

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2007

David R. Schanker
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. 2006AP1647

Cir. Ct. No. 2001CF2994

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JERMAINE MCFARLAND,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Jermaine McFarland appeals from a denial of his WIS. STAT. § 974.06 (2005-06)¹ postconviction motion. Because we conclude that

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

all of the issues raised by McFarland in this motion either have been addressed in this court's prior decision (*State v. McFarland*, No. 04-0633-CR, unpublished slip op. (WI App Apr. 12, 2005) (*McFarland I*)), or should have been raised in his "original, supplemental or amended" postconviction motion or direct appeal, and are therefore barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), or are without merit as discussed below, we affirm.

BACKGROUND

¶2 We set forth the factual and procedural history in *McFarland I* and provide here only those facts necessary to address the issues raised on this appeal.

¶3 McFarland was arrested for the shooting of Illeana McNeal-Veasley, and was charged with one count of first-degree reckless injury, while armed, contrary to WIS. STAT. §§ 940.23(1)(a) and 939.63 (1999-2000), one count of endangering safety by use of a dangerous weapon, contrary to WIS. STAT. § 941.20(2)(a) (1999-2000), and one count of being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a) (1999-2000). Additionally, McFarland was charged on all three counts as a habitual criminal, pursuant to WIS. STAT. § 939.62 (1999-2000). The matter was tried to a jury and McFarland was convicted on all three counts. The trial court sentenced McFarland to indeterminate periods of confinement² of twenty-one years, eight years and eight years, all to be served consecutively.

² The crimes were committed in October 1999, prior to the effective date of Truth-In-Sentencing I. See 1997 Wis. Act 283.

¶4 McFarland filed a motion for postconviction relief, alleging he was entitled to a new trial because of ineffective assistance of counsel. The trial court denied McFarland’s motion without a hearing and the court of appeals affirmed. *See McFarland I*, No. 04-0633-CR, unpublished slip op. The supreme court denied review.

¶5 In June 2006, McFarland filed a new motion for postconviction relief pursuant to WIS. STAT. § 974.06.³ After filing his motion and brief,

³ WISCONSIN STAT. § 974.06, entitled “Postconviction procedure,” provides, in pertinent part:

(1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

....

(4) All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The motion may be heard under s. 807.13.

(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the person.

(continued)

McFarland filed a second supplemental motion and brief. Because the supplemental brief, in combination with the first brief, exceeded the page limit under Milwaukee County Circuit Court Local Rule 427, the clerk refused to file the supplemental brief which was then returned to McFarland.⁴ The trial court denied McFarland's motion. McFarland filed a motion for reconsideration, and a notice of appeal of the June 7, 2006 trial court decision. The trial court denied McFarland's motion for reconsideration. Additional facts are provided in the remainder of this opinion as necessary.

DISCUSSION

I. Ineffective assistance of counsel

¶6 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985) (adopting *Strickland* two-prong test for analyzing ineffective assistance of counsel claims); *see also State v. Johnson*, 133 Wis. 2d 207, 222-23, 395 N.W.2d 176 (1986) (expanding on use of *Strickland* test); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (test for ineffective

(7) An appeal may be taken from the order entered on the motion as from a final judgment.

⁴ We would recommend to the trial courts that when addressing a similar situation in the future, where a movant under WIS. STAT. § 974.06 has attempted to file a supplemental brief which would exceed the page length under the Rules, that the trial court return both original and supplemental briefs to the movant with instructions that the movant should resubmit a single document that conforms to the Rules.

assistance of counsel as set forth in *Strickland* and *Johnson* to be applied to challenges of ineffectiveness under the Wisconsin Constitution).

¶7 An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting *Strickland*, 466 U.S. at 687). Performance is deficient if it falls outside the range of professionally competent representation. *Pitsch*, 124 Wis. 2d at 636-37. We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances, *see id.*; *Strickland*, 466 U.S. at 688, and we indulge in a strong presumption that counsel acted reasonably within professional norms, *Pitsch*, 124 Wis. 2d at 637. We review the attorney's performance with great deference and "the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *Johnson*, 153 Wis. 2d at 127. Generally, when a defendant accepts counsel, the defendant delegates to counsel the tactical decisions an attorney must make during a trial. *State v. Brunette*, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998) (citation omitted).

¶8 As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for the attorney's error, there is a reasonable probability that the result would have been different. *Id.* The defendant must prevail on both parts of the test to be afforded relief. *Johnson*, 153 Wis. 2d at 127.

¶9 A claim of ineffective assistance of counsel presents a mixed question of fact and law. *State v. O'Brien*, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *Id.* at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. *Id.* at 325.

A. *Failure to object to hearsay and double hearsay*

¶10 McFarland argues that trial counsel was ineffective for failing to object to the testimony of Jerome Glosson and Detective Victor Wong regarding statements made to them by Rochelle Ray because this testimony was hearsay and double hearsay. McFarland argues that this error violated his right to confront witnesses under the United States Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* set forth the rule that "[t]estimonial statements of witnesses absent from trial [are admissible] ... only where the defendant has had a prior opportunity to cross-examine [the witness]." *Id.* at 59. The *Crawford* decision overruled, in part, *Ohio v. Roberts*, 448 U.S. 56 (1980), which

had held that the Confrontation Clause permitted the admission of a hearsay statement made by a declarant who was unavailable to testify if the statement bore sufficient indicia of reliability, either because the statement fell within a firmly rooted hearsay exception or because there were "particularized guarantees of trustworthiness" relating to the statement in question.

Whorton v. Bockting, 127 S. Ct. 1173, 1178 (2007) (quoting *Roberts*, 448 U.S. at 66). However, the *Crawford* Court specifically noted that the outcome of *Roberts* would have been the same under either analysis. *Whorton*, 127 S. Ct. at 1179.

¶11 Here, however, trial counsel did object and the trial court sustained at least one of the objections. Further, the trial court found that this testimony was not hearsay or double hearsay because it was not being used for the truth of the matter asserted, but rather to “establish how the investigation proceeded.” The trial court concluded that McFarland’s “right to confrontation was not violated on this basis” since the testimony was not hearsay. Based upon our review of the record, we agree. Consequently, any failure by trial counsel to object did not constitute deficient performance under the *Strickland* test.

B. Failure to object to prosecutorial misconduct

¶12 McFarland next argues that his trial counsel was ineffective for failing to object to the prosecutor’s misconduct, including: (1) suborning perjury by State’s witnesses McNeal-Veasley and Glosson; and (2) making improper comments during closing argument. McFarland raises the suborning perjury issue for the first time on appeal. Accordingly, we will not consider it. *See Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (an appellate court generally will not consider arguments raised for the first time on appeal). Furthermore, McFarland could have included this in his previous postconviction motions. Accordingly, he is barred from arguing this issue in a subsequent postconviction motion absent providing a sufficient reason for his failure to include the issue in his original, supplemental or amended motion. *See WIS. STAT. § 974.06(4); Escalona-Naranjo*, 185 Wis. 2d at 185-86 (movant must provide a sufficient reason for failure to bring a constitutional issue in an original postconviction proceeding).

¶13 As to the prosecutor’s comments during closing argument, *State v. Wolff*, 171 Wis. 2d 161, 491 N.W.2d 498 (Ct. App. 1992), provides the test to be

applied when claims of prosecutorial misconduct are alleged regarding comments made in argument to the jury. *Id.* at 167. This test requires that the comments made must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* (citation and one set of internal quotations omitted). In making this analysis, a court

must consider the character of the remarks in the context in which they were made, the admonition by the [trial] court to the jury to disregard such remarks and its probable effect, the strength of the evidence on the issue of guilt and all other facts which may be relevant in determining what effect the improper remarks had upon the jury.

State v. Spring, 48 Wis. 2d 333, 340, 179 N.W.2d 841 (1970). In this case, McFarland argues that the prosecutor’s use of the term “miracle baby” was improper. However, it was the victim in trial testimony who identified her child that was born after the shooting as a “miracle baby.” The State argues, and we agree, that McNeal-Veasley “hardly needed a miracle baby to receive sympathy from the jury.” The one brief reference in closing argument to a “miracle baby” did not “so infect the trial with unfairness” that McFarland was denied due process. Additionally, the jury was instructed, prior to hearing closing arguments, that the arguments were not evidence and if any of the “remarks suggested certain facts not in evidence, [the jury should] disregard the suggestion ... [and draw its] own conclusions from the evidence.” Further, this court will not second-guess strategic decisions by trial counsel. *See Brunette*, 220 Wis. 2d at 443. For example, trial counsel may not have wanted to draw any additional attention to the fact that the victim could have lost a child as a result of the shooting, and thereby, cause even more likelihood of sympathy arising in the jury. As such, we cannot conclude that any failure by trial counsel to object was prejudicial.

C. Failure to interview alibi witnesses

¶14 McFarland next argues that trial counsel was ineffective for failing to interview two alibi witnesses, Malinda McFarland and Sheila Redding, but rather relying on police interviews of these witnesses. McFarland argues that the witnesses' statements at trial may have been different from their police interviews and trial testimony had trial counsel interviewed them before trial. However, the witnesses' testimony at trial was under oath, subject to perjury charges, should they lie. Presumably, they told the truth under oath—McFarland provides no evidence that they did not. Additionally, neither witness was certain in their testimony as to their activities on the particular weekend at issue. In fact, Malinda's testimony was consistent in her statement to police and at trial that she was not with McFarland during the time that the shooting occurred and that she, therefore, could not be certain where he was or what he was doing at the time of the shooting. Additionally, Redding (a fifteen-year-old at the time of the shooting) did not initially recall her activities on the subject weekend until after discussing it with Malinda and she then recalled that she and Malinda had been to a bar until perhaps midnight or one a.m. It is unclear how trial counsel's failure to interview these two witnesses prior to trial prejudiced the result of the trial. The jury also had the two eyewitness identifications (by photo array and in-court) by the victim and by an uninvolved third party that McFarland was the individual who shot McNeal-Veasley. We cannot conclude that trial counsel's failure to interview either McFarland or Redding prejudiced the outcome of McFarland's trial solely based upon the fact that trial counsel relied upon previous statements made by two alibi witnesses to police and did not separately interview the witnesses.

D. Failure to impeach Glosson's testimony and number of convictions

¶15 McFarland next argues that trial counsel was ineffective for failing to impeach Glosson on the number of convictions (two rather than the one mentioned at trial) which he had and on the conflict in his testimony between his initial statement to police and his testimony at trial.

¶16 The State notes that Glosson's criminal record included only one criminal conviction and that the second conviction which McFarland believes should have been brought to the attention of the jury resulted in a forfeiture only (pursuant to WIS. STAT. § 939.12, conduct punishable only by a forfeiture is not a crime), which would not be a conviction under WIS. STAT. § 906.09. The State goes on to note that even if the jury had been told that Glosson had two convictions, the jury is not instructed regarding evaluating the number of convictions, rather just that they may consider that the witness has been convicted of a crime.

¶17 We observed in *State v. Carnemolla*, 229 Wis. 2d 648, 654-55, 600 N.W.2d 236 (Ct. App. 1999):

While it is true that a higher number of convictions may suggest less credibility on a witness's part, *see, State v. Smith*, 203 Wis. 2d 288, 297-98, 553 N.W.2d 824, 828 (Ct. App. 1996), the question is one of degree. The State ... [argues that the] "marginal difference between two and three convictions cannot be considered so substantial as to undermine the jury's verdict." We agree. *Cf. State v. Boshcka*, 178 Wis. 2d 628, 643-44, 496 N.W.2d 627, 632 (Ct. App. 1992) (defendant's admission to five convictions rather than the true number, four, held to be harmless error); *State v. Bowie*, 92 Wis. 2d 192, 202, 204, 284 N.W.2d 613, 617 (1979) (defendant's admission to four convictions when he only had one, held to be harmless error). We think the difference between two and three convictions was marginal, and certainly not substantial enough to have affected the jury's verdict. We therefore

conclude that the error was harmless beyond a reasonable doubt.

Id. at 654-55. In this case, where the difference is between one or two convictions, and where the second conviction may arguably not be considered a criminal conviction for purposes of WIS. STAT. § 906.09, we conclude that any failure by trial counsel to impeach Glosson on a second conviction is harmless.

¶18 As to the inconsistency between Glosson's original statement to police on the night of the shooting and all of his subsequent testimony, Glosson's explanation for this discrepancy was discussed in his testimony at trial. In his original statement, Glosson told police that he did not get a good look at the shooter because his view was from above on his balcony. However, in later statements and at trial Glosson admitted that he told police this because initially he did not want to become involved. Accordingly, the jury heard that Glosson had changed his statement after his initial statement on the night of the shooting. Additionally, Glosson picked McFarland out of a photo array as the shooter and also identified McFarland at trial as the shooter. The jury also had McNeal-Veasley's eyewitness testimony and photo array and in-court identifications upon which to base a conviction. Based upon the above, we conclude that any failure by trial counsel to further impeach Glosson's testimony at trial was harmless.

E. Failure to impeach McNeal-Veasley's testimony

¶19 McFarland next argues that trial counsel was ineffective when he failed to impeach McNeal-Veasley's trial testimony as inconsistent with prior statements. McFarland argues that in the first police report, McNeal-Veasley stated that McFarland started shooting at her from the street. Throughout the entirety of the judicial proceedings, including testimony at the preliminary hearing

and at trial, however, McNeal-Veasley testified that McFarland was at her front door when he began shooting at her through the window in the door. Trial counsel did impeach McNeal-Veasley's testimony during trial by getting her to admit that she had originally reported that the shooter was shooting from the street. Trial counsel also argued that this was an inconsistency in the testimony. Accordingly, the inconsistency in testimony was before the jury and we conclude that any alleged failure by trial counsel to further impeach McNeal-Veasley's testimony was not prejudicial.

F. Arguments previously raised or not raised before the trial court

¶20 McFarland further argues that trial counsel was ineffective for trial counsel's comment to the jury that he was appointed by the Public Defender's Office. McFarland raised this issue in his 2003 postconviction motion, which the trial court denied and this court affirmed. *McFarland I*, No. 04-0633-CR, unpublished slip op. at 9, 12. Accordingly, McFarland cannot relitigate this issue here. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

¶21 Additionally, on pages thirty through forty-five of his appellate brief, McFarland makes several arguments which were included in his supplemental brief to the trial court which was never filed and that were not addressed by the trial court. Accordingly, we will not consider them. *Evjen*, 171 Wis. 2d at 688 ("[A]n appellate court will not decide issues not properly raised in the trial court.").

II. *No sufficient reason under Escalona-Naranjo*

¶22 In his motion to the trial court, in order to meet the “sufficient reason” standard of *Escalona-Naranjo*, McFarland recites the law that states that ineffective appellate counsel is a sufficient reason for not raising an issue in a previous postconviction motion or appeal. However, McFarland never states what conduct by appellate counsel was deficient. Rather, in his brief to the trial court, McFarland states only that his “assertion of the facts demonstrates ineffective assistance of post-conviction [counsel] for failure to raise, and inadequately raise the claims set out below on direct appeal.” Mere conclusory statements, without supporting factual allegations and relevant legal argument, are insufficient to meet *Escalona-Naranjo*’s sufficient reason requirement. *Id.*, 185 Wis. 2d at 185.

III. *No cumulative effect*

¶23 McFarland next argues that the cumulative effect of trial counsel’s deficient performance, as outlined in his brief, prejudiced McFarland’s defense. The State argues that most of the deficiencies argued by McFarland were not deficiencies and of those acts that may have been deficiencies in trial counsel’s performance, none alone nor all in combination rose to the level of changing the outcome of McFarland’s trial.

¶24 In *State v. Thiel*, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305, the supreme court held that when assessing prejudice under the *Strickland* test, the cumulative effect of counsel’s deficiencies must be considered. *Thiel*, 264 Wis. 2d 571, ¶59. As we noted above, many of the claims which McFarland asserts against his trial counsel’s performance were not deficient or if arguably deficient, were not prejudicial. Additionally, many of McFarland’s contentions are not properly before this court, including those which we had rejected in a

previous appeal or those which were never properly before the trial court. We conclude that when reviewing trial counsel's performance in its totality, there was no cumulative effect of deficiencies such that counsel's performance was prejudicial to the outcome of McFarland's trial.

IV. Trial court not judicially estopped

¶25 McFarland next argues that the trial court's logic in its decision on his present postconviction motion is circular (that Glosson's impeached testimony would be outweighed by McNeal-Veasley's eyewitness testimony and that McNeal-Veasley's impeached testimony would be outweighed by Glosson's testimony) and that the trial court should be judicially estopped from taking this position.

¶26 Judicial estoppel is not, however, applicable to a judge's position; rather, it is focused on the positions of the parties. *See State v. Johnson*, 2001 WI App 105, ¶10, 244 Wis. 2d 164, 628 N.W.2d 431 (Judicial estoppel has three "identifiable boundaries": (1) the *party's* position must be clearly inconsistent with his or her prior position; (2) the *party* to be estopped succeeded in convincing the earlier court to adopt its position; and (3) the facts at issue are the same.). Additionally, because the weighing of testimony is a credibility determination by the jury, either of the alternative viewpoints provided by the trial court in its decision could have occurred, are not mutually exclusive, and support the trial court's denial of McFarland's motion.

V. Interest of justice

¶27 McFarland argues that he should be granted a new trial in the interest of justice. However, pursuant to *State v. Allen*, 159 Wis. 2d 53, 55, 464

N.W.2d 426 (Ct. App. 1990), this court cannot order a new trial under WIS. STAT. § 752.35 because this is an appeal of a denial of a WIS. STAT. § 974.06 motion and not a direct appeal.⁵

VI. Denial of postconviction motion was not an erroneous exercise of discretion

¶28 Finally, McFarland argues that the trial court erroneously exercised its discretion in denying McFarland's WIS. STAT. § 974.06 motion for postconviction relief. McFarland first makes only the conclusory statement that the trial court must have inadequately considered his motion because the trial court ruled on the motion two days after receiving it. McFarland then contends that this is the first time he has raised the confrontation and hearsay claims, so the trial court's reasons for rejecting them are wrong.

¶29 First, McFarland offers no evidence that the trial court erroneously exercised its discretion when it ruled on this motion. In fact, the trial court specifically noted in its decision that it had reviewed at least portions of the record, including the earlier decisions of the trial and appellate courts in this case. As to the second and third contentions, we have discussed and rejected those above.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁵ While the Wisconsin Supreme Court commented on the position taken by the court of appeals in *State v. Allen*, 159 Wis. 2d 53, 464 N.W.2d 426 (Ct. App. 1990), in its decision in *State v. Armstrong*, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98, the supreme court did not overrule the *Allen* decision and, accordingly, this court must follow its precedent. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

