COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1920-CR **Cir. Ct. No. 98-CF-1813**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OTO ORLIK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Oto Orlik appeals a judgment of conviction and an order denying his motion for postconviction relief. The issues relate to ineffective assistance of counsel, a juror strike, instructions, and admission of evidence. We affirm.

¶2 Orlik was charged with first-degree intentional homicide of his daughter, attempted homicide of his wife, and two misdemeanor counts of bail jumping. Orlik pled not guilty and not guilty by reason of mental disease or defect. However, before trial he pled no contest to the charges, while maintaining his plea based on mental disease or defect. The jury concluded that Orlik did not have a mental disease at the time of the crime. Orlik filed a postconviction motion, primarily raising claims of ineffective assistance of counsel. Except for one paragraph, the court denied the motion without an evidentiary hearing. After taking evidence, the court also denied that claim. Orlik appeals.

¶3 The first issue is whether the court properly denied most of the ineffective assistance claims without an evidentiary hearing. A circuit court can properly deny the postconviction motion without a hearing if the defendant fails to allege facts which, if true, would entitle the defendant to relief, or if the defendant presents only "conclusory" allegations, without alleging facts that allow the reviewing court to meaningfully assess his or her claim. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 313-14, 548 N.W.2d 50 (1996). Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. ***Id***. at 310. We conclude that most of Orlik's motion was properly denied on this basis. Although the forty-page motion alleges numerous facts, the statements made are conclusory. They are little more than a collection of laments untethered to legal arguments. They provided no basis for the circuit court to conclude that, if the facts were proven, Orlik was entitled to relief.

¶4 We next consider whether the court properly denied the ineffective assistance claim on which it took evidence. This claim alleged that Orlik's trial attorneys were ineffective because they failed to move to sever the bail jumping counts, and that this failure resulted in the jury learning of the earlier charges for

which Orlik was released on bail. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). To demonstrate prejudice, 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. ***Strickland***, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id***.

¶5 The circuit court concluded, based on the testimony of the attorneys, that they made a conscious decision to include those prior incidents as part of a strategy of presenting a complete picture of Orlik and his claimed mental disease. Orlik argues that this strategy was unreasonable because it was not developed with his expert witness, inasmuch as the expert's testimony did not link the earlier incidents with Orlik's claimed mental disease. Although it is true that Orlik's expert was not asked about these incidents, we conclude the trial strategy was reasonable. We are satisfied that the jury would be able to link the defense theory and the earlier crimes, even if the expert did not specifically testify about Orlik's mental state at that time. Furthermore, even if the jury did not make this link, the possibility of prejudice is slight. That is, the fact that Orlik may have committed other crimes earlier would not tend to support a finding that he did not have a mental disease at the time of this crime.

¶6 Orlik next argues that the circuit court erred by denying his motion to strike a potential juror for cause. However, the juror was removed by a peremptory

strike. Reversal is not the remedy when a defendant chooses to exercise a single peremptory strike to correct a circuit court error. ***State v. Lindell***, 2001 WI 108, ¶¶111-13, 245 Wis. 2d 689, 629 N.W.2d 223. Orlik acknowledges ***Lindell***, but argues that we should continue to apply the case law that was in effect at the time of his trial. He provides no authority for the proposition that he is entitled to have this court continue to apply case law that has been overruled since his trial.

¶7 Orlik argues that the circuit court erroneously exercised its discretion by rejecting his request for a jury instruction that would have stated how long Orlik could be committed if the jury found him not guilty by reason of mental disease or defect. Orlik's concern is that the jury may have rejected his defense because it believed that accepting the defense might result in his release, immediately or later. The court gave the jury an instruction that restated the content of WIS. STAT. § 971.165(2) (2001-02):[1]

> If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health and family services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

¶8 Orlik offers no case law that would suggest the court erred, but he relies instead on an American Bar Association standard. We conclude the court did not err. First, it is not clear from the excerpt from the ABA standard quoted by

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Orlik that the instruction in his case was inconsistent with that standard. The instruction in his case did, in fact, inform the jury of dispositional consequences, although not to the level of detail that Orlik sought. More importantly, the instruction given did not make any statement as to how long Orlik might be committed. While the instruction did not specifically state that Orlik could be committed for the rest of his life, it also did not foreclose that possibility.

¶9 Orlik argues that the court erred by admitting testimony of Linda Lane over his objection. He argues that her psychological opinion testimony was inadmissible because she had never examined Orlik, which, Orlik believes, is required by WIS. STAT. § 971.16(5). He also argues that it was inadmissible because neither a report prepared by Lane, nor a police report that was intended to substitute for such report, was timely tendered to the defense as required by § 971.16(4). We reject Orlik's reading of these statutes. Neither of them requires an expert to conduct an examination before testifying. By its terms, the report requirement in § 971.16(4) applies only to experts who have examined the defendant. It has no application to other experts who might testify. In addition, the court limited Lane's testimony to only those things of which the defendant was put on notice more than three days before trial.

¶10 Orlik's brief contains numerous other arguments which, because they are inadequately developed, we will not address. *See* ***State v. Pettit,*** 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (We may decline to review issues that are "inadequately briefed," such as when "arguments are not developed themes reflecting any legal reasoning" and "are supported by only general statements."). We also point out that appellate counsel "need not (and should not)" raise every nonfrivolous claim on appeal, but should select from among the

claims in order to maximize the likelihood of success on appeal. ***Smith v. Robbins***, 528 U.S. 259, 288 (2000).

¶11 Finally, Orlik requests that we exercise our discretionary reversal authority under WIS. STAT. § 752.35. We find no basis, however, in the briefs and record upon which to do so. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992) (a final catchall plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed).

By the Court.—Judgment and order affirmed.

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