

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 11, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-1190-CR**

**Cir. Ct. No. 01CF001083**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LIONEL C. WHITEHEAD,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Brown County:  
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lionel C. Whitehead appeals an order denying his WIS. STAT. § 974.06<sup>1</sup> motion in which he alleged: (1) the State presented no

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

evidence to convict him of armed robbery or armed burglary; (2) his trial counsel was ineffective in several respects; and (3) the prosecutor impermissibly vouched for the credibility of the State's witnesses during his closing arguments. The trial court denied the motion without a hearing, concluding that Whitehead should instead have filed a motion for a new trial and that Whitehead failed to present these issues in his initial postconviction motion and appeal.<sup>2</sup> Although we do not accept all of the trial court's rationale, we affirm the order denying the motion without a hearing on other grounds. *See Bence v. Spinato*, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995).

¶2 The trial court may deny a postconviction motion without a hearing in three situations: (1) if the facts alleged in the motion, assuming them to be true, do not warrant relief; (2) if any key factual allegation is conclusory; or (3) if the record conclusively demonstrates that the moving party is not entitled to relief. *See State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). While sufficiency of the evidence cannot be raised by motion under WIS. STAT. § 974.06, a complete failure to produce any evidence can be reviewed by a motion under § 974.06 because conviction without evidence of guilt would constitute a denial of due process. *See Weber v. State*, 59 Wis. 2d 371, 379, 208 N.W.2d 396 (1993). Whitehead's arguments that the State presented no evidence to support the armed

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<sup>2</sup> The trial court rejected Whitehead's argument that ineffective assistance of appellate counsel constituted a sufficient reason for his failure to bring the issues in an earlier postconviction motion and appeal. The court incorrectly described Whitehead's argument as one regarding ineffective assistance of appellate counsel, reviewable by this court by a writ of habeas corpus. *See State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). The motion actually alleges ineffective assistance of postconviction counsel, a matter that is reviewable by motion under WIS. STAT. § 974.06. *See State ex rel Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).

burglary and armed robbery charges are cognizable under § 974.06. The arguments fail, however, on their merits.

¶3 The State presented evidence by the victims of the crimes, Timothy and Patricia Brown, that Whitehead entered their home while they were sleeping. Patricia awoke to see him standing near the foot of the bed. She screamed, awakening Timothy. Whitehead moved to Timothy's side of the bed and pointed a large chopping knife at him and ordered him to lay down. Whitehead then demanded money from Patricia. She retrieved two one dollar bills from a dresser and put them in Whitehead's hand. He demanded more money, grabbed Patricia by her hair and pulled her head toward his crotch saying "you're mine, bitch." Timothy then struggled with Whitehead and took the knife from him. Timothy pursued Whitehead through the house as Patricia called the police.

¶4 The police recorded Patricia's call at 12:46 a.m. They stopped Whitehead a short distance from the Browns' residence. He was perspiring heavily and had "a few loose dollar bills in his pocket." The Browns identified him as the perpetrator. Whitehead told the arresting officers that he was at a bar approximately seventy-five yards from the Browns' residence. The officers drove him to the bar, arriving at 1:08 a.m. The bartender told the police that Whitehead had left the bar thirty to sixty minutes before the officers brought him back. Therefore, Whitehead left the bar no later than 12:38 a.m., eight minutes before Patricia called the police.

¶5 Whitehead argues that the State presented no evidence to support the armed robbery conviction because the evidence showed that he robbed Patricia but that he threatened only Timothy. That argument fails for two reasons. First, under WIS. STAT. § 943.32(1)(b), stealing from one person while threatening "the owner

or another who is present” constitutes robbery. Second, the evidence shows that Whitehead was standing near Patricia displaying a knife when he demanded money from her. It was not necessary for him to point the knife at her to constitute armed robbery.

¶6 Whitehead also argues that the State presented no evidence to support the armed burglary conviction because he contends the evidence shows that items were removed from the dwelling and placed outside. Whitehead then returned to the residence, armed himself with the Browns’ knife and robbed Patricia. He alleges that the burglary refers to the initial entry when he stole items and there was no proof that he armed himself during that entry. That argument fails because the second entry also constituted a burglary. *See* WIS. STAT. § 943.10(1). He entered the dwelling without permission and with intent to steal and commit a felony, armed robbery. In fact, he did steal two dollars from Patricia after entering the second time and while armed with a knife. Because the record conclusively shows sufficient evidence to support the convictions for armed robbery and armed burglary, the trial court appropriately denied the motion without a hearing.

¶7 Whitehead’s postconviction motion raised three claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, Whitehead must show deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance occurs when counsel’s representation falls below an objective standard of reasonableness. *Id.* To establish prejudice, Whitehead must show that, but for counsel’s deficient performance, there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is one that undermines this court’s confidence in the outcome. *Id.* at 694.

¶8 Whitehead first argues that his trial counsel was ineffective by calling Whitehead's wife as an alibi witness. Her testimony was supported by a bank statement. The prosecutor successfully established that the bank statement was for a different date and that Whitehead's wife could not provide an alibi defense. Whitehead argues that his actual alibi witness was the bartender and that his wife's testimony undermined his alibi defense. Whitehead's postconviction motion does not allege facts that would establish prejudice from his counsel's decision to call his wife as an alibi witness. The bartender's testimony and his statements to the police did not establish an alibi for Whitehead. The bartender's recollection that Whitehead left the bar one half hour to an hour before the police returned with him does not account for his presence at the time the burglary and robbery occurred. Whitehead had at least eight minutes to walk seventy-five yards to the Browns' residence, place a computer and a leather jacket outside the home, re-enter and rob the Browns. Whitehead's wife's testimony did not undermine his alibi defense because the bartender did not provide an alibi.

¶9 Whitehead next argues that his trial counsel performed deficiently by failing to introduce into evidence the clothing he wore on the night of the incident. He asserts that the victims indicated that he was wearing dark clothing when, in fact, his pants were light blue and his black jacket had a gold emblem on the front. Whitehead's motion was appropriately denied without a hearing because the

record conclusively shows that the underlying premise was false. His clothing was admitted into evidence and sent to the jury room.<sup>3</sup>

¶10 Whitehead next argues that his trial counsel was ineffective for failing to point out inconsistent statements of the witnesses to the jury. He does not identify any inconsistencies. He apparently believes counsel should have impeached Patricia Brown's trial testimony with Timothy Brown's testimony from the preliminary hearing. Patricia did not provide a clothing description at the preliminary hearing, and she made no contradictory statements upon which to challenge her credibility.

¶11 Whitehead also apparently believes the Browns should have been impeached when they testified that they do not lock their doors. Whitehead alleges that Patricia told police she had been robbed before within the past few months and he believes it was unlikely they would not have locked their doors if they had been the victims of a recent robbery. Counsel's failure to inquire about

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<sup>3</sup> For the first time in his reply brief, Whitehead argues that his attorney was ineffective for failing to call the jury's attention to the discrepancy between his clothing and the victims' statements. His motion did not raise that issue. It refers only to counsel's failure to "show the jury" his clothes. An issue cannot be raised for the first time in a reply brief, see *Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 294 n.11, 28 N.W.2d 502 (Ct. App. 1995), and the trial court's rejection of the postconviction motion without a hearing was necessarily based on the language of the motion, not the revised version presented on appeal.

Whitehead also argues for the first time in his reply brief that his counsel was ineffective for failing to call another alibi witness, another bartender who left the bar with Whitehead and spoke with him for several minutes at his car. That alibi witness was not alleged in the postconviction motion and that claim will not be reviewed on appeal. The "statement of the issues" in his postconviction motion includes an allegation that counsel failed to interview and call witnesses who could have corroborated his alibi, but the text of the motion omits any discussion of additional alibi witnesses. The trial court appropriately denied the postconviction motion without a hearing based on that conclusory statement.

the previous robbery and locking their doors constitutes neither deficient performance nor prejudice because it is irrelevant.

¶12 Finally, Whitehead's postconviction motion alleged prosecutorial misconduct because the prosecutor vouched for the Browns' credibility. The record does not support that proposition. The prosecutor did not provide personal assurance or his own supporting evidence favoring the Browns' credibility. He merely argued from the evidence that their testimony was more believable than Whitehead's wife's testimony. The prosecutor appropriately urged the jury to determine credibility by reasoning from the evidence that Whitehead was guilty. He did not suggest that they arrive by a verdict by considering factors outside the evidence. *See State v. Smith*, 2003 WI App 234, ¶26, 268 Wis. 2d 138, 671 N.W.2d 854. The court properly denied the motion without a hearing because the transcript of the prosecutor's closing statement conclusively shows no prosecutorial misconduct.

*By the Court.*—Order affirmed.

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

