COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1186 **Cir. Ct. No. 1996CF960232A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MYRON ELCADO EDWARDS,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Myron E. Edwards, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for postconviction relief. Edwards asserts that the postconviction counsel who represented him on his direct appeal was ineffective for failing to raise claims that trial counsel was ineffective and for not properly impeaching trial counsel at a ***Machner***[2] hearing. We conclude trial counsel was not ineffective, which means postconviction counsel was not ineffective for failing to so allege. Further, we conclude that postconviction counsel did not provide ineffective assistance during cross-examination of trial counsel at the ***Machner*** hearing. Therefore, we affirm the order.

BACKGROUND

¶2 In 1996, Edwards was convicted after a jury trial of two counts of first-degree intentional homicide, one count of attempted first-degree intentional homicide, one count of attempted armed robbery and five counts of armed robbery, all as party to a crime, contrary to WIS. STAT. §§ 940.01(1), 943.32(1)(a) and (2), 939.32, and 939.05 (1995-96). He was sentenced to two consecutive life terms in prison without parole, plus 260 years.

¶3 For reasons not relevant to this appeal, he did not immediately file a motion for postconviction relief or a direct appeal. Ultimately, his direct appeal rights were reinstated and, with the assistance of postconviction counsel, Edwards filed a motion for postconviction relief. A ***Machner*** hearing was conducted. His

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

motion was denied and he appealed both the judgment and order in his direct appeal. We affirmed. *See* ***State v. Edwards***, No. 2005AP1324-CR, unpublished slip op. (WI App Mar. 27, 2007).

¶4 In ***Edwards***, we summarized the facts of the case. As relevant here, the police first interacted with Edwards during an investigation of an armed robbery at the Mitchell Street Bank that occurred on January 3, 1996. ***Id.***, ¶2. "Immediately after the robbery, the police followed a trail of money, dye and footprints in fresh snow from the bank to a home at 1823 South 17th Street." ***Id.*** Edwards was found in the home, arrested and taken to the police station for questioning. ***Id.***, ¶5.

> During the questioning, Edwards confessed to committing this bank robbery as well as five other armed robberies over the past three weeks, including a liquor store, two other banks and a video store. During the liquor store robbery, the store owner was shot and killed. During the video store robbery, a security guard was shot and killed and a patron was shot and left for dead.

Id., ¶6.

¶5 In his direct appeal, Edwards raised numerous challenges, including a single allegation of ineffective assistance of counsel that alleged trial counsel failed to present an alibi offense. ***Id.***, ¶¶1, 34. We rejected his arguments and affirmed the judgment and orders. ***Id.***, ¶41.

¶6 In March 2008, Edwards, acting *pro se*, filed the postconviction motion that is the subject of this appeal. He alleged that he had been denied the effective assistance of postconviction counsel because postconviction counsel failed to allege that trial counsel was ineffective in numerous ways, all of which are raised on this appeal and are discussed below. He further alleged that

postconviction counsel was ineffective for not effectively impeaching trial counsel at the ***Machner*** hearing. The postconviction court denied Edwards's motion in a written order, without a hearing. This appeal follows.

LEGAL STANDARDS

¶7 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 procedurally barred, if a defendant was afforded 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). To demonstrate ineffective assistance of postconviction counsel and overcome the procedural bar, Edwards must show that trial counsel was ineffective.

¶8 To prove ineffective assistance of counsel, a defendant must show deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because the defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶9 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121,

127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

¶10 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. ***Id.***, 466 U.S. at 694 ("The 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.").

¶11 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.

¶12 When a defendant raises an ineffective assistance claim in a postconviction motion, the following legal standards apply:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. 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. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant

> to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted). On appeal, if we conclude that a trial court reached "the proper result for the wrong reason," we will affirm. ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

DISCUSSION

¶13 At issue is whether Edwards's postconviction counsel was ineffective for failing to allege that trial counsel was ineffective in numerous ways, and for not effectively impeaching trial counsel. We conclude that the postconviction court did not erroneously exercise its discretion when it denied Edwards a postconviction hearing because "the record conclusively demonstrates" that Edwards is not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Specifically, Edwards's postconviction motion fails because trial counsel did not provide ineffective assistance, and postconviction counsel was therefore not ineffective for failing to allege trial counsel ineffectiveness. Further, postconviction counsel did not provide ineffective assistance during cross-examination of trial counsel at the ***Machner*** hearing. We examine each of Edwards's claims in turn.

I. Challenge to the preliminary hearing.

¶14 Edwards argues that "trial counsel was ineffective for not challenging the trial court's competency to exercise subject matter jurisdiction."

(Capitalization omitted.) Specifically, Edwards asserts that trial counsel should have objected based on three errors associated with the preliminary hearing. We reject his arguments on these three alleged errors and therefore reject his challenge to subject matter jurisdiction.

A. WIS. STAT. § 971.01(2).

¶15 Edwards argues that trial counsel should have objected to the fact that the Information was filed before the preliminary hearing started, which Edwards asserts is improper because WIS. STAT. § 971.01(2) directs the State to file the information "within 30 days *after* the completion of the preliminary examination." *See* ***id.*** (emphasis added). The postconviction court rejected this argument because the State filed the Information the same day as the preliminary hearing, which the postconviction court reasoned "was within 30 days after the completion of the preliminary examination." *See* ***id.***

¶16 In response to Edwards's argument, the State notes that it is not clear that the Information was filed prior to the preliminary hearing. The State explains: "Edwards infers from a statement by the prosecutor at the end of the preliminary hearing transcript that the Information was filed before the preliminary hearing. The record provides no further information about the precise time the Information was filed." (Record citation omitted.) The State argues that assuming Edwards's inference is correct, his challenge on appeal nonetheless fails because even if trial counsel had objected to the filing of the Information, the remedy would have been

dismissal without prejudice and the State could have simply refiled the Information.[3]

¶17 We agree with the State. Edwards has failed to show that trial counsel's alleged error was prejudicial. Therefore, trial counsel was not ineffective, and postconviction counsel was not ineffective for not arguing trial counsel ineffectiveness. Thus, we are affirming the postconviction court order, albeit on a basis not relied upon by the postconviction court. *See* ***Holt***, 128 Wis. 2d at 125.

B. WIS. STAT. § 971.01(1).

¶18 Next, Edwards argues that the Information was insufficient under WIS. STAT. § 971.01(1), because it did not provide adequate notice of the charges against him and he therefore "could not properly prepare a defense to any of the charges."[4] *See* ***Blenski v. State***, 73 Wis. 2d 685, 695, 245 N.W.2d 906 (1976) ("A charge is sufficiently stated if it states an offense to which the defendant is able to plead and prepare a defense."). Edwards does not argue that the twenty-six-page complaint failed to apprise him of the charges against him. Rather, he argues that the State was required to repeat the detailed charges in the Information. Edwards acknowledges that the State has provided citations to cases that support its assertion that notice of the charges may be provided by either the complaint or the

[3] In its well-written brief, the State offers other bases for affirmance. With this and subsequent issues, we will not summarize all possible bases for affirmance. Rather, we will identify the basis upon which we are affirming.

[4] In another section of his brief, Edwards challenges the content of the Information for what appears to be the same reasons cited here. For the reasons stated, we reject this latter argument as well.

Information. However, Edwards maintains that § 971.01(1) "creates a liberty interest for Edwards to have the nature of the charges provided in his Information." He cites ***State v. Woehrer***, 83 Wis. 2d 696, 266 N.W.2d 366 (1978), where the Wisconsin Supreme Court held that a criminal prosecution had to be dismissed where the district attorney failed to file an Information within thirty days of the defendant's waiver of a preliminary hearing. *See* ***id.*** at 697.

¶19 Like the postconviction court, we reject this argument. The complaint was sufficiently detailed to apprise Edwards of the charges against him and the Information is consistent with the format spelled out in WIS. STAT. § 971.03. In addition, Edwards has provided us with no specific examples or citations to the record documenting difficulties Edwards believes trial counsel experienced preparing a defense because of the format of the complaint or the Information. For these reasons, there was no valid basis to challenge the Information and trial counsel was therefore not deficient for not doing so. It follows that postconviction counsel was not deficient for not alleging trial counsel deficiency on this basis.

C. WIS. STAT. § 970.03(10).

¶20 Edwards argues that the court commissioner that conducted the preliminary hearing "failed to comply" with WIS. STAT. § 970.03(10) because Edwards "was entitled to have a finding on probable cause, of each count in his multiple count criminal complaint." The postconviction court rejected this argument, finding "that the preliminary hearing transcript shows that probable cause was found as to each count as it pertained to each defendant." We agree.

¶21 At the conclusion of the preliminary hearing, which included testimony concerning multiple defendants, the court commissioner stated: "Based

on the testimony on this record, I find probable cause to believe that the felonies have been committed within the jurisdiction of the [court] … and probably committed by each defendant."[5] On appeal, Edwards explicitly states that he "is not challenging the sufficiency of the evidence presented at the preliminary hearing." Rather, his argument appears to be that the court commissioner was required to state each count individually. However, the cases Edwards cites do not support that proposition. We are not persuaded. We conclude that trial counsel was not ineffective for failing to raise this issue, and that postconviction counsel was not deficient for not challenging trial counsel's performance on this issue.

II. Challenge to the jury instruction and verdict conference.

¶22 Edwards argues that "trial counsel was ineffective for not objecting to the trial court's failure to hold a jury instruction and verdict conference" that was "on the record." (Capitalization omitted.) The postconviction court's written decision stated: "Although there is no notation on the docket sheets that a jury instruction conference was held [on the record], the defendant must demonstrate that he was prejudiced by counsel's failure to object to a specific instruction." (Footnote omitted.) The postconviction court rejected Edwards's argument on prejudice grounds. We likewise reject Edwards's argument, but for a different reason: there *was* an off-the-record jury instruction and verdict conference, and it was memorialized on the record.[6] *See* ***Holt***, 128 Wis. 2d at 124.

[5] The preliminary hearing concerned crimes committed by four defendants, including Edwards.

[6] This information was not easy to find, given the age and size of the record and the lack of a notation in the docket sheets concerning the jury instruction conference.

¶23 At the close of the evidence, after both parties had rested, the trial court told them: "Then I would like to talk with counsel in chambers about the jury instructions." Later, the trial court stated on the record:

> Okay. The record should reflect that I've had an opportunity to meet with counsel to discuss the jury instructions and how we're proceeding at this time. I did provide counsel with a copy of proposed jury instructions. They are based on requests that were made by the parties.
>
> In fact, I granted every request except 200-A…. And I did not include any lesser includeds, and we'll talk about that. But other than that, they are all the instructions.

The trial court identified the jury instructions by number and also noted that it had shown counsel the proposed verdict forms.

¶24 In his reply brief, Edwards implicitly acknowledges that the parties spoke off the record. However, he asserts that the entire conference had to take place on the record. We disagree. WISCONSIN STAT. § 805.13(3)[7] governs the jury instruction and verdict conference. It provides:

> INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

[7] The current version of WIS. STAT. § 805.13(3) is identical to the 1995-96 version.

Contrary to Edwards's assertion, this statute does not prohibit the trial court from talking with the parties off the record, and it is in fact common practice for the trial court and counsel to meet off the record, outside the jury's presence, to discuss the jury instructions. A trial court *is required* to state "its proposed action on the motions," which it did in this case, and any objections by counsel must be on the record or they are waived. *See* ***id.*** Edwards's suggestion that the way the trial court summarized the proceedings somehow entitles him to a new trial is without merit.

¶25 We conclude that trial counsel was not deficient for failing to object to the way the trial court summarized the jury instruction conference, and postconviction counsel was not deficient for failing to challenge trial counsel's effectiveness on this basis.

III. Substantive challenges to the jury instructions.

¶26 Next, Edwards argues that trial counsel should have objected to three problems with the jury instructions. We have recognized that:

> [a] trial court has broad discretion in deciding whether to give a particular jury instruction, and the court must exercise its discretion to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence."

State v. Jensen, 2007 WI App 256, ¶8, 306 Wis. 2d 572, 743 N.W.2d 468 (citation omitted). "However, we will independently review whether a jury instruction is appropriate under the specific facts of a given case." ***Id.*** "Jury instructions are not to be judged in artificial isolation, but must be viewed in the context of the overall charge. If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist." ***State v. Hubbard***, 2008 WI

92, ¶27, 313 Wis. 2d 1, 752 N.W.2d 839 (citations and quotation marks omitted). With these standards in mind, we examine Edwards's three challenges to the jury instructions.

A. Armed robbery instruction.

¶27 Edwards was charged with five counts of armed robbery, in violation of WIS. STAT. § 943.32(1)(a) and (2) (1993-94),[8] and one count of attempted armed robbery. Section 943.32 provided in relevant part:

> **Robbery. (1)** Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of a Class C felony:
>
> (a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property….
>
> ….
>
> **(2)** Whoever violates sub. (1) by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon is guilty of a Class B felony.

Because one can violate § 943.32(2)[9] by using or threatening to use: (1) a dangerous weapon or (2) "any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon," two different jury

[8] Although the armed robberies and the attempted armed robbery at issue occurred in December 1996 and January 1996, we reference the 1993-94 version of WIS. STAT. § 943.32 here because § 943.32(2) was amended by 1995 Wis. Act 288 § 3 (effective date: May 10, 1996) to refer not only to a dangerous weapon but also to "a device or container described under s. 941.26(4)(a)."

[9] The 1995-96 version of WIS. STAT. § 943.32 is identical to the 2007-08 version, except that the classes of crimes have been changed. Currently, one who violates § 943.32(1) is guilty of a Class E felony, while one who violates § 943.32(2) is guilty of a Class C felony.

instructions have been created.[10] WISCONSIN JI—CRIMINAL 1480 is used when the facts show a defendant used a dangerous weapon; it states that the State must prove that "[a]t the time of the taking or carrying away, the defendant used or threatened to use a dangerous weapon." ***Id.*** (footnotes omitted). WISCONSIN JI—CRIMINAL 1480A was created for cases "where a robbery is alleged to have been committed 'by use or threat of use of any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon.'" ***Id.*** n.1 (citation omitted). It states that the State must prove "that at the time of the taking or carrying away, the defendant used or threatened to use an article used or fashioned in a manner to lead [another person] reasonably to believe it was capable of producing death or great bodily harm." ***Id.*** (footnotes omitted).

¶28 In this case, it is undisputed that with respect to each count of armed robbery or attempted armed robbery, the State's theory was that Edwards used an actual firearm, rather than an "article used or fashioned" to lead each of the victims to believe the item was a dangerous weapon. Indeed, the Information uses the term "dangerous weapon" with respect to each count. However, the first (and only) time the trial court defined armed robbery,[11] the trial court used only the "article used or fashioned" language when it stated the fifth element of the crime of armed robbery. The trial court instructed the jury as follows:

[10] WISCONSIN JI—CRIMINAL 1480 was originally published in 1966 and WIS JI—CRIMINAL 1480A was originally published in 1983. Both have been amended numerous times. However, the language at issue here—two sections of the definition of armed robbery—appears to be the same as that in the current version.

[11] For subsequent counts, the trial court reminded the jury that the crime of armed robbery had already been defined for them. For Count 3 and each of the subsequent counts, the jury was told that the Information alleged that Edwards had used a dangerous weapon.

> Count 3 charges attempt[ed] armed robbery, party to a crime, in the Choice Liquor Store. Count 3 of the [I]nformation charges that on December 11, 1995, at the Choice Liquor Store … as party to a crime, the defendant, with intent to steal, did and *by the use or threat of a dangerous weapon* attempt to take property from the presence of [the victim] by using force against him with intent to overcome his physical resistance or physical power of resistance to the taking and carrying away of property….
>
> ….
>
> Armed robbery, as described in 943.32(2) … is committed by one who with the intent to steal and *by use of threat or use of a dangerous weapon or an article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon*, takes property form the person….
>
> ….
>
> The fifth element requires that at the time of the carrying or taking away, the defendant or another acting with him as party to a crime *used or threatened to use an article used or fashioned in a manner to lead [the victim] to reasonably believe it was capable of producing death or great bodily harm*.

(Emphasis added.)

¶29 The State acknowledges that "[s]trickly speaking, the [trial] court's description of the fifth element was inappropriate because the evidence in the case and the State's theory of the case was that Edwards used actual firearms, not articles 'used or fashioned' to lead the victims to believe they were dangerous weapons." Thus, the State concedes, the language of WIS JI—CRIMINAL 1480 "would have been more appropriate." However, the State contends, because the language used by the trial court was broad enough to encompass both fake guns and actual guns, the jury instruction was not erroneous and trial counsel was not deficient for failing to object to it.

¶30 We agree with the State. While it would have been preferable to use the more specific language of WIS JI—CRIMINAL 1480 (referring to a "dangerous weapon"), the phrase "article used or fashioned in a manner to lead [the victim] to reasonably believe it was capable of producing death or great bodily harm" is broad enough to encompass use of an actual firearm. *See* ***Hubbard***, 313 Wis. 2d 1, ¶27. Thus, trial counsel was not deficient for failing to object when the jury instruction was read, and postconviction counsel was not deficient for not alleging trial counsel ineffectiveness.

B. Naming victims in the jury instructions.

¶31 Next, Edwards argues that trial counsel was ineffective for failing to object to the jury instructions on counts four through nine because the instructions did not specifically name the victim of each count. Edwards is mistaken. With respect to each count, the victim was identified by name. It is true that the trial court did not repeat the same instructions more than once, choosing instead to simply say, for example, that terms such as party to a crime and armed robbery were already previously defined. This is not error. There was no reason for trial counsel to object, and postconviction counsel was not ineffective for not alleging trial counsel ineffectiveness.

C. Jury instruction on first-degree intentional homicide.

¶32 Edwards's next argument concerns the trial court's use of WIS JI—CRIMINAL 411, concerning party-to-a-crime liability. Edwards asserts that the trial court "failed to completely instruct the jury on the essential elements of the crimes" and then cites WIS JI—CRIMINAL 411. Other than repeatedly saying that the instruction was incomplete, Edwards has not provided sufficient explanation or citations to the record for this court to understand and address his argument.

Although we review *pro se* prisoners' submissions liberally, *see* ***State v. Love***, 2005 WI 116, ¶29 n.10, 284 Wis. 2d 111, 700 N.W.2d 62, we will not, in granting leniency, abandon our neutrality to develop arguments, *see* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988); *see also* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we will not assess undeveloped arguments). We decline to consider Edwards's undeveloped argument further.

IV. Challenge to the sentence.

¶33 Edwards, who was sentenced to life in prison without the possibility of parole, argues that WIS. STAT. § 973.014(1)(c) (1995-96)[12] was unconstitutional because it allowed the trial court to make factual findings "to enhance the statutory

[12] WISCONSIN STAT. § 973.014 (1995-96) provided in its entirety:

> **Sentence of life imprisonment; parole eligibility determination. (1)** Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (a) The person is eligible for parole under s. 304.06(1).
>
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in s. 304.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06(1).
>
> (c) The person is not eligible for parole. This paragraph applies only if the court sentences a person for a crime committed on or after August 31, 1995.
>
> **(2)** When a court sentences a person to life imprisonment under s. 939.62(2m), the court shall provide that the sentence is without the possibility of parole.

maximum of a class A felony (life imprisonment)." He further argues that the trial court's statements that "some murders are more heinous than others" and that Edwards's crimes "were cold and calculated" were factual findings that violated ***Blakely v. Washington***, 542 U.S. 296 (2004), and ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). He asserts that his trial counsel was ineffective for failing to raise both of these arguments. We disagree.

¶34 First, we reject Edwards's challenge to the constitutionality of WIS. STAT. § 973.014(1)(c) (1995-96). The basis for Edwards's challenge is not clear. However, we note that our supreme court specifically rejected numerous constitutional challenges to WIS. STAT. § 973.014 (1987-88). *See* ***State v. Borrell***, 167 Wis. 2d 749, 778, 482 N.W.2d 883 (1992). Edwards has not identified a valid basis for trial counsel to have challenged the same statute.

¶35 Second, we reject Edwards's argument that trial counsel could have raised a valid objection based on ***Blakely*** and ***Apprendi***. Edwards was convicted of two counts of first-degree intentional homicide as a party to the crime, which carried a maximum penalty of life imprisonment without parole. *See* WIS. STAT. §§ 939.50(3)(a), 940.01(1) & 973.014 (1995-96).[13] The federal cases on which Edwards relies are distinguishable because both involved sentences that exceeded the statutory maximum for the convicted offense. *See* ***Blakely***, 542 U.S. at 313; ***Apprendi***, 530 U.S. at 490. Consequently, the trial court did not erroneously

[13] WISCONSIN STAT. § 940.01 (1995-96) provided in relevant part: "**First-degree intentional homicide. (1)** OFFENSE. Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." WISCONSIN STAT. § 939.50(3) (1995-96) provided in relevant part: "Penalties for felonies are as follows: (a) For a Class A felony, life imprisonment."

exercise its discretion when it imposed (and did not exceed) the maximum sentence for the crimes after considering evidence of Edwards's conduct.

¶36 We conclude there was no basis to challenge Edwards's sentence on the grounds he alleges. Trial counsel was therefore not deficient for failing to raise those challenges, and postconviction counsel was not deficient for failing to allege trial counsel ineffectiveness on this basis.

V. Impeachment of trial counsel.

¶37 Edwards argues that postconviction counsel was ineffective for failing to attempt to impeach trial counsel's testimony at the ***Machner*** hearing concerning whether Edwards ever told trial counsel he had an alibi. In Edwards's direct appeal, we rejected his claim that his trial counsel had performed deficiently by failing to present an alibi defense. We stated:

> The trial court held a hearing on Edwards's claim and his former trial counsel testified that he did not recall discussing an alibi defense with Edwards. Edwards asserted otherwise, testifying that he told his trial attorney about alibis for each offense and told him that another specific person committed the crimes. Edwards also presented the testimony of his friend, Jodie Heipel, and his mother, Sonja Gibson. However, neither individual could testify with specificity as to the whereabouts of Edwards on the dates of the crimes.
>
> Moreover, Edwards's former trial counsel testified that he hired a private investigator, and challenged the State's case against Edwards with motions regarding the arrest and line-up evidence, and with cross-examination of the State's witnesses.
>
> At the conclusion of the hearing, the trial court found that Edwards had not discussed with his attorney the possibility of asserting an alibi defense. It found that the record supported Edwards's former trial counsel's account as there was no mention of an alibi anywhere throughout the pretrial proceedings, the trial itself, or the initial postconviction proceedings. The trial court found

> Edwards's testimony to be incredible. The record supports the trial court's determinations. If an alibi had been discussed as a viable defense, it would have appeared somewhere during the proceedings. Accordingly, the trial court's findings are not clearly erroneous and, based on such, we cannot conclude that former trial counsel provided ineffective assistance.

Edwards, No. 2005AP1324-CR, unpublished slip op., ¶¶38-40.

¶38 In his subsequent postconviction motion, Edwards asserted that postconviction counsel should have discovered that trial counsel had submitted a proposed jury instruction on alibi and should have used that information to discredit trial counsel's testimony that no alibi defense was ever discussed. In effect, Edwards is once again arguing that he was denied the effective assistance of trial counsel because trial counsel did not present an alibi defense.

¶39 Although we dismissed this argument on direct appeal on grounds that Edwards had failed to show his trial counsel's performance was deficient, we reject it here because Edwards has failed to show trial counsel's failure to present an alibi defense was prejudicial. Specifically, Edwards has not presented sufficient evidence that he had a valid alibi defense. As we noted in ***Edwards***, neither of the witnesses Edwards offered in support of his alibi theory were able to testify as to his whereabouts on the dates of the crimes. *See* ***id.***, ¶38. To date, he has yet to provide information demonstrating that he has a specific witness who can offer an alibi for any of the crimes in question. Therefore, Edwards has failed to show he was prejudiced by trial counsel's failure to present an alibi defense and by postconviction's cross-examination of trial counsel.

CONCLUSION

¶40 We conclude that the postconviction court did not erroneously exercise its discretion when it denied Edwards's postconviction motion without a hearing. The record conclusively demonstrates that Edwards is not entitled to relief. He has not shown that his trial counsel was ineffective, and therefore his postconviction counsel was not ineffective for failing to allege trial counsel ineffectiveness. Further, we conclude that postconviction counsel did not provide ineffective assistance during cross-examination of trial counsel at the ***Machner*** hearing. We affirm the order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.