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

**May 30, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP1257** **Cir. Ct. No. 2001CF914**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KENNETH L. WILLIAMS,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth Williams appeals two orders denying his postconviction motions. In his motions, he requested records from a different trial

and a ***Machner***[1] hearing. Williams alleges his trial and appellate counsel were ineffective and his rights to due process and to confront witnesses against him were violated. We disagree and affirm the orders.

## BACKGROUND

¶2 Williams was charged with two counts each of first-degree intentional homicide and armed robbery for his role in a July 18, 2001 double murder. According to the evidence at trial, Williams and a second man, Antwaine Sago, robbed and killed two acquaintances who had substantial amounts of cash from drug dealing, then fled. The prosecution's theory at trial was that Williams provided background information, the gun, and the getaway vehicle, and Sago was the shooter. After the robbery, Williams and Sago divided the proceeds, with Sago receiving approximately $7,000 and Williams receiving $2,000. Williams's defense was that he had simply been in the wrong place at the wrong time, and Sago had decided on his own to rob and kill the victims as a crime of opportunity. He contended Sago had paid him $2,000 to keep quiet after the fact.

¶3 Williams was convicted of all four counts. He was sentenced to two life sentences without extended supervision eligibility for the homicides, plus a consecutive prison term on the armed robbery counts. We summarily affirmed his conviction in his initial appeal, in which he requested a new trial due to alleged jury prejudice.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶4 Williams filed a postconviction motion on January 30, 2006, in which he alleged a litany of errors at his trial. He filed a second motion February 13, alleging more errors, and a third motion February 14, asking for a transcript of Sago's trial and copies of statements Sago made to police. In two thoroughly written opinions, the circuit court denied all of Sago's motions.

## DISCUSSION

¶5 Trial counsel[2] is ineffective when (1) counsel provides deficient performance; and (2) the defendant suffered prejudice as a result. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Prejudice exists only if there is a reasonable probability of a different result absent the errors. ***Id.*** The circuit court has broad discretion to deny a motion alleging ineffective assistance without a hearing if the motion does not allege material facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

### I. Jury instructions

¶6 Williams first argues counsel should have requested a jury instruction on felony murder, a lesser included offense of first-degree intentional homicide. *See* ***State v. Morgan***, 195 Wis. 2d 388, 436, 536 N.W.2d 425 (Ct. App.

[2] Williams argues his motion is not procedurally barred because appellate counsel was ineffective for failing to raise these issues in his initial appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Postconviction counsel is only ineffective if counsel fails to raise an appellate issue that would have been successful. *See* ***State v. Ziebart***, 2003 WI App 258, ¶¶14-15, 268 Wis. 2d 468, 673 N.W.2d 369. Because we reject Williams's arguments in this appeal, we conclude Williams was provided effective assistance of appellate counsel.

1995). However, an instruction on a lesser-included offense is proper only where "there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989).

¶7 In this case, a jury could find Williams guilty of first-degree intentional homicide if (1) Williams intentionally aided and abetted Sago's armed robbery; (2) Sago committed first-degree intentional homicide; and (3) first-degree intentional homicide was a "natural and probable consequence" of the armed robbery. *See* WIS JI—CRIMINAL 406 (May 2005); *see also* ***State v. Ivy***, 119 Wis. 2d 591, 597, 350 N.W.2d 622 (1984). Conviction for felony murder would require the jury to conclude: (1) Williams intentionally aided and abetted Sago's armed robbery; (2) the two victims died; and (3) the deaths were caused by the commission of the armed robbery. *See* WIS JI—CRIMINAL 1030 (Apr. 2003); *see also* WIS. STAT. § 940.03.[3] Williams does not dispute that the victims were killed intentionally. The only difference between the two crimes, then, is the requirement that the intentional homicide be a "natural and probable consequence" of the armed robbery.

¶8 We conclude that under the evidence here, no reasonable jury could acquit on the homicide charge and still convict Williams of felony murder. A "natural and probable" consequence is one that "in the light of ordinary experience [is] a result to be expected, not an extraordinary or surprising result." WIS JI—CRIMINAL 406 (May 2005). To convict Williams of felony murder, the jury would

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

have to also conclude Williams was an aider and abettor of the armed robbery plot. No reasonable jury could believe murder was an "extraordinary or surprising result" of a plot to rob two drug dealers at gunpoint.

¶9 Williams argues a jury could make a contrary finding based on witness testimony that when he and Sago discussed the robbery, they indicated they believed "nobody was going to be hurt" and "it was going to be easy as pie." However, whether one crime is a natural and probable consequence of another is to be judged by the objective standard of a reasonable person in the defendant's position, not subjective perspective of the defendant himself. WIS JI—CRIMINAL 406 (May 2005). Whatever Williams himself may have believed, a reasonable person in his position could have reached only one conclusion.

**II. Other evidence**

¶10 Williams next provides a list of evidence he alleges counsel was ineffective for failing to use at trial. He alleges counsel should have subpoenaed certain witnesses, asked additional questions of others, and procured a receipt that would have corroborated part of Williams's defense. This evidence would have been of little or no use to Williams's defense. Williams is not entitled to a hearing because there is not a reasonable probability that the evidence, if introduced, would have led to a different result. *See* ***Love***, 284 Wis. 2d 111, ¶30.

¶11 **Hotel receipt:** Williams argues counsel should have introduced a hotel receipt from July 17, the night before the murders. The receipt was for a room rented by Williams's girlfriend, Nicole Wheelock. Wheelock testified Williams was with her in the room until late in the morning of July 18, while Sabrea Hill, Sago's girlfriend, testified she saw Williams and Sago plan the robbery early in the morning of July 18. The receipt would have been of little use

to Williams's defense because the dispute was over when Williams was actually present in the room, not whether Wheelock had in fact rented the room.

¶12 **Adrian Thomas:** Williams contends counsel should have presented testimony from Adrian Thomas. Thomas made a statement indicating Sago and Brandon Martin, one of the victims, had visited Thomas's apartment the day of the murders, but Williams was not with them. However, this is not necessarily contrary to Crystal Rose's testimony that Sago, Williams, and Martin spent most of the day together. Thomas's house was only one stop of many, and Williams still could have spent most of the day with Martin and Sago even if he did not go to Thomas's house. In addition, the fact that Martin and Sago went into one house without Williams does not undercut the State's theory that Williams was the link between the two and provided information used in the robbery. Finally, Thomas indicated in his statement that he believed Williams was responsible for the robbery and murder, which would have rendered his utility to Williams's defense questionable at best.

¶13 **Tara Hucek and Eugene Ware:** Williams argues counsel should have cross-examined Tara Hucek and investigated Eugene Ware to show the gun used in the murders belonged to Sago, not Williams. Williams told detectives he had sold the gun to Sago about a month before the murders. At trial, the State argued Williams provided the gun. Ware and Hucek would have testified to conversations they overheard in which Sago and Williams made statements corroborating Williams's version of the story.

¶14 This information might have been of some use to Williams because the State relied in part on evidence that Williams provided the gun to prove he was part of the robbery plot. However, Williams's own statement shows Williams still

had the gun and ammunition used in the robbery only a month prior to the robbery. To believe his account, the jury would have had to believe he was present in an apartment where his old gun was used in a robbery simply by chance—an unlikely scenario to say the least.

¶15 More importantly, the gun was only one of a number of facts linking Williams to the robbery plot. The State produced evidence that: (1) Williams was aware of information that could have been used to plan the crime; (2) Williams and Sago discussed the robbery the morning of July 18; (3) Williams spent most of July 18 with Sago and Martin, and this made Martin uncomfortable; (4) Williams was not shot by Sago, as the other witnesses were; (5) two individuals roughly matching Williams's and Sago's descriptions were seen running from the crime scene together; (6) Williams received some of the robbery proceeds; and (7) Williams and Sago were friendly following the murders. In view of this evidence, we are satisfied that testimony by Hucek and Ware on the source of the gun would not have changed the result of Williams's trial. *See* ***Love***, 284 Wis. 2d 111, ¶30.

¶16 **Sago:** Williams argues certain statements Sago made would have been useful in his defense because they conflicted with the State's argument that Williams was the link between Sago and the victims. However, even assuming Sago would not have invoked his privilege not to incriminate himself, his testimony would have been much more damaging than helpful to Williams. Williams acknowledges in his brief that Sago would have testified that Williams had personally committed the murders. While Sago's testimony that Williams was the shooter would have been inconsistent with the State's theory, it would nonetheless have been damaging to Williams.

¶17 **Isaac Williams:** Williams argues his uncle, Isaac Williams, would have provided him an alibi for the night of the murders. However, Williams admitted being at the scene of the crime, and no other witness corroborated Isaac's story. Williams does not explain how Isaac's proffered alibi would have been useful in his defense, and we do not see its utility either. To the extent Isaac might have provided other testimony helpful to Williams, his obvious willingness to tell whatever story might help his nephew escape conviction would have negated any value his testimony might have had for Williams's defense.

¶18 **Detective Haglund:** At trial, detective Robert Haglund testified Williams had indicated in one of his written statements that Williams ran to his car after the murders. The police report of the interview, however, contains a somewhat different story. In the report Williams says he took a different car, drove around, and then ran into Sago, who was driving Williams's car, in a different part of Green Bay. Williams argues his counsel should have cross-examined Haglund about this discrepancy.

¶19 This cross-examination might have been somewhat helpful to Williams because it would have undercut the State's theory that Williams provided the getaway vehicle. However, Williams's statement was not the only evidence supporting the getaway vehicle theory. A bystander testified she saw two men roughly matching Sago's and Williams's descriptions running in the direction of the parking lot at approximately the time of the murders. In addition, Williams's own statement acknowledges he eventually ended up riding in his vehicle with Sago, although he differed on the timing. Finally, as noted above, the getaway vehicle was only one fact of many showing Williams and Sago planned and executed the robbery together. For all of these reasons, we are satisfied that

cross-examination of Haglund would not have changed the result of Williams's trial. *See* ***Love***, 284 Wis. 2d 111, ¶30.

### III. Confrontation

¶20 A criminal defendant has the right to the "opportunity for effective cross examination" of the witnesses against him. ***Delaware v. Van Arsdall***, 475 U.S. 673, 679 (1986). In ***Van Arsdall***, the Supreme Court concluded the confrontation clause was violated where the defendant was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness," namely questions about the witness's agreement with the prosecution to dismiss charges against him. ***Id.*** at 680. Similarly, the right to present a defense gives a defendant the right, under certain circumstances, to present evidence with significant bearing on "fundamental elements of the defendant's defense." ***State v. Shomberg***, 2006 WI 9, ¶35, 288 Wis. 2d 1, 709 N.W.2d 370.

¶21 Williams argues his right to confrontation and a defense was violated when Crystal Rose, Martin's girlfriend, invoked the Fifth Amendment in response to a question about whether she had found drugs in their apartment prior to the murders. He argues her answer would have called her credibility into question because she had previously testified she had not seen drugs in the apartment and had never seen cocaine. However, whether there were drugs in the apartment was not seriously in dispute at the trial. The jury could infer Rose was lying about her knowledge of drugs even without her answer to the question. In addition, Williams's question would not have shown Rose had the kind of motive to favor one side over the other shown by the deal with the prosecution in ***Van Arsdall***. It would, at most, have shown Rose was willing to lie to protect

herself. The question therefore would not have shown the sort of "prototypical form of bias" found in ***Van Arsdall***. ***Van Arsdall***, 475 U.S. at 680. Rose's invocation of the privilege did not violate Williams's confrontation rights.[4]

## IV. Due Process

¶22 Williams argues his due process rights were violated when the State took different positions on the identity of the shooter at his and Sago's trials. In Williams's trial, the State contended Sago was the shooter; at Sago's trial, the State contended Williams was the shooter. *See* ***State v. Sago***, No. 2003AP1903, unpublished slip op. ¶6 (WI App July 27, 2004). Williams relies on ***Stumpf v. Mitchell***, 367 F.3d 594 (6th Cir. 2004). ***Stumpf*** involved an armed robbery of a house by ***Stumpf*** and an accomplice. The perpetrators shot the two occupants of the house, one fatally. ***Id.*** at 596-97. Stumpf entered a guilty plea to one count of aggravated murder and was eventually sentenced to death. ***Id.*** at 598-99. At a hearing to establish the factual basis for Stumpf's plea, the State maintained Stumpf had shot both victims, while Stumpf claimed he had shot only one. ***Id.*** at 596. After that hearing, Stumpf's accomplice was tried by a jury and convicted. ***Id.*** At the accomplice's trial, the prosecution urged the jury to accept Stumpf's version of the killings—that Stumpf had shot the first victim and the accomplice had shot the second—as true. ***Id.***

[4] The State argues there is no confrontation violation because the court retains the power to exclude evidence of questionable value, and Rose's testimony was at best marginally relevant. However, the court overruled the State's relevance objection to Williams's question. After Rose invoked her rights, the court concluded a mistrial was not warranted because the information Williams was attempting to elicit was of marginal value. This is not a case where a defendant alleges a confrontation clause violation based on the court's refusal to allow certain cross-examination questions under the rules of evidence.

¶23 The Sixth Circuit concluded this violated Stumpf's due process rights. ***Id.*** at 613. The Supreme Court reversed, however, concluding that there was no due process violation because under Ohio law, "the precise identity of the triggerman was immaterial to Stumpf's conviction" for murder. ***Bradshaw v. Stumpf***, 545 U.S. 175, 187 (2005). In other words, there was no due process violation because Stumpf was guilty of aggravated murder regardless of whether he was the shooter or the aider and abettor. ***Id.*** at 184, 187.

¶24 The same rule holds true here. Under Wisconsin law, a person who intentionally causes the death of another is guilty of first-degree intentional homicide. WIS. STAT. § 940.01. The same holds true for a person who aids and abets an armed robbery where an intentional homicide occurs as a natural and probable consequence. *See* ***Ivy***, 119 Wis. 2d at 597. Here, only Sago and Williams know which was the shooter and which was the aider and abettor. But the law does not distinguish between the two; both are guilty of first-degree intentional homicide. Because both are guilty of first-degree intentional homicide regardless of who played which role in the murders, the State did not violate due process when it pursued inconsistent theories as to the identity of the shooter.

## V. Motion for records

¶25 Finally, Williams appeals the court's decision that he was not entitled to a free transcript of Sago's trial and a transcript of a statement Sago made to police. In order to be entitled to a free copy of a transcript of a proceeding in a different case, a defendant must show a "particularized need" for the transcript. ***State v. Oswald***, 2000 WI App 3, ¶34, 232 Wis. 2d 103, 606 N.W.2d 238 (Ct. App. 1999). Similarly, to prevail in a motion for postconviction discovery a defendant must show the evidence is consequential to the case and

might create a reasonable probability of a different outcome. ***State v. O'Brien***, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999). In his brief, Williams argues the transcript would show the State used inconsistent theories to convict him and Sago, and that the transcript would include evidence that the homicides were not a natural and probable consequence of the robbery. However, the State has conceded that its theory at Sago's trial was that Williams was the shooter. Williams does not need the transcript to prove that point. Williams also fails to identify what information regarding the natural and probable consequences of the robbery might be included in Sago's transcript but not his. Similarly, he fails to explain what information he believes is contained in Sago's statements to police or what use that information might be to him. He therefore has failed to show he is entitled to the materials he requests. *See* ***id.***

*By the Court.*—Orders affirmed.

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