COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-0873-CR
01-0874-CR

Cir. Ct. Nos. 92-CF-2095B
94-CF-991B

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES GULLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. James Gulley, acting pro se, appeals from an order denying his motion for postconviction relief without a hearing. The issue on appeal is whether Gulley received ineffective assistance of trial, postconviction,

and appellate counsel. Because we conclude that he did not receive ineffective assistance of counsel, we affirm.

¶2 These consolidated cases have a rather complicated procedural history. Both cases stem from the same underlying incident in which Gulley and another man shot a rifle into a home in Beloit. In the 1992 case (No. 01-0873-CR), Gulley was convicted after a jury trial of three counts of first-degree recklessly endangering safety while using a dangerous weapon as a party to a crime. The court sentenced him to three consecutive nine-year prison terms. Gulley filed a direct appeal from this judgment. We affirmed and the supreme court denied his petition for review.

¶3 In the 1994 case (No. 01-0874-CR), by a separate complaint, Gulley was charged with two more crimes relating to the same incident. He was charged with one count of possession of a firearm by a felon as a habitual offender, and one count of misdemeanor obstruction of an officer as a habitual offender. Gulley pleaded no contest to these two charges. The court sentenced him to two years in prison on the first count, and a consecutive nine-month term on the second count to run consecutively to any existing sentence.[1] This sentence, however, was to run concurrently to the sentence imposed in the 1992 case. Gulley did not file a direct appeal from this conviction.

¶4 Gulley then filed several motions for sentence credit in these two cases. Eventually, this court directed that sentence credit be granted to Gulley. Gulley subsequently filed a postconviction motion seeking further relief in these

[1] This sentence was actually imposed prior to the time Gulley was sentenced in the 1992 case.

two cases. He sought to "vacate, set-aside or correct [his] sentence." By an order dated April 4, 2001, the circuit court denied the motion on the grounds that it was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). It is from this order that Gulley now appeals.

¶5 The first issue that must be addressed is the procedural posture of this appeal. We conclude that the motion filed by Gulley was, in effect, a motion for postconviction relief under WIS. STAT. § 974.06 (1999-2000).[2] The circuit court denied the motion on the basis that Gulley could have raised the issues in his previous appeal. We agree with the State, however, that because Gulley asserted ineffective assistance of counsel, ***Escalona*** does not bar the motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Nonetheless, we affirm the order of the circuit court, but for a different reason. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). We conclude that Gulley has not established that he received ineffective assistance of counsel.

¶6 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** at 697. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶7 Although the issues appear to overlap and are difficult, at points, to discern, it appears that Gulley has asserted four grounds in support of his claim that he received ineffective assistance of counsel. He asserts that his trial, postconviction and appellate counsel were ineffective for failing to raise the following issues: (1) that the second set of charges filed against him should have been barred by double jeopardy; (2) that the jury instructions were improper; (3) that the State did not prove the elements of the crime beyond a reasonable doubt, or in other words, that there was insufficient evidence to convict him; and (4) that the penalty enhancer was improperly applied.

¶8 Gulley first claims that the second set of charges brought against him constituted a successive prosecution for the same offense and therefore, were barred by double jeopardy. If these charges were barred by double jeopardy, then counsel was ineffective for failing to challenge the second prosecution on this ground.

¶9 We conclude that Gulley's second prosecution did not violate double jeopardy. Gulley seeks to take advantage of the three-year period of time during which the United States Supreme Court's decision in ***Grady v. Corbin***, 495 U.S. 508, 521 (1990), held that double jeopardy bars the State from proving an essential element of a crime charged in a later case by attempting to prove conduct that constitutes a crime for which the defendant already was prosecuted. ***Grady***, however, was overruled by ***United States v. Dixon***, 509 U.S. 688, 704 (1993), which reaffirmed the "same elements" test of ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). The second set of charges were filed against Gulley after ***Grady*** was overruled. The same elements test is the proper standard to determine whether double jeopardy bars Gulley's second conviction.

¶10 Under the "same elements" test, a conviction bars a subsequent prosecution unless "each provision requires proof of a fact for conviction which the other does not require." WIS. STAT. § 939.71. Under this test, Gulley's second conviction was not barred by double jeopardy because the reckless endangerment charges and the possession of firearm charges are different in law. The first-degree recklessly endangering safety charges required proof of three essential elements: that Gulley endangered the safety of another person; that he did so by criminally reckless conduct; and that such conduct showed utter disregard for human life. WIS JI—CRIMINAL 1345 (1994). The possession of a firearm by a felon charge required proof of two essential elements: that Gulley possessed a firearm and he had been convicted of a felony prior to the act of possession. WIS JI—CRIMINAL 1343 (2000). These two crimes are different in law because each possesses at least one element that the other does not. *See* ***State v. Vassos***, 218 Wis. 2d 330, 336-37, 579 N.W.2d 35 (1998). Since Gulley's successive prosecutions are not barred by double jeopardy, then his counsel were not ineffective for failing to raise the issue.

¶11 The second issue Gulley raises is whether the jury instructions were proper. The State assumes that Gulley is arguing that the jury instructions were improper as to the penalty enhancer. As we read Gulley's brief, however, he is making two separate arguments. First he is arguing that the jury instructions are improper, and then he argues that the penalty enhancer was improperly applied to his 1992 case.

¶12 With regard to the issue of whether the jury instructions were proper, Gulley does not identify which instruction he believes was improper and he does not explain why the instruction was improper. Because the issue was inadequately

briefed, we will not address the issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶13 The next issue, then, is whether the penalty enhancer was improperly applied. The State suggests that Gulley is arguing that the jury instructions in the 1992 case were inadequate for lack of a nexus instruction on the dangerous weapon element. We agree with the State that this claim can be resolved quite simply. The nexus requirement of ***State v. Peete***, 185 Wis. 2d 4, 9, 517 N.W.2d 149 (1994), requires the State to prove that a dangerous weapon facilitated the underlying crime before the dangerous weapon penalty enhancer can be applied. In this case, however, use of the weapon was the crime. "If a defendant commits a crime while using or threatening to use a dangerous weapon, a nexus is established." ***Id.*** at 18. Again, since there was no merit to this claim, Gulley's counsel were not ineffective for failing to raise these issues.

¶14 The final issue appears to be whether the State proved each element beyond a reasonable doubt. When considering a challenge to the sufficiency of the evidence, this court must affirm

> if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt.... [T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.

State v. Alles, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (internal quotations and emphasis omitted). If more than one inference can be drawn, the inference which supports the jury's verdict must be followed unless the evidence was incredible as a matter of law. ***Id.*** at 377.

¶15 We agree with the State that it is not clear from Gulley's brief whether he is challenging the sufficiency of the evidence for the dangerous weapon element or for the three recklessly endangering safety counts. In either event, however, there was sufficient evidence to convict him. The evidence established that multiple gunshots were fired into a Beloit residence occupied by three people. The evidence also established that the gunshots were fired from a red-colored Maverick which had a loud muffler or no muffler at all. The evidence also established that when the police spotted a car matching that description and attempted to stop it, the driver sped up and the police chased the car for ten minutes during which the driver rammed a squad car and avoided a roadblock before being stopped. Gulley was in the front passenger seat and his co-defendant was driving. The police found spent shell casings on the front seat of the car.

¶16 The evidence further showed that on the previous afternoon, Gulley's co-defendant had argued with one of the residents of the home and threatened to shoot him. There was further evidence which showed that the casings found in the car, and hidden in the squad car, were consistent with the casings found in the home. A rifle was also subsequently found near the residence. Gulley and his co-defendant were found to have traces of gunpowder on their hands. In sum, there was more than sufficient evidence produced at trial to support the convictions.

¶17 Since all of the issues raised by Gulley lack merit, none of his counsel were ineffective for failing to raise or argue the issues. Consequently, his claim that he received ineffective assistance of counsel must fail.

By the Court.—Order affirmed.

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