COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2694 **Cir. Ct. No. 99-CF-127**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT W. MEYER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Kurt Meyer appeals an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2001-02).[1] The issues

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

relate to ineffective assistance of counsel and newly discovered evidence. We affirm.

¶2 Meyer makes several arguments that his trial counsel was ineffective. 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 need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697. 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶3 Meyer first argues that his trial counsel was ineffective by failing to investigate a possible witness, Melissa Jackson. The State responds that the circuit court properly denied Meyer's motion on this issue without a hearing. However, our review of the record shows that this issue was not raised in Meyer's motion, and was not ruled on by the circuit court. We usually do not decide issues that are raised for the first time on appeal, and we see no reason to do so in this case. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶4 Meyer next argues that his appellate counsel was ineffective in connection with the fact that he was in restraints during the three-day jury trial. Even if we assume that Meyer was in restraints during the trial, and that there was some deficient performance by appellate counsel in not raising the issue, we conclude that Meyer has failed to allege prejudice sufficient to undermine our confidence in the outcome. The jury was already aware that he had nine prior convictions.

¶5 Meyer argues that his trial counsel failed to take proper action to enable him to appear at trial in civilian clothes, rather than prison attire. Before trial, the court had ruled that Meyer could appear in civilian clothes. Meyer's postconviction motion alleged that trial counsel "failed to object to the trial Court that Petitioner's family tried to bring civilian clothing on two separate occasions after trial counsel requested Petitioner be allowed to wear civilian clothes.… Petitioner told Trial Counsel that he had clothing available but jail Sergeant Mary Ward denied this clothing on two separate occasions." The motion was accompanied by an affidavit by Marvin Bloss, stating that he tried to bring civilian clothes on two separate occasions, but "county clerk" personnel Mary Ward did not allow him to drop them off at the courthouse. We conclude that Meyer did not sufficiently allege facts that would tell what the attorney failed to do that caused Meyer not to be able to have civilian clothes for trial.

¶6 Meyer argues that his trial counsel was ineffective by failing to object to a statement by the prosecutor during closing argument that referred to Meyer as a "thug." The prosecutor made the comment to describe how she believed another witness in the case regarded, or should have regarded, Meyer. This is not a sufficient allegation of deficient performance. A prosecutor may use this type of descriptive term, as long as it is used in analyzing the evidence, as it was here. ***State v. Johnson***, 153 Wis. 2d 121, 132, 449 N.W.2d 845 (1990).

¶7 Finally, Meyer argues that the circuit court erred by denying his motion for a new trial based on newly discovered evidence. To prevail, Meyer must show a reasonable probability that a different result would be reached at a new trial. ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). This is a discretionary determination that we affirm unless discretion was erroneously exercised. ***Id.*** Meyer's new evidence consists of a police report of a statement taken

from a prison inmate who said he had spoken with somebody else who was involved in the incident for which Meyer was convicted. We see nothing in the statement that suggests a reasonable probability of a different outcome. The inmate's description of the incident does not provide any significant evidence on whether Meyer was involved.

By the Court.—Order affirmed.

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