OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 8, 2017

To:

Hon. David L. Borowski
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Hon. Jeffrey A. Conen
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Christopher G. Wren
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Robert Paul Wester 306196
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

You are hereby notified that the Court has entered the following opinion and order:

2014AP1555-CR State of Wisconsin v. Robert Paul Wester (L.C. # 2010CF3005)

Before Kessler, Brash and Dugan, JJ.

Robert Paul Wester, *pro se,* appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree reckless homicide as party to a crime. Wester also appeals from an order of the circuit court that denied his postconviction motion for a new trial.[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate

[1] The Honorable Jeffrey A. Conen presided at trial and imposed the sentence reflected in the judgment of conviction. The Honorable David L. Borowski denied the postconviction motion.

for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[2] The judgment and order are summarily affirmed.

Wester was originally charged with felony murder, with a predicate offense of substantial battery, for the death of Todd Kyrola. Wester had two co-defendants: Mark Kartes, charged with first-degree intentional homicide, and Bradley Olson, charged with substantial battery with intent to cause bodily harm. All four men were homeless, and Kyrola had been beaten with fists, feet, a brick, and a board at the defendants' "campsite." Kartes was allegedly the instigator, and the one who decided to dump Kyrola's body in the Kinnickinnic River.

An information reiterated the felony murder charge against Wester, adding party-to-a-crime liability. An amended information changed the charge to first-degree intentional homicide but inadvertently omitted the party-to-a-crime component; an amendment to reinstate the party-to-a-crime liability was allowed at trial. A jury convicted Wester of first-degree reckless homicide as party to a crime, a lesser-included offense of the intentional homicide charge. The trial court sentenced Wester to thirty years' initial confinement and ten years' extended supervision.

Wester's appointed postconviction attorney determined the only meritorious issue she could pursue was a claim of sentencing disparity between Wester's sentence and the sentences received by Kartes and Olson.[3] She filed a motion for resentencing. Dissatisfied, Wester

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] Kartes entered a plea to first-degree reckless homicide and received a total of thirty years' imprisonment. Olson entered a plea to felony murder with substantial battery as the predicate and received thirteen years' imprisonment. Both men testified against Wester.

directed counsel to move to withdraw. She did, and, after issuing appropriate cautions to Wester, the circuit court approved the motion to withdraw.

Wester then filed a *pro se* postconviction motion seeking a new trial. At the outset of the motion, he purported to identify four grounds for relief: "1.) Mr. Wester was denied due process for submitting evidence and exhibits into the trial proceedings, 2.) Denied compulsory process for subpoenaing witnesses to testify on his behalf, 3.) Appointed deficient, ineffective trial counsel, and 4.) Appointed ineffective postconviction counsel." The circuit court concluded Wester's motion failed to set forth a viable claim for relief and denied the motion. Wester appeals.

In the statement of issues in his appellate brief, Wester identifies the same four "issues" that he did at the outset of his postconviction motion. The substantive portion of his brief, however, actually raises a multitude of issues under nineteen separate headings, nearly all of which claim ineffective trial counsel.

"[A] convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305. Indeed, because of the sheer number of complaints he makes, many of Wester's

arguments are not fully developed, and we will not develop those arguments for him.[4] *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

Further, this court "is not a performing bear, required to dance to each and every tune played on an appeal."[5] ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). Thus, to the extent that the circuit court's order has already addressed most of Wester's complaints, we incorporate the decision by reference. A copy of the circuit court's opinion is attached as an exhibit hereto. To the extent that there are issues on appeal not addressed in the circuit court's decision, we summarily reject those issues as lacking in merit. *See* ***id.***

---

[4] Additionally, because of briefing limitations, *see* WIS. STAT. RULE 809.19(8)(c)1., some of Wester's arguments amount to nothing more than citations to extended portions of the record. For example, in his claim that certain witnesses should have been called, Wester writes:

> Note: Locate 'testimony' relevant to potential witness #1) Jack Leibl – **R:63-31 thru 33; pp. 61-62, 66, 84-86, l. 3; R65-17, (l. 22 thru p. 18, l. 9), and pp. 22 & 25** Note: Locate 'discovery statements' relevant to potential witness #2) Steve Zerniac – **App., p. 49, (2nd from last pgrph.), and App., p. 50, (2nd pgrph., last sentence).** Note: 'discovery statement' relevant to potential witness #12) the Wisconsin Street Ambassador – **App., p. 55, (last full pgrph.), and App., p. 60, (1st pgrph.).**

This type of argument is improper. *See* ***Calaway v. Brown Cty.***, 202 Wis. 2d 736, 750-51, 553 N.W.2d 809 (Ct. App. 1996); *see also* ***DeSilva v. DiLeonardi***, 181 F.3d 865, 867 (7th Cir. 1999) ("A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record.").

[5] An appellant "need not (and should not) raise every" possible claim but, rather, should "select from among them in order to maximize the likelihood of success on appeal." ***Smith v. Robbins***, 528 U.S. 259, 288 (2000).

We additionally note that despite Wester's initial characterizations of the four main "issues" on appeal, he has not developed any due process or compulsory process arguments outside of the ineffective-trial-counsel context already rejected. And, while Wester complains that postconviction counsel was ineffective because she "excused" all of his issues as lacking merit, not only is this argument undeveloped, but, having reviewed Wester's issues, we discern no ineffectiveness, as we are hard-pressed to disagree with her conclusion.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT Branch 12 MILWAUKEE COUNTY

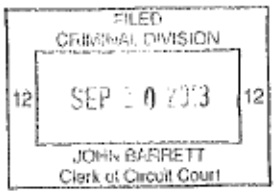
STATE OF WISCONSIN,

Plaintiff,

vs.

ROBERT WESTER,

Defendant.



Case No. 10CF003005

DECISION AND ORDER DENYING MOTION FOR NEW TRIAL

On September 5, 2013, the defendant filed a *pro se* motion for postconviction relief seeking a new trial pursuant to section 809.30, Wis. Stats. He complains that he was denied due process when the trial judge refused to allow him to submit certain evidence and exhibits at trial, that trial counsel was ineffective for failing to subpoena multiple witnesses in his defense, and that other errors and instances of ineffective assistance occurred. The court finds no merit to the defendant's assertions and denies the motion *in toto*.

The defendant was charged with felony murder for the death of Todd Kyrola while committing the crime of substantial battery. Simultaneously, co-defendant Mark Kartes was charged with first degree intentional homicide for Kyrola's death, and co-defendant Bradley Olson was charged with substantial battery (with intent to cause bodily harm). The four men were homeless, and the victim was beaten with fists, feet, a brick, and a board by all three defendants at their campsite. The complaint suggests that Kartes was the main instigator in the affair and alleges that Kartes was the one who decided to finish off the victim and throw him in the river so he wouldn't "rat" on them about being beaten.

1

(48)

Defendant Wester rejected the State's plea offer,[1] and the State then filed an amended information charging the defendant with first degree intentional homicide. A jury trial was held before the Hon. Jeffrey A. Conen on April 5 - 7, 2011, after which the jury found him guilty of a lesser included offense, first degree reckless homicide (PTAC). On August 12, 2011, Judge Conen sentenced him to forty years in prison, bifurcated into thirty years of initial confinement and ten years of extended supervision. The case has since been assigned to this court as the successor to Judge Conen's homicide calendar.

Postconviction counsel was appointed to represent the defendant's appellate interests, but on June 25, 2012, the court permitted counsel to withdraw due to the defendant's desire to represent himself in postconviction matters. He has obtained the appropriate extensions for doing so from the Court of Appeals, and his motion is timely.

At trial, the defendant did not testify. However, during opening statement, defense counsel told the jury they would hear a tape of the defendant's statement to police indicating that he had tried to stop Kartes from killing the victim and that it was Kartes and Olson who dumped the victim into the river. Counsel also told the jury that the medical examiner would testify that the initial punches to the victim, in which the defendant admitted involvement to police, did not cause his death, but that it was the latter blows from Kartes that caused death.[2] Both parties indicated that what actually occurred involved a credibility determination.

The defendant first complains about trial counsel's short visits to him and counsel's failure to discuss his trial strategy with him or review his [Wester's] paperwork prior to trial. He

[1] Kartes accepted the State's plea offer to reduce his crime to first degree reckless homicide with a recommendation of 32 years in prison (22 years of initial confinement and ten years of extended supervision). Tr. 4/6/11, a.m., p. 16. In doing so, he agreed to cooperate in the prosecution of Wester and Bradley. Id. at 17.

[2] In effect, the medical examiner stated that the latter blows were reasonably probable to cause the victim's death rather than the initial blows, but he did not (and could not) specify who delivered the blows. That was left to the jury to determine from the co-defendants' testimony and from the statement that the defendant gave to police, as testified to by Detective Jacks, and the audio recording.

has not shown, however, that counsel's failure to do these things jeopardized any part of his trial, and the court cannot conclude from a review of the trial transcript that counsel did not have any trial strategy or simply sat by and did nothing. On the contrary, the defendant was charged with first degree intentional homicide, and trial counsel managed to convince the jury with his presentation that the defendant's acts were something less that intentional homicide.

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 694; also State v. Johnson, 153 Wis.2d 121, 128 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. State v. Moats, 156 Wis.2d 74, 101 (1990). "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' Strickland, 466 U.S. at 694 . . . ." State v. Erickson, 227 Wis.2d 758, 769 (1999).

The defendant's argument with respect to what counsel told him about a final pretrial does not set forth anything which demonstrates that he was somehow prejudiced by what occurred. Moreover, contrary to his assertions, the defendant's presence at a final pretrial was not required by law. Section 971.04(1), Wis. Stats., provides that a defendant *shall be* present only at the following proceedings: "(a) at the arraignment; (b) at trial; (c) during voir dire of the trial jury; (d) at any evidentiary hearing; (e) at any view by the jury; (f) when the jury returns its verdict; (g) at the pronouncement of judgment and the imposition of sentence; (h) at any other

proceeding when ordered by the court. Whether or not Judge Conen holds final pretrials or whether or not the defendant attended had no effect on the trial itself or its outcome.

The defendant's next claim focuses on the extensive diary he had compilated during his nine months in custody and which he expected to introduce as evidence when he testified. He submits that the court's refusal to allow him to introduce it to the jurors deprived him of a fair trial and also caused him not to testify. Judge Conen's determination that it was not admissible evidence was correct. (Tr. 4/4/11, a.m., p. 7). The defendant's testimony as to what was in the diary, if relevant, would have been admissible, but the diary itself was not admissible evidence.

The defendant next asserts that trial counsel ignored his [Wester's] witness list and called Police Officer Paul Bjorkquist as the only witness in his defense.[3] He contends that he had at least 23 other witnesses to call, as well as many of the homeless people listed in the police reports, all of which would constitute character witnesses as to his veracity. The defendant asserts that many of these witnesses could have testified to the events that occurred before and after the murder, which would have shown Kartes's and Olson's testimony as not altogether truthful. None of these witnesses were present at the time Kyrola was killed and could not have aided the jurors as to who had done what to the victim and when. His claim that his witnesses "would've testified to Wester's veracity!" (*Motion, p. 8*) does not constitute a legal basis for demonstrating the ineffective assistance of counsel because no witness can be called to attest to another person's veracity. State v. Haseltine, 120 Wis. 2d 92, 96 (Ct. App. 1984). Trial counsel cannot be deemed ineffective for failing to call the defendant's list of witnesses "to discredit Kartes' & Olson's testimonies against his client" (*Motion, p. 10*) because none of those witnesses were there when Kyrola was beaten and killed.

[3] The defendant also called Detective Jeremiah Jacks before P.O. Bjorkquist on April 6, 2011.

The defendant's claims regarding counsel's failure to obtain Wester's maps and diagrams, failure to share an incident report with Wester containing an interview with a House of Correction dorm mate, failure to interview the dorm mate, and failure to object to the make-up of the jury pool are all without merit and do not meet the Strickland criteria for ineffective assistance. Further, an objection by counsel to the court's decision not to allow note-taking for such a short and straightforward trial would probably have been overruled. Note-taking is a discretionary call by the court, and even if an objection would not have been overruled, this court perceives no prejudice in this case for not allowing the jurors to take notes. The jury clearly paid close attention simply for the fact that it did not find the State met its burden of proving the defendant committed first degree intentional homicide.

The defendant also complains that the court did not allow written transcripts of the testimony to be given to the jury. This court knows of no court that orders written transcripts of the testimony to be given to the jury. It is impractical and is simply not done.

The defendant next argues that trial counsel should have objected to only one-third of his audio confession being played for the jury because it was "incomplete evidence." The court does not find it reasonably probable that the outcome of the trial would have been any different had the entire audio confession been played. Based on the argument made by the defendant in his motion,[4] there was no prejudice to the defendant in this regard; for one thing, the incident report was never given to the jury. Although the defendant contends that Detective Jacks told the jury that the defendant had washed both his socks and his pants,[5] nothing about mud or blood was

[4] "Playing Wester's 'entire' audio confession would've also informed the the 'sic] jurors Wester stated: " I washed my socks (in the sink), at the motel because they were grungy and had mud on them.", ... NOT 'blood' on them!, as Jacks testified & wrote in his 6-17-10 Inc. Rprt., sppl. 0048." (*Motion, p. 14, emphasis in original*).

[5] Tr. 4/6/11, p.m., pp. 69-71.

mentioned, and no mix-up between "mud' and "blood" needed to be clarified by the audio confession. It was not an issue in the testimony.

The defendant also believes that the incident involving the person who took pictures of the jurors should have resulted in a mistrial. The court had the pictures deleted from the camera, and it banned the person from the courtroom. (Tr. 4/6/11 a.m., pp. 8-10). It also questioned the jury panel to see if it was a potential problem for any of them. (Id. at 9). Any request for a mistrial would not have been granted under these circumstances. The defendant has not shown he was deprived of a fair trial based on this incident.

The defendant's assertion that trial counsel "threw the case -- intentionally!" (*Motion, p. 17, emphasis in original*) is without support based on the trial transcript itself. His contention that trial counsel failed to inform the jury of the plea offers the State made to him is completely without merit, for if counsel had done so, there would have been a mistrial. He would not have been permitted to inform the jury of any prior plea offers because that would have been improper and inconsistent with the law in Wisconsin. Defendant's remaining contentions found at pages 18-20 of his motion lack any arguable merit and will not be addressed.

Finally, the court finds sufficient evidence exists to support the jury's verdict.

For all of the above reasons, the defendant has not set forth a viable claim for relief. A new trial is not warranted in this case.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief (new trial) is **DENIED.** Dated this 10th day of September, 2013, at Milwaukee, Wisconsin.

BY THE COURT:

David L. Borowski
Circuit Court Judge

6