COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2506 **Cir. Ct. No. 1988CF883161A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIRK EDWARD HARRIS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Dirk E. Harris appeals from the dismissal of his WIS. STAT. § 974.06 (2005-06)[1] postconviction motion and from an order denying his

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

motion for reconsideration. We conclude the trial court correctly found that Harris failed to allege facts sufficient to entitle him to relief, failed to show that conduct by his trial counsel was ineffective, and if trial counsel's performance was arguably deficient, failed to show Harris was prejudiced by this performance; therefore, we affirm.

BACKGROUND

¶2 Harris previously appealed his judgment and conviction, *see* ***State v. Harris***, 189 Wis. 2d 162, 525 N.W.2d 334 (Ct. App. 1994), ("***Harris I***") which was affirmed by the Wisconsin Supreme Court, *see* ***State v. Harris***, 199 Wis. 2d 227, 544 N.W.2d 545 (1996). Accordingly, we will set forth only those facts necessary to address this appeal.

¶3 In the early morning of December 4, 1988, the body of Dennis Owens was discovered on a City of Milwaukee street. Owens's death was caused by multiple gunshot wounds to the chest and head. His wallet, money and credit cards, which witnesses at a nearby tavern noted that he had had with him earlier in the evening, were missing.

¶4 Later that same day, Harris purchased jewelry using one of Owens's credit cards. Also that same day, Harris drove Owens's car and informed a friend that he was leaving Wisconsin because he was in trouble. The next day, Harris asked his mother for money to leave town and showed her Owens's credit cards and identification. Owens's identification cards and the license plates from his car were later recovered by police in Harris's mother's trash, where she had told police she had found them.

¶5 At trial, Harris's friend, James Malone, testified that he had been out drinking with Harris the evening of Owens's death, that in the middle of the evening out, Harris and Malone had driven to Harris's house and Harris had retrieved a gun and ammunition, telling Malone "[L]et's go down to the fag bars and roll a queer." The pair then drove to an area near where Owens's body was eventually found. Malone testified that he stayed in the car and slept and that he was later awoken by Harris who told him that he "just shot a nigger." Malone also testified to Harris's additional shots into Owen and to Harris's rifling through Owens's pockets.

¶6 Harris left Milwaukee and was eventually apprehended in Amarillo, Texas. While in custody there, he confessed. After a suppression hearing was conducted by the trial court, the confession was found to be inadmissible because the Milwaukee detectives' actions violated the requirements of ***Miranda v. Arizona***, 384 U.S. 436 (1966), and Harris's right to counsel. The trial court also found that Harris had given the confession voluntarily, making the confession admissible if, but only if, Harris testified.

¶7 On the first day of trial, a *Milwaukee Sentinel* newspaper headline read, "'Trial in Death of Worker at TV Station to Begin' … 'Judge's ruling limits use of confession.'" A copy of that newspaper was in the jury room and a number of prospective jurors admitted to either reading the headline and/or a portion of the article. After voir dire of the jurors, many of whom stated that they had seen the headline, and one who stated that she had read a portion of the accompanying article, the jury was empanelled. It included jurors who had seen the article or headline.

¶8 The defense's theory at trial was that Harris had not committed the murder; rather, it was committed by a friend of Harris's who had been identified as the person driving Owens's car shortly before Owens's body was found. This theory was supported by evidence from the State's crime lab witnesses. Harris never testified at trial and, accordingly, his confession was never introduced.

¶9 The jury returned a verdict of guilty to first-degree intentional homicide. Harris, through his original counsel, filed a postconviction motion which was denied. Harris then appealed, again through his original trial counsel. The appellate court affirmed the jury verdict. Harris then petitioned the supreme court, which took his case and affirmed.

¶10 In August 2006, Harris filed the present WIS. STAT. § 974.06 motion, alleging ineffective assistance of trial counsel for counsel's failure to: (1) file a motion for a speedy trial; (2) put on a reasonable defense under the circumstances where the jury was aware of the existence of Harris's confession, even though suppressed; (3) inform Harris that he, and not counsel, had the right to accept or reject a plea offer; (4) object to allegedly improper remarks made by the State during its opening statement and closing arguments; and (5) request that the court poll the jury. Harris also alleges ineffectiveness of postconviction/appellate counsel when counsel failed to appeal denial of change of venue and the court allowing improper jurors on panel. Harris also contends that the trial court erred by: (1) failing to grant the motion for change of venue; (2) failing to strike for cause prospective jurors who, during voir dire, expressed a prejudice against defendants who refused to testify at trial; and (3) allowing a juror on the panel who did not understand the English language.

¶11 The trial court denied the motion. Harris filed a motion for reconsideration which the trial court also denied, on the merits. Harris appealed.

DISCUSSION

¶12 Ordinarily, all grounds for relief under WIS. STAT. § 974.06 (including issues involving ineffective assistance of trial counsel) must be raised in the original, supplemental or amended postconviction motion or direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Issues not raised in the first such motion are waived, "*unless* the court ascertains that a 'sufficient reason' exists" for the failure to raise the issue. ***Id.*** at 181-82 (emphasis in original). "[W]here a defendant is represented by the same counsel both at trial and on appeal, the inability of the defendant's trial counsel to assert his own ineffectiveness constitutes a 'sufficient reason' under sec. 974.06(4), Stats., for not asserting the matter in the original sec. 974.06 motion." ***State v. Robinson***, 177 Wis. 2d 46, 53, 501 N.W.2d 831 (Ct. App. 1993). This standard was affirmed post-release of the ***Escalona-Naranjo*** decision by ***State v. Hensley***, 221 Wis. 2d 473, 474, 477, 585 N.W.2d 683 (Ct. App. 1998).

¶13 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, 369 N.W.2d 711 (1985) (adopting ***Strickland*** two-prong test for analyzing ineffective assistance of counsel claims); *see* ***State v. Johnson***, 133 Wis. 2d 207, 222-23, 395 N.W.2d 176 (1986) (expanding on use of ***Strickland*** test); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (test for ineffective

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

¶14 Performance is deficient if it falls outside the range of professionally competent representation, ***Pitsch***, 124 Wis. 2d at 636-37, *i.e.*, 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). 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). "Review of the performance prong may be abandoned '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice….'" ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (citing ***Strickland***, 466 U.S. at 697).

¶15 To prove 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 counsel's error, there is a reasonable probability that the result of the trial would have been different. ***Id.***

¶16 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324-25, 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.*** However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

I. Challenge to trial court's actions during trial barred

¶17 Harris challenges, as an erroneous exercise of its discretion, the following decisions and actions which the trial court undertook at trial: (1) failing to grant the motion for change of venue; (2) failing to strike for cause prospective jurors who, during voir dire, expressed a prejudice against defendants who refused to testify at trial; and (3) allowing a juror on the panel who did not understand the English language. The trial court, both in its decision on Harris's WIS. STAT. § 974.06 motion and in its decision on Harris's motion for reconsideration, determined that Harris was procedurally barred to assert these claims by ***Escalona-Naranjo***. We agree and conclude that Harris has failed to provide any reason, much less a sufficient reason, why he did not raise these challenges in his "original, supplemental or amended" postconviction motion or in his direct appeal; therefore, we affirm the trial court's findings that these claims are barred by ***Escalona-Naranjo***. *See* ***id.***, 185 Wis. 2d at 181-82, 185.

II. Ineffective assistance of counsel claim

¶18 Harris alleges that his trial counsel (who was also his postconviction and appellate counsel) provided ineffective assistance when he failed to: (1) file a motion for a speedy trial; (2) put on a reasonable defense under the circumstances where the jury was aware of the existence of Harris's confession, even though

suppressed; (3) inform Harris that he, and not counsel, had the right to accept or reject a plea offer; (4) object to allegedly improper remarks made by the State during its opening statement and closing arguments; and (5) request that the court poll the jury. Harris further contends that he is not procedurally barred by ***Escalona-Naranjo*** to raise these issues because his trial, postconviction and appellate counsel were all the same attorney.

¶19 Before ineffective assistance of postconviction counsel can be based upon ineffective assistance of trial counsel, the record supporting ineffective assistance of trial counsel must include trial counsel's testimony. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."). A defendant who has made factual allegations with sufficient specificity which, if true, would establish both prongs of the ***Strickland*** test, is entitled to the opportunity to make the necessary record in an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996).

¶20 However, before a trial court must grant a ***Machner*** hearing on an ineffective assistance-of-counsel claim, the defendant must allege sufficient facts to raise a question of fact for the court. ***State v. Washington***, 176 Wis. 2d 205, 214-15, 500 N.W.2d 331 (Ct. App. 1993). A conclusory allegation, unsupported by factual assertions, is legally insufficient and does not require the trial court to conduct a ***Machner*** hearing. ***Id.*** We recently noted, in ***State v. Howell***, 2006 WI App 182, ¶17, 296 Wis. 2d 380, 722 N.W.2d 567, *review granted*, 2007 WI 16, ___ Wis. 2d ___, 727 N.W.2d 34.

> The ***Nelson/Bentley*** test asks whether a motion alleges "facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record [otherwise] conclusively demonstrates that the defendant is

> not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (paraphrasing ***Nelson*** [***v. State***], 54 Wis. 2d [489,] 497, [195 N.W.2d 629 (1972)] and ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996)); *see also* ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62. A motion requesting an evidentiary hearing must contain non-conclusory allegations, that is, allegations that "'allow the reviewing court to meaningfully assess [the defendant's] claim.'" ***Allen***, 274 Wis. 2d 568, ¶21 (quoting ***Bentley***, 201 Wis. 2d at 314).

Howell, 296 Wis. 2d 380, ¶17. The supreme court, in ***Allen***, provided additional guidance when it "explained that a motion sufficient to meet the ***Nelson/Bentley*** standard should 'allege the five "w's" and one "h"; that is, who, what, where, when, why, and how.'" ***Howell***, 296 Wis. 2d 380, ¶19 (citation omitted).

¶21 The determination of whether a defendant's postconviction motion alleges facts sufficient to entitle the defendant to an evidentiary hearing is a mixed standard of review. ***Allen***, 274 Wis. 2d 568, ¶9. "First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo." ***Id.*** If, however, "'the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Bentley***, 201 Wis. 2d at 309-10 (citation omitted). "We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard." ***Allen,*** 274 Wis. 2d 568, ¶9.

A. Speedy trial motion

¶22 Harris alleges that he was unaware that he could move the court for a speedy trial, and that his counsel was ineffective for not informing him of his

ability to do so. Harris states that this failure to move for a speedy trial deprived him of the ability to serve his sentences concurrently, allowed the newspaper article to be published, and allowed for other inmates-informers to access his court file. The State argues that: (1) Harris does not allege that if he had known of his right to move for a speedy trial that he would have demanded that his counsel file such a motion; and (2) there is no requirement for counsel to "specifically discuss whether a speedy trial demand should be made," concluding that, therefore, "[trial counsel's] performance was not deficient." Additionally, the State argues that Harris has not shown that he was prejudiced in any way because he received a life sentence (thus his length of incarceration was not affected by not being sentenced to a concurrent sentence), and further, that Harris has not supported with material facts his claims that either the newspaper article or informer access would not have occurred but for counsel failing to inform Harris of his right to file a motion for a speedy trial.

¶23 After Harris's arrest for the murder of Owens, Harris was convicted of first-degree intentional homicide and received a mandatory life sentence. Harris fails to assert any material facts to support his contention that: (1) if he had known about an ability to demand a speedy trial that he would, in fact, have done so; (2) the *Milwaukee Sentinel* article would not, in fact, have been published, even though the date of the trial and the ruling limiting the use of the confession would have been publicly available information; and (3) the informers would not have had access to his file. Accordingly, we affirm the trial court's denial, without a ***Machner*** hearing, of Harris's motion asserting ineffective assistance of trial counsel because of the failure to advise Harris of his right to demand a speedy trial.

B. Defense strategy in light of jurors' knowledge of confession

¶24 Harris alleges that his trial counsel essentially put on no defense because the strategy employed was that Harris did not commit the murder, yet trial counsel knew that the jurors were aware that Harris had confessed to the murder, due to the *Milwaukee Sentinel* article published on the morning of his first day of trial. Harris argues that counsel should have presented the defense of competency and voluntary intoxication as Harris had been "binge drinking" all day before the killing. The State argues that choosing a defense strategy is a tactical decision that is "entrusted" to counsel to make, not to defendants. The State also notes that Harris's counsel did present evidence in support of a defense that Harris was not guilty of the murder by presenting State crime lab evidence and testimony which supported the theory that another individual was identified as driving Owens's car shortly before the discovery of Owens's body. The State concludes that Harris has not met the deficiency prong of the ***Strickland*** test and, further, that Harris has provided no argument or facts to support a claim that he was prejudiced by not asserting these other defenses.

¶25 The jury had testimony before it that Harris had been drinking the evening of Owens's death, including the testimony of his accomplice Malone. Additionally, there was overwhelming evidence to support Malone's version of the events, which we noted with specificity in ***Harris I*** and which included, in part: (1) the shell casing matching those found at the site of the shooting were found in the stolen car that Harris had been identified as driving on the night of the killing; (2) Harris's confessions to two inmates that he had, in fact, killed Owens; (3) police discovery of Owens's identification cards and car license plates in Harris's mother's trash; (4) Harris's comment to friends that he was "in trouble" and needed to leave the state; (5) Harris's mother's comments to a co-worker that

she had seen Owens's credit cards in her son's possession; and (6) Harris's use of Owens's credit card the day following the murder to purchase a bracelet for his girlfriend at a jewelry store. Harris proffers no material facts to support a claim that the outcome of his trial would have been different had trial counsel pursued either a competency or voluntary intoxication defense. Accordingly, on this basis we affirm the trial court's denial of Harris's motion, without a ***Machner*** hearing.

C. Plea offer

¶26 Harris alleges that his counsel rejected a plea offer to second-degree homicide without informing him that it was his right to accept or reject a plea offer. The State argues that Harris has failed to state either that he would have accepted the plea offer if he had known that it was his decision, or in what way (*i.e.*, what material facts exist that show how) counsel's failure caused Harris prejudice. Specifically, Harris never says he would have accepted the plea.

¶27 A failure to explain a plea offer may constitute deficient performance. *See* ***State v. Ludwig***, 124 Wis. 2d 600, 611, 369 N.W.2d 722 (1985). However, to meet the ***Strickland*** test, a defendant must show both deficient performance and prejudice in order to succeed on a claim of ineffective assistance of counsel. ***Id.***, 466 U.S. at 687. As the trial court noted, in its decision on the motion for reconsideration, "[t]here is a presumption here that the defendant concurred with counsel's approach, and his conclusory allegations to the contrary do not sufficiently overcome this presumption." Harris provides no facts, such as he argued with his counsel to take the deal, but counsel refused; or that he in any way disagreed with his counsel at the time of the offer that he should not accept the plea offer. In the absence of a showing of any material facts to support Harris's conclusory allegation that the mere rejection by counsel, rather

than himself, of the plea offer would have changed the outcome of this case does not provide sufficient facts to allege that this action by his counsel prejudiced Harris. Accordingly, on this basis we affirm the trial court's denial, without a ***Machner*** hearing.

D. State's remarks during opening statement and closing arguments

¶28 Harris alleges that trial counsel failed to object to improper remarks made by the State during its opening statement and closing arguments. Harris claims that the State's comments, during its opening statement, that "[t]he evidence will show that after he had shot Dennis Owens like a vulture who would pick over his prey"; and remarks during closing arguments, "focus on Dirk Harris, the man who has admitted killing and robbing Dennis Owens," and "Dirk Harris, the man who's admitted to people that he murdered Dennis Owens and robbed him," were improper. The State did not address this issue as an ineffective assistance of counsel issue, but rather as an issue directed solely at the trial court's exercise of its discretion and, therefore, barred by ***Escalona-Naranjo***. The trial court, in its decision on the motion for reconsideration, noted that, "[b]ased on the record … the court perceives no impropriety in the State's opening statement or closing argument."

¶29 The supreme court has specifically noted that "counsel in closing argument should be allowed 'considerable latitude,' with discretion to be given to the trial court in determining the propriety of the argument." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation omitted).

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the

> prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus, we examine the prosecutor's arguments in the context of the entire trial.

State v. Neuser, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citations omitted). "Substantial latitude is given, and we will not throttle the advocate by unreasonable restrictions so long as the comments relate to the evidence." ***Draize***, 88 Wis. 2d at 456. We will affirm the trial court's ruling unless the trial court has erroneously exercised its discretion such that it "is likely to have affected the jury's verdict." ***Neuser***, 191 Wis. 2d at 136.

¶30 Prior to opening statements[2] and closing arguments,[3] the trial court instructed the jury that the lawyers' statements and arguments were not evidence. Upon our independent review of the opening statement and closing arguments of the State, we conclude that none of the State's remarks "so infected the trial with

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[2] The trial court specifically instructed the jury:

> What the lawyers have to say in the opening statement is not evidence. It's an opportunity for them to tell you what they think the case is going to be about or what it's not going to be about, but what they have to say is not evidence. The evidence will be what you hear from the witnesses who are called both on direct, cross-examination and then the exhibits that I permit and when testimony begins, evidence begins.

[3] During the jury instructions given to the jury by the trial court immediately prior to closing arguments, the trial court stated:

> Do consider carefully the closing arguments of the attorneys. But their arguments and conclusions and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence, and decide upon your verdict according to that evidence under the instructions which I'm giving you.

unfairness as to make the resulting conviction a denial of due process," ***id.***; rather, the State commented on the evidence presented at trial and appropriately directed the jury to consider the evidence in reaching their verdict. First, as to the "vulture" remark during the State's opening statement, trial counsel did object and the trial court sustained the objection. Accordingly, trial counsel was not ineffective. Second, as an example of one of the above-noted statements in context, the paragraph in which the "focus" statement is included reads:

> Arthur Fromke and Glen Conroy are not involved in this case. They are not the murderers, and there's no evidence to suggest that. I submit to you any suggestion is nothing more than a smoke screen I asked you to avoid at the beginning of the trial. Maintain your focus on Dirk Harris, the man who has admitted killing and robbing Dennis Owens.

This paragraph came after approximately forty pages of transcript during which the State laid out the evidence presented, including testimony by a number of individuals to whom Harris had admitted that he had killed Owens. Any failure to object to these remarks was not ineffective assistance of counsel because the remarks were proper. We affirm the trial court's denial of Harris's motion on this claim.

E. Polling the jury

¶31 Harris alleges that he was prejudiced by the failure of his trial counsel to request that the jury be polled. The State did not address this issue as an ineffective assistance of counsel issue, but rather as an issue directed solely at the trial court's exercise of its discretion and, therefore, barred by ***Escalona-Naranjo***. The trial court, in its decision on the motion for reconsideration, noted that Harris "has not established that he was prejudiced because the jury was not polled."

¶32 The right to poll the jury is not compulsory. ***State v. Jackson***, 188 Wis. 2d 537, 541, 525 N.W.2d 165 (Ct. App. 1994). "A defendant has the right, when timely asserted, to have the jurors individually polled on their verdict." ***State v. Coulthard***, 171 Wis. 2d 573, 581, 492 N.W.2d 329 (Ct. App. 1992). In ***State v. Yang***, 201 Wis. 2d 725, 549 N.W.2d 769 (Ct. App. 1996), we held:

> Because the decision whether to request an individual polling is one delegated to counsel, we decline to hold that counsel's failure to inform a defendant of the right to an individual polling is, in itself, deficient performance. The right to an individual polling of the jury is a significant right because it is a means to test the uncoerced unanimity of the verdict. But it is not the only method for assuring a unanimous verdict. The standard jury instruction tells the jury that the verdict must be unanimous, and that all twelve jurors must agree to arrive at a verdict. When the trial court reads the verdict, it may ask the jurors as a group, as it did in this case, if it is the verdict of each one.
>
> We conclude the better rule is that when defense counsel is present at the return of the jury verdict and does not request an individual polling, whether counsel's performance is deficient depends on all the circumstances, not simply on whether counsel explained to the defendant the right to an individual polling.
>
> ….
>
> In the absence of any indication that the jury's verdict was not unanimous, we conclude the decision not to request an individual polling was a reasonable one in the circumstances of this case and was not deficient performance. [The defendant] is therefore not entitled to an evidentiary hearing on this claim.

Id. at 745-46 (citations and footnotes omitted).

¶33 Harris has not asserted what would have been different if his counsel had requested that the trial court poll the jury. Harris has not suggested any facts indicating the jury verdict might not have been unanimous. No transcript has been provided to determine what specifically occurred at the time the verdict was

announced by the jury; however, attached to Harris's WIS. STAT. § 974.06 motion as exhibit H is a copy of a Case Information sheet which appears to be notes, not verbatim, of what occurred.[4] A review of the record does show that the jury was given an instruction that their verdict must be unanimous.[5] Harris has provided no

[4] The notes read, in pertinent part:

> May 5, 1990 Hon. William Gardner Presiding, Circuit Court Br. CRFF
>
> ….
>
> JUry [sic] trial as to Dirk Harris Continued.
>
> Defendant in Court with attorney William Marquis. Donald Jackson Assistant District Attorney present in Court for the State of Wisconsin.… Court charged the Jury who at the hour of 1:59 p.m. retired to deliberate. And afterwards at the hour of 5:38 p.m. the Jury returned and by their foreperson, Mary Klingbeil, brought in verdicts as follow, to-wit:
>
> "We, the Jury, find the defendant, Dirk E. Harris, guilty in the manner and form as set forth in the INformation. [sic] (First Degree Murder). Signed Mary Klingbeil, Foreperson. Dated [sic] this 5th day of May, 1990 at MIlwaukee, [sic] Wisconsin.
>
> and
>
> We, the Jury, find the defendant, Dirk E. Harris, guilty in the manner and form as set forth in the Information (Armed Robbery). Signed Mary Klingbeil, Foreperson. DAted [sic] this 5th day of May, 1990 at Milwaukee, Wisconsin."
>
> Verdicts received and recorded. Jury discharged. MOtions [sic] by counsels.

[5] After completion of the closing arguments, the trial court provided the verdict form to the jury, and provided, in pertinent part, the following instruction:

> Now, this is a criminal and not a civil case. Therefore, before the jury may return a verdict which may legally be received, such verdict must be reached unanimously. In a criminal, [sic] case all twelve jurors must agree in order to arrive at a verdict.

material facts to support a conclusion that he was prejudiced by this failure to poll the jury. Accordingly, we affirm the trial court's denial of Harris's motion that his counsel was ineffective for failing to request that the trial court poll the jury.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.