 89, ¶32, 263 Wis. 2d 145, 666 N.W.2d 1 (citations omitted). "The 'same offense' in this specific situation should be an offense identical in law and fact." ***Id.***, ¶33.

¶8 Donoe does not argue that the two offenses are identical in law, and they are not. He instead argues that because the legislature later repealed the carjacking while armed and resulting in death statute, WIS. STAT. § 943.23(1r), and instead made it a predicate crime for felony murder, WIS. STAT. § 940.03, the legislature intended that carjacking while armed and resulting in death be a lesser included offense of homicide. We disagree. Both crimes are Class A felonies and the punishment for each crime is the same. This establishes that the carjacking charge is not a lesser included offense of the homicide charge. Further, the carjacking statute was repealed five years after Donoe was convicted. We reject Donoe's argument that his conviction on these two charges violates double jeopardy.

¶9 Donoe next argues that his due process rights were violated because two jurors should have been stricken for cause. First, as the State points out, his counsel did not object so any error is waived. ***State v. Brunette***, 220 Wis. 2d 431,

440-41, 583 N.W.2d 174 (Ct. App. 1998). Even had his counsel objected, however, we conclude that there is no merit to the argument.

¶10 Donoe asserts that one juror demonstrated bias when she gave an equivocal response to a question from the prosecutor as to whether she would feel uncomfortable viewing grisly photographs of the victim. The prosecutor later followed up by asking if she meant that she would be unable to follow an instruction to the view the evidence impartially and objectively. She responded that she "would do her best." We conclude that this was sufficient. *See* ***State v. Oswald***, 2000 WI App 3, ¶6, 232 Wis. 2d 103, 606 N.W.2d 238 (Ct. App. 1999).

¶11 The second juror Donoe claims should be stricken responded to a question about whether he would "give the defendant a break" because of his young age. The juror responded that he had an eighteen-year-old grandson and "would be shook up." This response shows that any bias that this juror had was in Donoe's favor. Consequently, we reject Donoe's argument that these two jurors should have been stricken for cause.

¶12 Donoe next argues that his inculpatory statement should not have been admitted into evidence because the police had not informed his parents that he was in custody and being interrogated. The rule in Wisconsin is that the police must immediately attempt to contact the parents or other interested adult when a child is taken into custody. ***State v. Jerrell C.J.***, 2005 WI 105, ¶¶42-43, 283 Wis. 2d 145, 699 N.W.2d 110. This rule, however, is not a per se rule excluding in-custody admissions of anyone under the age of sixteen who has not been given the opportunity to consult with a parent or adult. ***Id.***, ¶43. More importantly, however, the record demonstrates that in this case the police asked Donoe how to contact his parents and he told them that his parents were unreachable.

Consequently, the police did attempt to contact Donoe's parents, and the attempt failed. This argument also must fail.

¶13 Although not addressed in his brief-in–chief, Donoe argued in the circuit court and in his reply brief that the pipe wrench used to strike the victim was not a dangerous weapon. This argument is frivolous. Whether an item is a dangerous weapon depends on how it used. WIS JI—CRIMINAL 910 (2003). Obviously, the wrench used to strike the victim was capable of producing great bodily harm. Therefore, it was a dangerous weapon within the meaning of the statute. We reject this argument as well.

¶14 Donoe next argues that his two trial counsel were ineffective for a number of reasons. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶15 Donoe argues that his trial counsel were ineffective for failing to challenge the jurisdiction of the court, for failing to challenge the crimes charged as violating double jeopardy, for failing to challenge the admissibility of his statement, and for failing to move to strike the jurors for cause. Because we have concluded that none of these arguments have merit, his counsel were not ineffective for failing to challenge them. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments).

¶16 He also alleges that his trial counsel were ineffective because they did not investigate his mental health history. The record establishes, however, that his second trial counsel did investigate the claim and moved for an adjournment of the trial to pursue the matter. Counsel, however, had very little evidence in support of an NGI plea. In fact, the only medical report indicated little support for such a claim. The circuit court denied the motion. We conclude that counsel were not ineffective on this basis, and for the same reason were not ineffective for failing to advise him to enter an NGI plea.

¶17 Finally, Donoe argues that his trial counsel were ineffective because they did not have Donoe testify at this ***Miranda-Goodchild*** hearing.[2] Donoe, however, never states what it is he would have testified to and how that would have affected the outcome of the hearing. Because of this, we cannot conclude that counsel was ineffective for failing to call him. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

[2] ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264-65, 133 N.W.2d 753 (1965) and ***Miranda v. Arizona***, 384 U.S. 436 (1966).