COURT OF APPEALS DECISION DATED AND FILED

March 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP1028

Cir. Ct. No. 1995CF955598A

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: LEE E. WELLS and DENNIS R. CIMPL, Judges.[1] *Affirmed.*

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

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[1] The Honorable Lee E. Wells presided over all pretrial and trial proceedings and entered judgment. Due to judicial rotation, the Honorable Dennis R. Cimpl entered orders denying Williams's *pro se* WIS. STAT. § 974.06 (2009-10) postconviction motion and motion for reconsideration. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶1 BRENNAN, J. Lawrence Williams appeals *pro se* from an order denying his WIS. STAT. § 974.06 postconviction motion, from an order denying his motion for reconsideration, and from the underlying judgment of conviction. We conclude that Williams's postconviction motion is procedurally barred because Williams fails to allege a sufficient reason for not previously raising his claims as required by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574. Therefore, we affirm.

BACKGROUND

¶2 In the month that elapsed between November 17 and December 16, 1995, Williams and three of his cohorts—including Shulbert Williams (Williams's brother), and Andre Mitchell and Jerry Curry (Williams's friends)—went on a crime spree, robbing various businesses in the City of Milwaukee. Their crime spree came to an end when they shot Milwaukee Police Officer Jeffrey Cole following a robbery at a Speedy Lube on December 16. During police interviews after his arrest, Williams admitted to participating in ten robberies during those final weeks of 1995, including the December 16 Speedy Lube robbery which ended in the shooting of Officer Cole.

¶3 Following Williams's admissions, the State filed a criminal complaint charging Williams with eleven felonies, all as a party to a crime, including: one count of attempted first-degree intentional homicide while armed with a dangerous weapon; seven counts of armed robbery, all while concealing identity; and three counts of attempted armed robbery, two while concealing identity.

¶4 Williams filed a motion to suppress his admissions to the robberies, alleging that the police did not read him his ***Miranda*** rights and physically intimidated him into confessing to crimes he did not commit. A ***Miranda/Goodchild*** hearing[2] was held, after which Williams's motion to suppress was denied. The trial court found Williams's testimony that he was not read his ***Miranda*** rights and that he was physically abused by the detectives who interrogated him to be "totally unbelievable." The trial court found the detectives' testimony to the contrary to be credible.[3]

¶5 At trial, Williams took the stand and recanted his admissions to all of the robberies except the final robbery at the Speedy Lube on December 16. He again testified that the police did not read him his ***Miranda*** rights before questioning him after his arrest and that he told the detectives that he participated in a number of robberies that he did not actually commit because the police physically harmed him. Williams admitted, however, to being involved in the armed robbery of the Speedy Lube on December 16 and that he was involved in a getaway following the robbery. Williams testified that he had a gun at the robbery, that he was the driver of the car that sped away from the scene, and that he noticed someone following them after they fled. Williams, Mitchell, and Curry were all in the car. Williams said he pulled the car into an alley to try to get away from the person following them. He then saw Curry step out of the car and begin

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[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[3] The record does not contain a copy of Williams's motion to suppress or the trial court's order denying the motion, and the record only contains a portion of the transcript from the corresponding ***Miranda/Goodchild*** hearing. Accordingly, we rely on our opinion written in response to Williams's direct appeal for the facts surrounding his motion to suppress. *See* ***State v. Williams***, 220 Wis. 2d 458, 460-61, 583 N.W.2d 845 (Ct. App. 1998).

shooting. It was later revealed that Curry had shot and hit Officer Cole who had followed the car from the robbery. Officer Cole survived and later identified Williams as the driver of the getaway car.

¶6 The jury found Williams guilty of all eleven counts, and the court entered judgment accordingly. Williams, represented by counsel, pursued a direct appeal, in which he claimed that his custodial statements were elicited by the police in violation of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), and that the trial court erred in dismissing an extra juror after the evidence in the case was closed but before the jury started its deliberations. We affirmed the trial court. ***State v. Williams***, 220 Wis. 2d 458, 460, 583 N.W.2d 845 (Ct. App. 1998). The Wisconsin Supreme Court denied Williams's petition for review.

¶7 More than twelve years later, Williams filed the *pro se* WIS. STAT. § 974.06 postconviction motion that is at issue in this case. In it, he alleged that his postconviction counsel was ineffective for failing to challenge the ineffectiveness of his trial counsel on various grounds. The trial court denied the motion without a hearing. Williams filed a motion for reconsideration, which the trial court also denied. This appeal follows.

DISCUSSION

¶8 Williams now argues that the trial court erred in denying his motions and that because his postconviction counsel was allegedly ineffective for failing to raise claims regarding the ineffectiveness of his trial counsel, a "sufficient reason" exists under ***Escalona-Naranjo*** and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) to permit his WIS. STAT. § 974.06 postconviction motion. More specifically, Williams argues that his postconviction counsel should have claimed that his trial counsel was ineffective for: (1) failing

to investigate certain alibi witnesses; (2) failing to challenge the prosecutor's comments during voir dire; (3) failing to challenge the striking of a potential juror for cause; (4) failing to challenge the prosecutor's comments during closing argument; (5) failing to adequately challenge the admissibility of the statements Williams made to the police after his arrest; (6) failing to include Williams in sidebars; and (7) failing to challenge the jury instruction on party-to-a-crime culpability.[4] We will address each of his arguments in turn.

A. Legal Standards

¶9 When a defendant files a WIS. STAT. § 974.06 postconviction motion after he has already filed a previous motion or direct appeal, a sufficient reason must be shown for failure to raise the new issue in the previous motion or appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 184-85. A possible justification for belatedly raising a new issue is ineffective assistance of the attorney who represented the defendant in the previous proceedings.[5] ***Rothering***, 205 Wis. 2d at 681-82.

[4] Williams's brief does not always clearly identify those claims he wishes to raise. Those issues listed are those this court was able to decipher. To the extent he raises other claims in his brief that this court does not address, we conclude that those issues are inadequately briefed and lack discernable merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[5] The State claims that "[w]hether ineffective assistance of postconviction counsel on direct appeal may constitute a 'sufficient reason' under WIS. STAT. § 974.06(4) to enable the defendant to obtain review of the merits of the underlying claims of error remains an open question." (Citing ***State v. Lo***, 2003 WI 107, ¶¶54-57, 264 Wis. 2d 1, 665 N.W.2d 756). We disagree. In fact, just recently in ***State v. Allen***, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, the Wisconsin Supreme Court reiterated its previous holding in ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), "that ineffectiveness of postconviction counsel may constitute a sufficient reason as to why an issue that could have been raised on direct appeal was not." ***Allen***, 328 Wis. 2d 1, ¶85 (citing ***Rothering***, 205 Wis. 2d at 682; emphasis omitted).

¶10 When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel was actually ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To prevail on a claim of ineffective assistance of trial counsel, Williams must show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶11 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).

¶12 To satisfy the prejudice prong, the defendant must demonstrate that the lawyer's errors were sufficiently serious so as to deprive him or her of a fair trial and a reliable outcome, ***Johnson***, 153 Wis. 2d at 127, and "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 a probability sufficient to undermine confidence in the outcome." ***Id.***

¶13 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127-28. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

¶14 Absent unusual circumstances, a postconviction hearing is necessary to sustain a claim of ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A defendant's claim that counsel provided ineffective assistance does not, however, automatically trigger a right to a hearing. ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A trial court may deny a postconviction motion without a hearing "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." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion was sufficiently supported to warrant an evidentiary hearing is a legal issue that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

¶15 With those legal standards in mind, we turn to Williams's claims.

B. Failure to Investigate Alibi Witnesses

¶16 Williams asserts before this court and in his WIS. STAT. § 974.06 motion that he gave his trial counsel the names of five witnesses who could provide him with an alibi: Tamika Jones, Shauntae Fountain, Darisha McKinley, Brandy Bailey, and Dannette Lampken. Williams now argues that his trial counsel was ineffective for failing to follow up with those witnesses. However, "[w]hen a defendant claims that trial counsel was deficient for failing to present testimony,

the defendant must allege with specificity what the particular witness would have said if called to testify." ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647. Williams fails to do so here and in his § 974.06 motion.

¶17 While Williams conclusorily asserts that Jones and Fountain would have provided him with an alibi—presumably for one or more of the ten robberies he admitted to—he does not say in either his brief to this court or the brief accompanying his postconviction motion what Jones or Fountain would have said if they had testified. We cannot find trial counsel ineffective based on conclusory assertions not supported by evidence.

¶18 With respect to the other three potential witnesses—McKinley, Bailey, and Lampken—Williams does not tell us in his appellate brief what they would have said had they taken the stand during his trial. And while he attached affidavits from each potential witness to his postconviction motion, the affidavits do not allege with specificity what each witness would have testified to.

¶19 McKinley states in her affidavit that if she were called to testify she "would not be able to give specific dates and time," but that she "can definitely recall a time in 1995 from approximately August to December in which … Williams … was at my house almost everyday." Even if true, Williams was not with McKinley every moment of every day. Her broad assertion that she saw him everyday does not provide him with an alibi for any of the ten robberies as he could easily have seen her each day and committed the robberies of which he was convicted.

¶20 Bailey asserts in her affidavit that because of the time that has passed since Williams's trial she "can't recall specific dates" regarding when she was with Williams. Again, her statement does not provide Williams with an alibi.

¶21 In Lampken's affidavit, she avers that she was dating Williams in 1995 "and so we were with each other everyday." However, she goes on to state that "[n]ear the end of November we had a fight and ended our relations. We saw each other sometimes after that but not as much as we used to." Only two of the ten robberies took place in November, the rest occurred in December, during which time Lampken admits she did not see Williams "as much as we used to." Moreover, even if Lampken saw Williams every day in November that does not foreclose the possibility that he also committed the two November robberies at times when he was not with her, but perhaps saw her earlier or later in the day.

¶22 We also note that during trial Williams's counsel informed the court that two of the alibi witnesses Williams now brings to our attention—Bailey and Fountain—were in the courtroom. Counsel informed the court that neither were true alibi witnesses, that instead, while both could testify that they believed Williams was home sick for a period of time during November 1995 they could not specifically say where Williams was during the commission of the crimes. Counsel told the court that he investigated both witnesses but did not believe they could provide Williams with an alibi and that he had explained as much to Williams. Williams acknowledged at that time that he had discussed the issue with counsel and that neither Bailey nor Fountain would testify. In other words, Williams has expressly waived his right to now argue that his trial counsel was ineffective in that regard. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612.

¶23 Consequently, we cannot conclude that Williams's trial counsel was ineffective for failing to interview the five named alibi witnesses.

C. <u>Failure to Challenge the Prosecutor's Comments During Voir Dire</u>

¶24 To the best of our estimation, Williams next challenges his trial counsel's failure to object to two statements the prosecutor made during voir dire: (1) that the prosecutor misled the jurors by purportedly presenting an incorrect description of party-to-a-crime culpability; and (2) that the prosecutor "introduce[d] extraneous prejudicial information" that Curry shot Officer Cole and abridged Williams's constitutional right to notice that Curry was being named as an accomplice. Both of his arguments are without merit.

¶25 First, Williams asserts that the prosecutor misled the jury with respect to the standards for party-to-a-crime culpability when he used the example of an "old west … bank robbery." In context, the prosecutor stated as follows:

> Judge Wells also told you that one of the aspects of all these charges is that the defendant is charged as a party to a crime, and he briefly described that. That means that either the defendant committed the crime, he helped commit the crime[,] or was willing to help or he agree[d] with someone or planned with someone to commit a crime. That's in a nutshell, as the Judge will tell you what the law is.
>
> I'm not here to tell you what the law is, but in a nutshell, that's what it is. Even if you don't directly commit it, if you help someone or you're willing to help someone or you know it or you plan or agree with someone to commit a crime, you're just as guilty as they are. *The best example is the old west. The bank robbery. The guy who's outside with the horses watching for the sheriff is responsible for what happens in the bank.*
>
> And that includes—and the judge will tell you—that those crimes weren't intended, but naturally followed[.]

(Emphasis added.) Williams conclusorily asserts that this statement of law is "incomplete and deficient" but fails to explain *how* the statement misled or

misinformed the jury. We need not address undeveloped arguments. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶26 Williams is also wrong in his assertion that he was not afforded proper pretrial notice that Curry was an alleged accomplice in the charged crimes. Due process requires that a criminal defendant be given "sufficient details regarding the nature of the charge and the conduct which underlies the accusation to allow her or him to prepare or conduct a defense." ***State v. Stark***, 162 Wis. 2d 537, 544, 470 N.W.2d 317 (Ct. App. 1991). However, in his own statement to police, Williams named Curry as an alleged accomplice. While true that Curry was not a named defendant in the criminal complaint and was identified in the complaint only as "the juvenile," because the complaint was based, in part, on Williams's statement to police, it was certainly no secret to Williams who the complaint was referring to. Therefore, Williams was properly notified and his trial counsel did not perform ineffectively by failing to object.

D. Failure to Challenge Striking Juror Kurtz

¶27 Williams also argues that his trial counsel did not "object[] … in good faith" when the trial court permitted the State to remove a juror for cause during voir dire. Williams contends that the juror should not have been removed for stating that she could not uphold the law as it was explained to her. Because Williams failed to raise this issue before the trial court in his WIS. STAT. § 974.06 motion and because his trial counsel did in fact object to the State's motion to strike the juror, we affirm.

¶28 First, Williams did not raise this issue in his WIS. STAT. § 974.06 postconviction motion before the trial court. Because he did not provide the trial court with an opportunity to address the issue, Williams has forfeited it. *See* ***State***

v. Van Camp, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed forfeited).

¶29 Second, Williams's challenge is without merit because it is evident from the record that Williams's trial counsel objected to the removal of the prospective juror and preserved any issue for appeal.

¶30 During voir dire, the State told prospective jurors that for all eleven counts, Williams was charged as a party to a crime, so that Williams could be held criminally culpable if he "committed the crime, … helped commit the crime or was willing to help or he agree[d] with someone or planned with someone to commit a crime," and that he was responsible for any "natural or probable" consequences flowing from the crimes. The State informed the panel that the court would instruct it on the concept, but asked if any of the prospective jurors "has a problem" with the concept of party-to-a-crime culpability. Juror Kurtz raised her hand indicating that she did.

¶31 Following an individual voir dire in chambers on the concept of party-to-a-crime culpability, Juror Kurtz unequivocally told the trial court that she had "an ethical problem" with the concept and would not be able to "follow the law." The State moved to strike her for cause and Williams's trial counsel objected. The court granted the motion.

¶32 A prospective juror should be removed for cause for subjective or objective bias. *See* ***State v. Oswald***, 2000 WI App 2, ¶17, 232 Wis. 2d 62, 606 N.W.2d 207. A prospective juror is subjectively biased if not "sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have." ***Id.***, ¶19. A ruling on subjective bias "is a factual finding and will be upheld unless clearly erroneous." ***Id.*** "A prospective juror is objectively biased if 'a reasonable

person in the prospective juror's position objectively could not judge the case in a fair and impartial manner.'" ***Id.***, ¶25 (citation omitted). A ruling on objective bias presents "a mixed question of law and fact" that will be reversed "only if a reasonable judge could not have reached it as a matter of law." ***Id.***

¶33 Here, the trial court properly exercised its discretion and removed Juror Kurtz for cause when she expressed an inability to apply the law of the case. Williams's trial counsel cannot be faulted because he objected to the removal and preserved any potential issue for appeal. To the extent that Williams argues that the objection was not in good faith, we fail to see how that is so. Again, his argument in that regard is conclusory.

E. Failure to Challenge the Prosecutor's Comments During Closing Arguments

¶34 Williams also contends that his trial counsel was ineffective for failing to challenge certain portions of the prosecutor's closing argument. In particular, Williams argues that during closing argument the prosecutor: (1) shifted the burden of proof and misstated the law on party-to-a-crime culpability; (2) introduced new evidence; (3) improperly asked jurors to consider the plight of the victims; (4) improperly commented on Williams's demeanor during the trial; and (5) improperly vouched for the credibility of certain witnesses. We address each in turn.

¶35 Generally speaking, "'[c]losing argument is the lawyer's opportunity to tell the trier of fact how the lawyer views the evidence and is usually spoken extemporaneously and with some emotion.'" ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998) (citation omitted). Consequently, considerable latitude is to be allowed counsel in closing arguments, subject only to the rules of

propriety and the discretion of the trial court. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "A prosecutor may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury." ***State v. Lammers***, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463.

¶36 The constitutional test when the defense makes a timely objection to a prosecutor's closing argument is whether the prosecutor's remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Mayo***, 301 Wis. 2d 642, ¶43 (citation and one set of quotation marks omitted). Whether the prosecutor's remarks affected the fairness of the trial is determined by viewing the statements "in [the] context of the entire trial." ***Id.*** "'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements … must be viewed in context.'" ***State v. Wolff***, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted; alterations in ***Wolff***).

1. Misstated the Law

¶37 Williams argues that the prosecutor misstated the law in two respects during closing arguments: (1) by improperly instructing the jury on party-to-a-crime culpability; and (2) by making statements that improperly shifted the burden of proof from the State to the defense. We address each in turn.

¶38 Both of Williams's arguments are based on the following comments of the prosecutor in closing:

> And the judge also told you that if another crime is committed during the course of the crime they intend, the crime they initially intend, if another crime is committed during the course of that and that's a natural and probable

> consequence of the crime they went out to commit, then the person who committed that additional crime as well as the person who planned with him is guilty of it whether the person who planned with him and didn't do it intended that crime be committed or not, and that [is] sometimes difficult to understand, but *that's the law*.…
>
> And when Judge Wells read you the instructions, he read them to you appropriately. He read *that the State has to show that the defendant attempted to cause the death of [Officer Cole]* and intended to—but again—there again you have to insert the words, and you have to consider the defendant attempted to cause the death of [Officer Cole] or a person who he was acting as a party to a crime with at that time attempted to cause [Officer Cole's] death.

(Emphasis added.)

¶39 Wisconsin law permits a person to be charged as a party to a crime under certain circumstances. WISCONSIN STAT. § 939.05 states that:

> (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> (2) A person is concerned in the commission of the crime if the person:
>
> > (a) Directly commits the crime; or
> >
> > (b) Intentionally aids and abets the commission of it; or
> >
> > (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which *under the circumstances is a natural and probable consequence* of the intended crime….

(Emphasis added.)

¶40 Williams's first argument is that the prosecutor inaccurately described party-to-a-crime culpability. Williams complains that the prosecutor's explanation of party-to-a-crime culpability omitted the phrase "under the circumstances," which is contained in the statute, and thereby misstated the law. He is incorrect.

¶41 The prosecutor's omission of the phrase "under the circumstances" is of no matter. While the prosecutor's description of the statute did not track the statute word for word, it properly conveyed the statute's meaning. The prosecutor stated that "if another crime is committed during the course of the crime they intend," and "that's a natural and probable consequence of the crime they went out to commit, then the person who committed that additional crime as well as the person who planned with him is guilty of it." In short, the prosecutor was merely paraphrasing the jury instruction, which is not a misstatement of the law. Accordingly, Williams's trial counsel was not ineffective for failing to challenge what was a proper explanation of the law during closing argument.

¶42 Second, we reject Williams's assertion that the prosecutor's comments during closing argument improperly shifted the burden of proof from the State to the defense. Williams contends that when the prosecutor allegedly told the jury that Williams "intended to cause the death of [Officer Cole] by agreeing to commit an armed robbery" and then told the jurors that was "the law," he shifted the burden of proof from the State to the defense. We disagree because the prosecutor accurately stated the law, and Williams takes the prosecutor's comments out of context.

¶43 Williams's argument is not well-developed, but apparently he contends that the prosecutor shifted the burden of proof by implying that the law

required the jury to conclude that Williams intended to kill Officer Cole. But that is not what the prosecutor said. Contrary to Williams's assertion, the prosecutor properly recited the "natural and probable consequences" aspect of the party-to-a-crime jury instruction. Referring to that statutory language, the prosecutor said "that's the law." He was not telling the jury that it was "the law" that Williams intended to kill Officer Cole. Further, the prosecutor explicitly stated "that the State has to show that the defendant attempted to cause the death of [Officer Cole]." The prosecutor's statements did not misinform the jury; and therefore, Williams's trial counsel did not err in failing to object to the prosecutor's closing argument in this regard.

2. Relied on Extraneous Information

¶44 Next, Williams argues that the prosecutor improperly relied on facts not in evidence and told jurors that Williams "knew" that Curry was not arrested at the time Williams was arrested and that Williams "lured" Officer Cole into the alley where he was shot. His argument is without merit.

¶45 First, Williams does accurately assert that during closing arguments the prosecutor referred to Williams's knowledge that Curry had not been arrested at the time of Williams's arrest. However, Williams testified to as much during the trial. During cross-examination, the prosecutor and Williams engaged in the following exchange when discussing Williams's interactions with police after his arrest:

> Q: But [the detective] didn't start questioning you then, right? You were taken out to try and locate a building where Jerry Curry might be, right?
>
> A: Yes, I did.

> Q: And—'Cause he hadn't been arrested when you were arrested. He was in the building when you were arrested, but he wasn't arrested, right?
>
> A: Correct.

¶46 Because Williams testified that he knew Curry wasn't arrested at the time of his arrest, the prosecutor did not err in mentioning the fact during his closing argument, and Williams's trial counsel was not ineffective for failing to object.

¶47 Second, Williams's assertion that the prosecutor improperly stated that Williams "lured" Officer Cole into an alley is without merit. Williams does not cite to the record for his assertion and our review of the prosecutor's closing statement did not reveal what portion of the statement Williams is referring to. Further, Williams testified at trial that he had a gun and that he drove into an alley after the Speedy Lube robbery in an attempt to elude the individual who was following them. If the prosecutor had stated that Williams "lured" Officer Cole into the alley, it would have been a fair extrapolation from the evidence given.

3. Invoked Empathy

¶48 Williams also argues that his trial counsel should have objected when the prosecutor sought sympathy from the jurors by allegedly asking them to "'consider what the victims went through and what they had just gone through when they gave the descriptions [of the suspects],'" and again when the prosecutor purportedly asked the jury "'to think about what [the victims] went through and what happened to them and how they felt and how they were treated.'" We disagree.

¶49 It is evident from the record that the prosecutor's assertions, in both instances, were made in reference to small discrepancies in the witnesses' testimonies. The prosecutor was attempting to explain those discrepancies to the jury by noting the stress and emotional effects of being the victim of a crime. His observations were fair and based upon the facts revealed at the trial. There was nothing improper about the prosecutor's statements and nothing for Williams's counsel to object to.

4. References to Williams's Demeanor

¶50 Next, Williams apparently argues that his physical appearance and demeanor during the trial were other acts evidence pursuant to WIS. STAT. § 904.04, and, therefore, the prosecutor could not mention them during closing arguments. There are a multitude of problems with this argument, none of which are necessary for us to explore here. Even if we assume that Williams's trial counsel acted deficiently for failing to challenge this portion of the prosecutor's closing argument, Williams has not demonstrated prejudice.

¶51 Williams refers to the prosecutor's following statement:

> You know, [Williams] sits here all day. He's now here with his hands folded and you've been here with him for five days [a]s he sat here in his nice clothes with his hands folded acting quiet, but I want you to think about what he did and what he looked like and how he acted on December 16th….
>
> And don't let his folded hands and his calm demeanor let you forget about what he did, even about what he admitted to doing on the stand now as he's trying to get away with this. Don't forget about it.

The impact of the statement is nominal at best when viewed against the wealth of evidence the State introduced over the course of the five-day trial, particularly

Williams's testimony that he committed the final robbery and drove the getaway car, and Officer Cole's eyewitness identification.

5. Witness Credibility

¶52 Williams also contends that his trial counsel was ineffective for failing to object when the prosecutor purportedly improperly vouched for the credibility of several of the witnesses. More specifically, Williams alleges that the prosecutor vouched for the credibility of: (1) the detective who interviewed Williams after his arrest by stating that Williams was twice "advised … of his rights" prior to questioning; and (2) Officer Cole by stating that the jurors should believe Officer Cole's testimony that Williams and Mitchell had exited the car in the alley after the Speedy Lube robbery even though that was contrary to Williams's testimony. We disagree.

¶53 "'[A] prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented.'" ***Lammers***, 321 Wis. 2d 376, ¶16 (citation omitted). That is what the prosecutor did here. The prosecutor merely repeated the detective's testimony that he read Williams his ***Miranda*** rights before questioning and repeated Officer Cole's testimony that Williams and Mitchell had exited the car in the alley. There is no error and trial counsel did not act ineffectively for failing to object.

F. Failure to Properly Challenge the Admissibility of Williams's Statements to Police

¶54 Williams also claims, for the first time on appeal, that his trial counsel was ineffective when challenging the admissibility of Williams's custodial statements to police. Williams asserts that his trial counsel failed to: (1) properly investigate Williams's claim that police physically abused Williams during the

first police interview; (2) adequately challenge the credibility of the detectives who interviewed Williams; and (3) adequately develop Williams's claim that he invoked his right to counsel during the first police interview.[6]

¶55 To begin, Williams fails to state with specificity what else he believes his trial counsel should have done either when investigating the claim of physical abuse, challenging the detectives' credibility,[7] or developing Williams's claim that he asked for an attorney. Nor does Williams explain what new information would have been revealed or how it would have affected the outcome of the ***Miranda/Goodchild*** hearing. He merely argues that trial counsel should have done more, but such a conclusory assertion is not enough on which to hinge a claim of ineffective assistance of counsel. *See* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding."). In other words, Williams has failed to demonstrate that his trial counsel was deficient in this regard.

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[6] The State asserts that Williams also claims that his trial counsel was ineffective for not challenging the police failure to electronically record the interviews. However, Williams admits in his appellate brief that when he was interviewed in 1996 Milwaukee police were not required to record the interview. Instead, we understand Williams to be arguing that the fact that the interview was not recorded made it more important that his trial counsel properly challenge the credibility of the detectives who interviewed Williams.

[7] Williams does argue that his trial counsel should have challenged the credibility of the detectives by asking the following: "Why wasn't an attorney present [during questioning]? Especially since his client said he requested an attorney?" However, contrary to Williams's assertion, his trial counsel did ask at least one of the detectives whether "at any time … Mr. Williams ask[ed] for a lawyer?" And the detective answered: "No, sir, he did not." Williams also asserts his counsel should have asked the detectives: "Did the detective really go to law school or even have some practice dealing with the law above what's required for his current job as a detective?" We fail to see how these questions are relevant. *See* WIS. STAT. § 904.02 ("Evidence which is not relevant is not admissible.").

¶56 Moreover, Williams raises this issue for the first time on appeal. Because he failed to raise the issue in his WIS. STAT. § 974.06 postconviction motion, he has forfeited the issue. *See* ***Van Camp***, 213 Wis. 2d at 144 (arguments raised for the first time on appeal are generally deemed forfeited).

G. Failure to Include Williams in Sidebars

¶57 Next, Williams contends for the first time that his trial counsel was ineffective because counsel did not permit Williams to participate in sidebars that occurred during the trial and did not inform Williams about the nature of the sidebars. However, Williams did not have a right to participate in the sidebars. *See* ***State v. Clifton***, 150 Wis. 2d 673, 685-86, 443 N.W.2d 26 (Ct. App. 1989). And again, he forfeited this argument when he failed to raise it in his WIS. STAT. § 974.06 motion before the trial court. *See* ***Van Camp***, 213 Wis. 2d at 144.

H. Failure to Challenge Jury Instructions

¶58 Williams contends that his trial counsel was ineffective because he failed to object to the jury instruction for party-to-a-crime culpability. In particular, Williams challenges the inclusion of the phrase "a natural and probable consequence of the intended crime." We reject this argument because the language is not wrong and because his trial counsel did object to the inclusion of the natural-and-probable-consequence language in the instruction.

¶59 WISCONSIN STAT. § 939.05(2)(c) states that an individual is culpable as a party to a crime if "[s]uch a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a *natural and probable consequence of the intended crime*." (Emphasis added.)

¶60 Based upon the statute, the trial court properly instructed the jury as follows:

> As applicable in this case, a person is concerned in the commission of a crime if he[:] (a) directly commits the crime[;] or (b) intentionally aids and abets the commission of it[;] or (c) is a party to a conspiracy with another or others who commit it or advises, hires or counsels, [or] otherwise procures another to commit it.
>
> Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is *a natural and probable consequence of the intended crime*.

(Emphasis added.) In other words, the language Williams objects to—"natural and probable consequence of the intended crime"—comes directly from the statute. The trial court did not err in including it.

¶61 Moreover, Williams's trial counsel did object to inclusion of the language during the conference on the jury instructions. When discussing the instruction, the court explicitly asked if there were any objections to the party-to-a-crime instruction, Williams's trial counsel explicitly stated: "Yes. I still object to 'If such act follows incidentally and naturally in the execution of the common design as one of its natural and probable consequences, even though it was not intended as a part of the original design or common plan.'" Trial counsel cannot be faulted for not making an objection that he actually made.

CONCLUSION

¶62 In summary, we note that not only has Williams failed to demonstrate that his trial counsel acted deficiently, Williams has also failed to demonstrate that he was prejudiced by any alleged deficiency. Williams admitted to police that he committed the ten robberies with which he was charged. While

he later attempted to retract those statements, the trial court noted that his testimony in that regard was "totally unbelievable." And Williams testified at trial that he participated in the final armed robbery at the Speedy Lube, drove the getaway car, and was present when Curry stepped out of the car and shot Officer Cole who had followed them from the scene. Williams's statements and his testimony were fatal to his case, and he has not demonstrated that any action by his trial counsel would have altered the outcome of his trial.

¶63 Furthermore, contrary to Williams's assertions, he was not entitled to a ***Machner*** hearing on his claim simply because he filed a motion for one. Because it is evident from the face of his motion that he does not raise sufficient facts to entitle him to relief, the trial court did not err in denying his motion without granting him a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.