COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0263-CR **Cir. Ct. No. 99CF5947**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. MCPHETRIDGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Thomas McPhetridge appeals *pro se* from a judgment entered after a jury convicted him of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (1999-2000).[1] He also appeals from the

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

orders denying his postconviction motions. McPhetridge claims: (1) the trial court allowed improper impeachment evidence; (2) the prosecution failed to turn over exculpatory evidence; (3) his trial counsel was ineffective; (4) the trial court improperly instructed the jury; (5) the trial court erred in failing to hold a ***Machner***[2] evidentiary hearing; (6) his sentence was based on incorrect information; and (7) the trial transcripts have been altered and are incorrect. We disagree with all of these contentions and affirm.

I. BACKGROUND.

¶2 On November 19, 1999, McPhetridge sexually assaulted the twelve-year-old daughter of his live-in girlfriend. On November 20, 1999, he was arrested at his workplace and taken to the West Milwaukee Police Department. After McPhetridge was given ***Miranda***[3] warnings, he made statements denying his guilt to Officer Robert Bennett.

¶3 McPhetridge was charged with one count of first-degree sexual assault of a child. He was brought to trial on February 28, 2000. At trial, McPhetridge testified on his own behalf. Officer Bennett was called by the State as a rebuttal witness and testified about McPhetridge's custodial statement. McPhetridge's custodial statement was also used to impeach his own testimony on cross-examination. On February 29, 2000, a jury convicted McPhetridge of first-

[2] During a ***Machner*** hearing, trial counsel testifies and the postconviction hearing court determines whether trial counsel's actions were ineffective. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

degree sexual assault of a child. The trial court sentenced him to six years' imprisonment.

II. ANALYSIS.

¶4 McPhetridge raises numerous challenges to the judgment of conviction – some decipherable and others rather incoherent. As is often stated, "[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Mgmt. of Wisconsin, Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). We find that McPhetridge's challenges best fit within seven categories. Any of the issues raised but not discussed in any of these categories have been deemed to lack sufficient merit to warrant individual attention. *See* ***id.***

A. The trial court did not err in admitting evidence of McPhetridge's custodial statement.

¶5 McPhetridge claims that the State's use of his custodial statement was improper because the statement was "involuntary." "Whether a statement is voluntary or involuntary depends on whether it was compelled by coercive means or improper police practices." ***State v. Franklin***, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999). "We look to the totality of the circumstances to resolve the question, weighing the defendant's personal characteristics – such as his or her age, education, intelligence, physical and emotional condition, and prior experience with the police – against the coercive police conduct." ***Id.*** (citation omitted).

¶6 Where the defendant challenges the admissibility of a custodial statement, the trial court is required to hold a hearing outside of the presence of the jury. *See* WIS. STAT. § 971.31(3); *see also* ***State ex rel. Goodchild v. Burke***, 27

Wis. 2d 244, 133 N.W.2d 753 (1965). However, "unless the defendant challenges the voluntariness of statements he made or that he was not advised of his ***Miranda*** rights, the trial court is under no obligation to hold an evidentiary hearing." ***State v. Monje***, 109 Wis. 2d 138, 149, 325 N.W.2d 695 (1982). Here, we conclude that because McPhetridge failed to object to the voluntariness of his statement either before or during trial, he was not entitled to a ***Miranda-Goodchild*** hearing. Therefore, the trial court did not err in admitting evidence of McPhetridge's custodial statement.

B. McPhetridge offers no support for his claim of prosecutorial misconduct.

¶7 The Due Process Clause of the United States Constitution requires that criminal defendants be afforded a meaningful opportunity to present a complete defense in order for criminal prosecutions to comport with prevailing notions of fundamental fairness. *See* ***California v. Trombetta***, 467 U.S. 479, 485 (1984). In order to safeguard the right to present a complete defense, the Supreme Court has developed an area of law constitutionally guaranteeing criminal defendants access to exculpatory evidence. *See* ***id.*** Such evidence is material, however, only if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***United States v. Bagley***, 473 U.S. 667, 682 (1985). A reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *See* ***Kyles v. Whitley***, 514 U.S. 419, 434 (1995).

¶8 Here, McPhetridge claims the prosecution failed to turn over exculpatory evidence – namely, reports made by a Sensitive Crimes Unit victim-advocate, who advocated on behalf of McPhetridge's victim. However,

McPhetridge has offered no proof that: (1) such records actually exist; (2) such records would have contained evidence relevant to his defense; or (3) such evidence would have led to a different outcome in his trial. Accordingly, because the alleged records would not have contained either apparently exculpatory evidence, *see, e.g.,* ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985), or potentially exculpatory evidence, *see, e.g.,* ***State v. Greenwold***, 189 Wis. 2d 59, 69-70, 525 N.W.2d 294 (Ct. App. 1994), we need not engage in further analysis to determine that McPhetridge's due process rights were not violated.

C. McPhetridge's trial counsel was not ineffective.

¶9 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. 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. *See* ***id.*** at 687.

¶10 However, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Id.*** at 691. In other words, "[t]he 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." ***Id.***

at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶11 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687.

¶12 McPhetridge contends his trial counsel was ineffective for a number of reasons:

> McPhetridge was prejudiced by appointed trial counsel by refusal to investigate, to provide relevant evidence, expert testimony and testing, by inability to effectively cross examine witnesses, for refusal to demonstrate perjured statements, allowing prosecution unlimited access and latitudes while providing minimal defense relying on prosecution and judge to provide defense.

There are additional critical remarks regarding his trial counsel scattered throughout McPhetridge's brief.

¶13 Yet, none of his general criticisms reach the dual requirements of ***Strickland*** in any comprehensible manner. For us to decide these issues, we would first have to develop them; however, we cannot serve as both advocate and judge. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Therefore, because these issues are inadequately briefed, we decline to address

them. *See* ***id.*** (stating that this court will not address issues on appeal that are inadequately briefed).

D. McPhetridge waived any objection to the jury instructions.

¶14 McPhetridge's fourth claim of error alleges that the trial court erroneously instructed the jury. However, it is well settled that failure to object to jury instructions results in waiver of any alleged defects in the instructions. ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988). Here, because McPhetridge failed to object to the jury instructions, he waived any claim of error.

E. The trial court did not err in denying McPhetridge's postconviction motion without a hearing.

¶15 Citing ***State v. Avery***, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997), McPhetridge next claims that the trial court erred in denying his August 2001 postconviction motion without holding a ***Machner*** evidentiary hearing. The question of whether a trial court must hold an evidentiary hearing involves a two-part test and necessitates a mixed standard of review:

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any of the three factors enumerated in ***Nelson***. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard.

Bentley, 201 Wis. 2d at 310-11 (citations omitted). In ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the supreme court enumerated three factors that a circuit court should consider in exercising its discretion:

> [I]f the defendant fails to allege sufficient facts in his [or her] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 497-98.

¶16 Here, even taking into account that we sometimes choose to hold *pro se* litigants to less stringent standards than attorneys, *see* ***Haines v. Kerner***, 404 U.S. 519, 520 (1972), review of McPhetridge's August 2001 postconviction motion reveals that he asserted merely conclusory allegations. Accordingly, because the motion failed to allege sufficient facts, the trial court had the discretion to deny McPhetridge's postconviction motion without a hearing based on the second factor enumerated in ***Nelson***.

F. McPhetridge fails to establish that his sentence was based on improper information.

¶17 It appears that McPhetridge is arguing that his sentence was based, at least in part, on an incorrect presentence investigation report (PSI). Although "[d]efendants have a due process right to be sentenced on the basis of accurate information…, a defendant who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). Further, it is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal, including a copy of the PSI if relevant to the appellant's claim of

sentencing error. *See* WIS. STAT. § 809.15(1); *see also* ***Lee v. LIRC***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996).

¶18 Here, McPhetridge has failed to provide a copy of the PSI. When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989). Therefore, we conclude that the trial court did not rely on inaccurate information in sentencing McPhetridge.

G. McPhetridge fails to prove that the trial transcripts have been altered.

¶19 Finally, McPhetridge alleges: "The transcripts are altered and … only provide the courts an unchallengeable and incredible means of sustaining the conviction." While concluding that these alleged errors are critical to our review of the case, he fails to identify the portions of the trial transcripts that have been allegedly altered or provide any legal authority in support of his claim. This claim of error is inadequately briefed, and accordingly, we decline to address it any further. *See* ***Pettit***, 171 Wis. 2d at 647 (stating that this court will not address issues on appeal that are inadequately briefed). Based upon the foregoing reasons, the trial court is affirmed.

By the Court.—Judgment and orders affirmed.

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