COURT OF APPEALS DECISION DATED AND FILED

February 10, 2009

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. 2008AP888

Cir. Ct. No. 2003CF4495

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVIN LEE BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Devin Lee Brown, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion. Brown asserts

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

postconviction counsel was ineffective for failing to raise claims that trial counsel was ineffective. We conclude trial counsel was not ineffective, which means postconviction counsel was not ineffective for failing to so allege. We therefore affirm the order.

BACKGROUND

¶2 In 2004, Brown was convicted of first-degree intentional homicide for the death of Lamar Ashley and was sentenced to life in prison. He appealed that decision, arguing his confession had been involuntary and he had been denied the right to confront a witness, and we affirmed his conviction. *See* ***State v. Brown***, No. 2005AP2450-CR, unpublished slip op. ¶1 (WI App Dec. 19, 2006).

¶3 In March 2008, Brown filed a WIS. STAT. § 974.06 motion for relief. He alleged "postconviction/appellate" counsel was ineffective for failing to investigate and preserve issues that should have been raised in the first round of postconviction proceedings. Several of the issues went to trial counsel's effectiveness, and Brown sought a ***Machner***[2] hearing with respect to both attorneys' performances.

¶4 After addressing Brown's other claims of error, the trial court parsed out four claims of ineffective assistance of trial counsel and concluded each lacked merit. The court thus concluded trial counsel was not ineffective for failing to pursue the issues, and postconviction counsel was not ineffective for failing to raise trial counsel's omissions. The trial court denied Brown's motion without a hearing, and Brown now appeals.

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

DISCUSSION

¶5 WISCONSIN STAT. § 974.06 "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental, or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A motion brought under § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in the motion preceding the first appeal. *See* ***Escalona***, 185 Wis. 2d at 185. Ineffective assistance of postconviction or appellate counsel may constitute a "sufficient reason" for not previously raising an issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).[3] To demonstrate ineffective assistance of postconviction counsel and overcome the procedural bar, Brown must show that trial counsel was ineffective.

¶6 A defendant claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Deficient performance and prejudice present mixed questions of fact and law. ***Id.*** We uphold the trial court's factual determinations unless clearly erroneous. *See* ***State v. Swinson***, 2003 WI App 45, ¶57, 261 Wis. 2d 633,

[3] On appeal, Brown makes no mention of postconviction counsel and instead focuses directly on trial counsel's performance. The State argues this omission means Brown abandoned his argument about postconviction counsel's performance and cannot overcome the procedural bar. Although *pro se* litigants are normally bound by the same rules on appeal as attorneys, we tend to treat *pro se* prisoners' submissions more liberally. *See* ***State v. Love***, 2005 WI 116, ¶29 n.10, 284 Wis. 2d 111, 700 N.W.2d 62; ***State v. Wood***, 2007 WI App 190, ¶17 n.7, 305 Wis. 2d 133, 738 N.W.2d 81. Here, Brown addresses the fundamental issue of trial counsel's performance; we will not invoke waiver.

660 N.W.2d 12. Whether the facts reveal deficient performance or prejudice is a question of law we review independently. ***Id.***

¶7 To prove deficient performance, a defendant must establish that his or her attorney made errors so serious that the lawyer was not performing as constitutionally guaranteed counsel. ***Id.***, ¶58. There is a strong presumption that counsel has performed reasonably and within professional norms. ***Id.*** Counsel need not be perfect, or even very good, to be constitutionally adequate. *See* ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305.

¶8 To demonstrate prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). That is, the defendant must demonstrate not that there would have been a different verdict absent counsel's errors, but that the errors rendered the resulting conviction unreliable. ***Swinson***, 261 Wis. 2d 633, ¶58.

¶9 We may begin our analysis with either the deficient performance or prejudice prong. ***Strickland***, 466 U.S. at 697. If the defendant fails to make a sufficient showing on one of the prongs, we need not address the other. ***Id.***

¶10 As noted, the trial court identified four arguments relating to trial counsel's effectiveness. These are the issues Brown now raises on appeal.

A. Sequestration Order

¶11 Brown challenged his warrantless arrest and subsequent statement to police with a motion to suppress. Detectives Percy Moore and Mark Peterson

were involved in Brown's arrest at the home of Dorothy Franklin, and both detectives testified about gaining consent to enter Franklin's house. Prior to trial, the court had ordered all the witnesses sequestered, but when Moore testified, Peterson was in the courtroom. Brown contends Peterson's presence during Moore's testimony violated the sequestration order and trial counsel was ineffective for failing to object.

¶12 Peterson had been designated the State's representative. The sequestration order therefore would not apply to him. *See* WIS. STAT. § 906.15(2)(b). An attorney is not deficient for failing to make an objection that would be overruled. ***State v. Traylor***, 170 Wis. 2d 393, 405, 489 N.W.2d 626 (Ct. App. 1992).

¶13 Brown also fails to show any prejudice from counsel's failure to object. After Moore and Peterson testified, Franklin and Precyous Banks testified that the police entry was not consensual. Ultimately, the court concluded Franklin and Banks were "incredible and unreasonable" and denied the suppression motion. Brown does not show that a successful objection to Peterson's presence during Moore's testimony would have changed the result. *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272. That is, because the issue hinged on Franklin and Banks' incredibility, not on Moore and Peterson's credibility, Brown has not shown how sequestering Peterson would have produced a different result or how failing to sequester him undermines the jury's verdict.

B. Cross-Examination of the State's Witness

¶14 Laticia Nelson was on the porch of her residence with the victim when he was shot and she was the only eyewitness to the shooting. Nelson later identified Brown as the shooter from a six-photo array. Brown presents a jumble

of claims but essentially argues her identification was unreliable. When first interviewed, Nelson told police she had never seen the shooter before. At trial, she testified she had remembered him from a party and knew where he lived. Brown contends Nelson identified him only after neighbors told her they knew Brown had been the shooter and pressured her to identify him. He asserts trial counsel should have better explored inconsistencies in Nelson's testimony through cross-examination to help flesh out this theory and should have requested a hearing on the admissibility of her identification.

¶15 On cross-examination, Nelson admitted that she had told police she did not recognize Brown, despite testifying at trial that she knew him from a party. Nelson also admitted she was initially unsure of the shooter's identity and she admitted confirming it was Brown only after others told her he had been the shooter. Counsel explored with Nelson the conditions under which she made her identification, eliciting testimony that it was after midnight and dark, and Nelson had ducked down, away from the shooter, after the first shots were fired. Thus, through cross-examination, Nelson confessed her inconsistencies and uncertainty to the jury. Brown does not identify to what greater depths counsel should have gone to improve the cross-examination. We discern no deficient performance.

¶16 Brown also contends counsel should have challenged Nelson's identification, which he claims should not have been permitted because it was unreliable. Brown cites five indicia of reliability which he claims are not present here: opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the witness's accuracy in prior descriptions of the criminal; the witness's level of certainty at the confrontation; and the length of time between the crime and the confrontation. *See* ***Neil v. Biggers***, 409 U.S. 188, 199-200 (1972). However, these factors go to reliability of an identification that

follows an impermissibly suggestive out-of-court confrontation, such as a show-up. *See* ***id.*** at 199. Nothing about Nelson's identification of Brown from a photo array was or was alleged to be impermissibly suggestive. To the extent Brown's complaint is simply that Nelson is an unreliable witness, the assessment of her credibility is left to the jury, not this court. *See* ***State v. Hirsch***, 2002 WI App 8, ¶33, 249 Wis. 2d 757, 640 N.W.2d 140.

C. Use of the Photo Array at Trial

¶17 Using the photo array police had shown Nelson, the prosecutor asked her to point out to the jury the photo of the person she had identified as the shooter. The following exchange occurred:

> [STATE]: Okay. In that lineup of photos which one did you pick out?
>
> [NELSON]: The top last one.
>
> [STATE]: The top one?
>
> [NELSON]: On the left.
>
> [STATE]: I'm going to ask you to point to him now for the jury, okay? Top right?
>
> [NELSON]: Yes.
>
> [DEFENSE COUNSEL]: Well, that's the top right, but she testified the top left.
>
> [STATE]: No, she --
>
> THE COURT: I heard her say top left.
>
> [STATE]: Okay. … I thought she said top end but, in any event, which person did you identify when the police came out to tell you -- to ask you to look at photographs?
>
> [NELSON]: The top right.

Nelson also testified that after she made her initial identification, the police had her initial the picture she selected. Her initials were under Brown's photograph when the array was presented to the jury and she acknowledged his photo as the one she initialed. However, because Brown's picture was on the right of the array, and Nelson originally testified it was on the left, Brown asserts the State was leading her testimony and counsel should have requested a mistrial. This contention is without merit.

¶18 A mistrial is appropriate only if "in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial." ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). Brown does not show a mistrial was warranted, although he attempts to show the in-court identification was impermissibly suggestive. Here, the trial court ruled that "the picture had already been initialed by the witnesses and there was simply a misunderstanding as to what side of the picture she was referring to." This finding is not clearly erroneous. Accordingly, even if counsel was deficient for failing to request a mistrial, there was no prejudice from counsel's failure to seek a mistrial that would not have been granted. *See* ***id.***

D. Real Controversy/Meaningful Defense

¶19 Brown asserts there is reversible error because counsel failed to have certain allegedly exculpatory statements from Eulos Rounds admitted at trial. Thus, Brown asserts the issue of Rounds' credibility was not fully tried and Brown

was therefore deprived of a meaningful defense.[4] However, Rounds' statements were admitted when the interviewing detectives read them to the jury. Brown does not identify what specific portions of Rounds' statements are missing or should have been presented to the jury in another manner. Given only this conclusory and undeveloped argument, we cannot say counsel was ineffective or that there was prejudice, and we decline to further address the argument. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we do not consider unexplained, underdeveloped arguments).

¶20 Brown's ineffective assistance of trial counsel arguments lack merit. Because trial counsel was not ineffective, appellate counsel was not ineffective for failing to raise trial counsel's performance as an issue in the first appeal. Brown therefore cannot use ***Rothering*** to circumvent the dictates of WIS. STAT. § 974.06 and ***Escalona***, and the trial court properly denied Brown's present § 974.06 motion without a hearing.

By the Court.—Order affirmed.

This opinion shall not be published. WIS. STAT. RULE 809.23(1)(b)5.

[4] As part of this argument, Brown asserts he is entitled to a new trial because the real issue has not been fully tried. He complains he "did not have a full trial on the issue of Rounds' credibility." As noted above, however, he does not identify what portion of Rounds' statements was missing. We use our discretionary power of reversal "sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. The real issue was Brown's role in Ashley's death, and it was fully tried.