

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 2006

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. 2005AP2239-CR

Cir. Ct. No. 2004CF877

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES F. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. James Brown appeals a judgment of conviction and an order denying his postconviction motion. The issue is whether he was entitled to a hearing on his claim of ineffective assistance of trial counsel. We affirm.

¶2 Brown's postconviction motion alleged that there was a verdict specificity and unanimity problem in the instructions and verdict, in that the jury convicted him on the one charged count of felon in possession of a firearm, but the evidence described two acts by Brown that might arguably constitute that crime. In the alternative, he alleged that his trial counsel was ineffective for not objecting to this problem. The circuit court denied the motion without a hearing, after concluding that the two acts were related events within a continuous short period of time, and therefore the jury was not required to agree on which of those acts Brown committed.

¶3 On appeal, we assume, without deciding, that Brown is correct that there was a specificity and unanimity problem in the verdict. However, because no objection was made at trial, that issue was waived, and can be raised only in the form of ineffective assistance of counsel. *State v. Marcum*, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992). The question then becomes whether Brown was entitled to an evidentiary hearing on that issue. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶4 We conclude that Brown was not entitled to an evidentiary hearing because, regardless of what reason, if any, that his trial counsel had for not objecting to the instructions and verdict form, a reasonable attorney could have intentionally chosen not to object. *See State v. Koller*, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838; *State v. Kimbrough*, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752 (function of a court assessing a claim of deficient performance is to determine whether counsel's performance was objectively reasonable). Brown's attorney could reasonably be concerned that an objection

would cause an amendment by the State that would result in two separate counts, and two convictions, rather than one. *See* WIS. STAT. § 971.29(2) (2003-04).¹ Therefore, we conclude that Brown's motion did not sufficiently allege deficient performance to require a hearing.

By the Court.—Judgment and order affirmed.

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

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

