

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 20, 2002**

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. 00-3553  
STATE OF WISCONSIN**

**Cir. Ct. No. 96-CF-180**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,  
  
PLAINTIFF-RESPONDENT,  
  
V.  
  
ROBERT J. SMOTHERS,  
  
DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Kenosha County:  
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Robert J. Smothers has appealed from an order denying a postconviction motion filed by him pursuant to WIS. STAT. § 974.06

(1999-2000),<sup>1</sup> challenging his 1996 conviction of second-degree intentional homicide by use of a dangerous weapon. We affirm the order.

¶2 The homicide charge arose from the stabbing death of Smothers' friend, Jay Meyer, outside of Smothers' residence. At trial, Smothers claimed that he stabbed Meyer in self-defense because Meyer had him in a choke hold and he feared for his life. Smothers was convicted of the lesser charge of second-degree intentional homicide after the jury rejected the original charge of first-degree intentional homicide.

¶3 Smothers' conviction was previously upheld on direct appeal. In addition, this court has previously denied a pro se petition filed by Smothers, alleging ineffective assistance of appellate counsel in his direct appeal.

¶4 Smothers' current appeal arises from the trial court's denial of a postconviction motion filed by him pursuant to WIS. STAT. § 974.06, alleging ineffective assistance of his trial counsel, and ineffective assistance of postconviction counsel based upon her failure to file a postconviction motion raising ineffective assistance of trial counsel. Smothers contends that his trial counsel's failure to object to certain evidence and portions of the prosecutor's closing argument constituted ineffective assistance. He contends that he was denied effective assistance of trial counsel by the cumulative effect of the four alleged instances of deficient performance, and that postconviction counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel in a timely postconviction motion.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version.

¶5 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Even if deficient performance is found, a judgment of conviction will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. It is not ineffective assistance to fail to bring a motion or raise an objection which would have lacked merit. *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996); *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶6 Initially, we note that the trial court denied Smothers' motion without holding an evidentiary hearing. However, a trial court, in the exercise of its discretion, may deny a postconviction motion alleging ineffective assistance without holding a hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). Smothers' motion was properly denied without an evidentiary hearing because the record conclusively demonstrates that he is not entitled to relief.

¶7 Smothers' first argument is that his trial counsel rendered ineffective assistance when he failed to object to the State's introduction of a 911 tape in its case-in-chief, or seek redaction of a portion of the tape. The 911 tape recorded a

call made by Smothers' neighbor seeking emergency assistance, and detailing that Smothers had stabbed someone and had asked her to call for help. During the conversation, the dispatcher asked to talk to Smothers, who told him that someone "got stabbed." The dispatcher then asked Smothers if he knew who stabbed the victim, to which Smothers replied: "Well, I'm not ready to make no statement."

¶8 Smothers contends that this statement constituted an invocation of his right to silence, and that his trial counsel should have objected to the inclusion of this portion of the 911 recording in the evidence presented by the State in its case-in-chief. He contends that his trial counsel also should have objected when, in closing argument, the prosecutor asked the jury to infer Smothers' guilt based upon his invocation of his right to remain silent.

¶9 Nothing in the 911 tape or in the prosecutor's closing argument stated or implied that Smothers' invocation of his right to silence demonstrated that he was guilty of the charged offense. Instead, the prosecutor relied on the statements in the tape, including what Smothers reported to the neighbor who made the 911 call, and what Smothers told the 911 dispatcher about the stabbing. The prosecutor also relied on the tape to demonstrate that Smothers did not tell either his neighbor or the dispatcher that the victim had attacked him, that he was in fear for his life, and that he had acted in self-defense.

¶10 It was permissible for the prosecutor to present evidence which demonstrated that when the stabbing occurred Smothers did not claim that he was attacked and acting in self-defense. It was also permissible for the prosecutor to argue from these facts that the self-defense claim was fabricated at a later date. Although the prosecutor referred to Smothers' words indicating that he was not ready to make a statement, the prosecutor did so in the context of arguing that

Smothers was trying to figure out a way to extricate himself from the situation. This was a permissible argument based upon the evidence, not a comment on Smothers' exercise of his right to remain silent.

¶11 Smothers' next argument is that his trial counsel rendered ineffective assistance when he failed to object to portions of the prosecutor's closing argument which, according to Smothers, suggested to the jurors that they should infer Smothers' guilt based upon his postarrest invocation of his rights to counsel and to remain silent, and his exercise of his right to obtain discovery materials. Specifically, he objects to the prosecutor's statement that

[y]esterday, September 11<sup>th</sup>, a long time has passed since March 23<sup>rd</sup>, since then Mr. Smothers has been charged. He's become represented by Mr. Rose. He's had an opportunity to get and review the police reports, the witness statements, and now he's ready to make a statement. I was in danger of being killed. I believed my life was in danger. That is his statement September 11<sup>th</sup> of 1996.

¶12 No evidence was admitted at trial indicating that Smothers had invoked his right to counsel or his right to remain silent after being arrested and being informed of his *Miranda*<sup>2</sup> rights. However, Smothers contends that the prosecutor's argument impermissibly drew the jury's attention to the fact that he had remained silent from the time of the stabbing to the time of trial, and improperly used this information to discredit his self-defense claim and imply that he was guilty.

¶13 We reject this argument because, as with the evidence regarding the 911 call, the prosecutor did not rely on Smothers' invocation of his rights to

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

silence and counsel or contend that Smothers' silence demonstrated his guilt. Instead, he argued that Smothers' failure to assert that he was attacked and acting in self-defense until after reviewing discovery materials and going to trial permitted an inference that he fabricated the defense to fit the other evidence in the case. He contrasted Smothers' testimony at trial with his statements when reporting the stabbing, including his failure to tell his neighbor or the 911 dispatcher that he was attacked and acting in self-defense. This was a legitimate and permissible argument based upon the facts. Trial counsel was not deficient for failing to object to it.

¶14 Smothers' next argument is that his trial counsel should have objected when the prosecutor referred to him in closing argument as a liar, repeatedly stated that Smothers had lied to the jury and should not be believed as to any of his testimony, and stated that in his opinion Smothers was a liar. At trial, Smothers denied that he had smoked marijuana prior to the stabbing and relied upon a toxicology report which found no evidence of marijuana in his system after the stabbing. In rebuttal, the State presented Charles Rains, who testified that he smoked marijuana with Smothers outside a tavern shortly before the stabbing. In closing argument, the prosecutor relied upon Rains' testimony to argue that Smothers lied about smoking marijuana. He further argued that because Smothers lied about smoking marijuana, the jury should find that he lied about the remainder of his testimony, including his claim of self-defense.

¶15 A prosecutor is entitled to comment on a witness' credibility provided the comment is based on evidence presented. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her of the defendant's guilt and should also convince

the jurors. *Id.* at 19. A prosecutor may give a personal opinion based on the evidence, provided it is limited to the evidence actually adduced at trial. *State v. Cydzik*, 60 Wis. 2d 683, 694-95, 211 N.W.2d 421 (1973). Improper argument occurs when the prosecutor suggests that the jury should arrive at its verdict by considering factors other than the evidence. *Adams*, 221 Wis. 2d at 19.

¶16 Based upon Rains' testimony, the prosecutor was entitled to argue that Smothers was lying about smoking marijuana and that because he was lying about one subject, the jury should also conclude that he was lying in his other testimony. Because this was a legitimate inference to be made by the prosecutor, and because nothing in the prosecutor's statements exceeded the bounds of permissible argument, Smothers' trial counsel was not ineffective for failing to object to it.

¶17 Smothers' final allegation is that his trial counsel rendered ineffective assistance when he failed to object to a statement by the prosecutor in his closing argument which indicated that Smothers would "jump for joy" if convicted of a lesser-included offense rather than first-degree intentional homicide. Contrary to Smothers' contention, this was not a statement by the prosecutor implying that Smothers had conceded his guilt to the lesser offense. It was made in the context of the prosecutor's argument that the evidence proved Smothers' guilt of first-degree intentional homicide, and that the evidence did not support a finding that Smothers' conduct was reckless rather than intentional, or that he acted in legitimate self-defense. Within the context of this argument, it was proper for the prosecutor to comment that Smothers would be pleased if convicted of a lesser offense than first-degree intentional homicide. Because nothing in the statement implied that Smothers was conceding his guilt as to any charge, trial counsel was not deficient for failing to object to it.

¶18 Because trial counsel did not perform deficiently in any of the situations challenged by Smothers, Smothers' argument that relief is warranted based upon the cumulative effect of the alleged errors also fails. Similarly, postconviction counsel was not ineffective for failing to raise these issues in postconviction proceedings.

*By the Court.*—Order affirmed.

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



