

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2012

Diane M. Fremgen
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. 2010AP2599-CR

Cir. Ct. No. 2008CF1778

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY L. ANDERSON,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. Jerry Anderson appeals an order denying his pro se postconviction motions seeking a new trial. Anderson contends that: (1) minorities were excluded from the jury pool, violating Anderson's constitutional rights; (2) the record is defective, denying Anderson the right to

fully present his arguments on appeal; (3) a detective, who testified for the State, bribed the victim by placing money into her account in jail and then falsely testified that the money came from an agency; (4) the circuit court failed to provide a particularized ruling as to each of Anderson's claims; (5) the circuit court erred by relying on irrelevant and improper criteria at sentencing; (6) the prosecutor engaged in misconduct by pursuing charges against Anderson despite inconsistencies in witness testimony; and (7) Anderson's trial counsel was ineffective.¹ We reject these contentions, and affirm.

BACKGROUND

¶2 Anderson was convicted, following a jury trial, of false imprisonment, strangulation and suffocation, second-degree recklessly endangering safety, four counts of battery, and felony bail-jumping. Anderson moved for postconviction relief, claiming discriminatory jury selection, prosecutorial misconduct, ineffective assistance of counsel, inconsistent statements by witnesses, insufficiency of the evidence, and improper sentencing. Anderson also moved to correct the record, claiming errors in the transcript. Following a hearing, the circuit court denied Anderson postconviction relief and found that there was no basis to correct the record. Anderson appeals.

¹ Anderson concedes in his reply brief that additional arguments he raised in his brief-in-chief lack a legal basis.

DISCUSSION

Jury Pool

¶3 Anderson contends that African-Americans were excluded from his jury pool, violating his constitutional rights. Anderson cites *Duren v. Missouri*, 439 U.S. 357 (1979), for the proposition that systematic exclusion of a distinct group from jury pools violates the constitutional requirement that the jury represent a fair cross-section of this community. Anderson asserts that Dane County systematically excludes African-Americans from jury pools by using randomized lists of drivers' licenses and state identifications from the Department of Transportation to select potential jurors, resulting in the absence of African-Americans available for his jury. He argues that it has been established that this system results in an underrepresentation of minorities on juries, and asserts that Dane County's continued use of a system known to result in underrepresentation is systematic exclusion. We disagree.

¶4 The constitution requires that the “‘jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.’” *Id.* at 363-64 (citation omitted). Thus, to establish a prima facie violation of the right to a representative jury, a defendant must show that: (1) the excluded group is a distinctive group in the community; (2) representation of the group in jury pools is not fair and reasonable in relation to the number of the people in that group in the community; and (3) the underrepresentation is due to systematic exclusion in the jury-selection process. *Id.* at 364. The problem with Anderson's argument is that he has not established the third part of the test, that the underrepresentation of African-Americans in his

jury pool was due to systematic exclusion in the jury process. While systematic exclusion may be established by showing exclusion over time, *see Brown v. State*, 58 Wis. 2d 158, 165, 205 N.W.2d 566 (1973), Anderson merely asserts, without support, that juries in Dane County have been underrepresentative of minorities for years. The burden to prove underrepresentation over time is on the defendant, *see id.*, and Anderson has not made that showing here.

Record

¶5 Anderson contends that the record is defective, denying him the opportunity to fully present his arguments on appeal. He contends that statements that were made at trial were not recorded in the transcript, and that a letter from his trial counsel confirmed that fact. However, the letter to Anderson from his trial counsel states only that counsel remembers the investigating detective testifying that she placed money in the victim's jail account, and that statement should be in the trial transcript. The detective's statement that she placed money in the victim's jail account appears in the trial transcript. To the extent that Anderson is asserting other statements are missing from the transcript or that the transcript is otherwise defective, we have no basis to disturb the circuit court's finding that the transcript was accurately prepared, as certified by the court reporter. *See State v. DeLeon*, 127 Wis. 2d 74, 82, 377 N.W.2d 635 (Ct. App. 1985) (explaining that review of circuit court factual findings as to dispute over transcript is reviewed under clearly erroneous standard).

Witness Bribery

¶6 Anderson contends that the detective bribed the victim by placing money into her account in jail and then falsely testified that the money came from an agency. However, the detective testified that she placed money into the

victim's jail account to cover necessities, explaining that it was her experience that victims were better able to focus on upcoming trials when they had necessities. She also stated that she helped the victim locate housing through an agency. At the postconviction motion hearing, the detective again explained her action in providing money to the victim. The circuit court found the detective credible. We discern no basis to disturb the circuit court's order as to this issue. *See State v. Plank*, 2005 WI App 109, ¶11, 282 Wis. 2d 522, 699 N.W.2d 235 (explaining that it is the role of the circuit court to determine witness credibility).

Particularized Ruling

¶7 Anderson contends that the circuit court failed to provide a particularized ruling as to each of Anderson's claims. However, the circuit court order states that it is based on "the reasons stated on the record" at the postconviction motion hearing. At the postconviction motion hearing, the circuit court provided detailed explanation of its decision as to many of Anderson's specific arguments, and also stated that "if [the court] miss[ed] any of the various grounds that [Anderson] ha[d] alleged ... or neglect[ed] to specifically mention [them], suffice it to say [the court] considered everything, and an omission ... is not to be seen as ... failing to rule on something." We discern no error in this process.

Sentencing

¶8 Anderson contends that the circuit court erred by relying on irrelevant and improper criteria at sentencing. He argues that the circuit court relied on false information that Anderson had been charged with attempted homicide in Illinois. However, Anderson does not identify at what point in the sentencing transcript he believes the circuit court relied on an assertion that

Anderson had been charged with attempted homicide. Our review of the sentencing hearing transcript as well as the presentence investigation report does not reveal any reference to a charge for attempted homicide in Illinois. Accordingly, we discern no merit in this claim.

Prosecutorial Misconduct

¶9 Anderson asserts that the prosecutor engaged in misconduct by pursuing charges against Anderson despite inconsistencies in witness testimony. He asserts that it was clear that Anderson had not inflicted the harm on the victim, yet the State pursued the charges anyway. We disagree. There was evidence at trial that Anderson had caused the injuries to the victim, including prior statements by the victim to the investigating detective. On this record, we perceive no error by the State in pursuing the charges against Anderson.

Ineffective Assistance of Counsel

¶10 Finally, Anderson contends that his trial counsel was ineffective by failing to pursue the errors he claims above and being unprepared for trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (counsel is ineffective if counsel's performance is deficient and that deficient performance prejudiced the defense). To establish ineffective assistance of counsel, Anderson must show that: (1) counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) counsel's performance was prejudicial in that there is a reasonable probability that the outcome of the trial would have been different absent counsel's errors. *Id.* at 689, 694. Anderson has failed to establish that his trial counsel's performance was deficient, and thus his claim of ineffective assistance of counsel fails.

¶11 First, as we have explained, Anderson’s specific claims of error that he believes counsel should have pursued lack merit. Additionally, the circuit court held a postconviction motion hearing and took testimony by Anderson’s trial counsel as to her trial strategy and preparation. Counsel testified that she pursued a strategy of attacking inconsistencies in the victim’s original statements reporting that Anderson had inflicted her injuries and focusing on the victim’s testimony that she lied when she made those statements. Counsel stated she spent close to a hundred hours preparing for Anderson’s trial. The circuit court found trial counsel credible. Because the record establishes that counsel did not commit errors so serious that she was not acting as reasonably competent counsel, her performance was not constitutionally deficient. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

