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**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**

May 6, 2019

*To*:

Hon. Jeffrey A. Wagner
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

Jeffrey P. Jensen 479658
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

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

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2017AP784-CR State of Wisconsin v. Jeffrey P. Jensen (L.C. # 2014CF2428)

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

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Jeffrey P. Jensen, *pro se*, appeals from a judgment of conviction, entered upon a jury's verdicts, for one count of attempting to work or volunteer with children after having been

convicted of a child sex offense, contrary to WIS. STAT. §§ 948.13(2) and 939.32 (2013-14),[1] and one count of felony bail jumping, contrary to WIS. STAT. § 946.49(1)(b) (2013-14). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgment.

At the outset, we note that Jensen's appellate brief is deficient. He offers fewer than two pages of discussion and almost no background or procedural facts. However, our review of the State's brief and the record allows us to outline the procedural history.

A jury found Jensen guilty of the aforementioned crimes. He was sentenced to two consecutive sentences totaling five years of initial confinement and five years of extended supervision. Jensen's appointed appellate counsel filed a no-merit appeal but later dismissed the appeal to pursue issues of arguable merit. Before appellate counsel could file a postconviction motion, Jensen elected to terminate appellate counsel, indicating that he would either hire another attorney or proceed *pro se*. The trial court initially denied appellate counsel's motion to withdraw but later allowed her to withdraw after reviewing letters from Jensen outlining his understanding of the risks and consequence of proceeding *pro se*.

[1] WISCONSIN STAT. § 948.13(2)(a) (2013-14) provided in relevant part: "Except as provided in pars. (b) and (c), whoever has been convicted of a serious child sex offense and subsequently engages in an occupation or participates in a volunteer position that requires him or her to work or interact primarily and directly with children under 16 years of age is guilty of a Class F felony."

We note that the specific statutes discussed in this decision have not been amended in the years since Jensen committed his crimes, so we will refer to the current version of the statutes. All subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Jensen chose not to file a postconviction motion and instead filed an appellate brief.[2] On appeal, Jensen presents two arguments. We begin with his allegation that trial counsel provided ineffective assistance. Jensen's entire argument states:

> Mr. Jensen's counsel was ineffective in the following ways: He chose not to call witnesses that clearly would have bolstered the testimony presented by Mr. Jensen and very possibly [a]ffected the decision made by the jury. He chose to enter into an agreement with the prosecution that clearly prejudiced Mr. Jensen before the jury. He chose without reason to impeach the testimony of [two witnesses].

Jensen's ineffective assistance argument fails for at least two reasons. First, a defendant cannot prevail on a claim alleging ineffective assistance of trial counsel unless the defendant first files a motion in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."); *see also* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (recognizing that a ***Machner*** hearing in the trial court "is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion"). Here, Jensen chose not to file a postconviction motion, so the trial court did not conduct a ***Machner*** hearing at which trial counsel would have testified.

Second, Jensen has presented only the barest of allegations of ineffective assistance. To demonstrate that there was constitutionally ineffective assistance, a defendant has the burden to prove both: (1) that counsel's performance was deficient; and (2) that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Jensen alleges that trial

[2] Jensen did not file a reply brief.

counsel performed deficiently, but he has not provided any details about the testimony at trial. Further, he has not adequately explained how he was prejudiced by his trial counsel's performance. *See* ***id.*** at 694 (holding that to prove prejudice, a defendant must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Jensen is not entitled to relief based on his allegations of ineffective assistance of trial counsel.

Next, we turn to Jensen's argument that it was improper to charge or convict him of attempting to work or volunteer with children after having been convicted of a child sex offense. *See* WIS. STAT. § 948.13(2). Jensen points to the attempt statute, WIS. STAT. § 939.32(1), which states in relevant part: "Whoever attempts to commit a felony or a crime specified in s. 940.19, 940.195, 943.20, or 943.74 may be fined or imprisoned or both as provided under sub. (1g), except [in circumstances inapplicable here]." Jensen argues that because the statute he was accused of attempting to violate, § 948.13(2), is not listed in § 939.32(1), "there is no legal stance to charge or convict [him] of this charge."

We are not persuaded. WISCONSIN STAT. § 939.32(1) refers to a person who attempts to commit a felony *or* who attempts to commit one of several enumerated crimes. Thus, this court has recognized that "[u]nder § 939.32(1), all felonies may be charged as attempted crimes, except for felonies excluded by statute or by case law." *See* ***State v. Henning***, 2013 WI App 15, ¶13, 346 Wis. 2d 246, 828 N.W.2d 235. Jensen was charged with attempting to violate WIS. STAT. § 948.13(2), which is a Class F felony. *See* ***id.*** He has not identified any case law or statute that prevents his specific crime from being charged as an attempted crime. The only case he cites in support of his argument is ***State v. Cvorovic***, 158 Wis. 2d 630, 462 N.W.2d 897 (Ct. App. 1990).

***Cvorovic*** held that "attempted fourth-degree sexual assault" was not an offense recognized under Wisconsin law because WIS. STAT. § 939.32(1)-(2) (1999-2000) did not list fourth-degree sexual assault as a crime that may be prosecuted as an attempt. *See* ***Cvorovic***, 158 Wis. 2d at 633. However, the crime at issue in ***Cvorovic***, fourth-degree sexual assault, was a misdemeanor. *See* WIS. STAT. § 940.225(3m) (1999-2000). In contrast, Jensen's crime is a felony, *see* WIS. STAT. § 948.13(2), and therefore falls within § 939.32(1) (referring to a person who "attempts to commit a felony"). ***Cvorovic*** does not support Jensen's argument. We conclude that Jensen has not shown it was improper to charge and convict him of attempting to work or volunteer with children after having been convicted of a child sex offense.

For the foregoing reasons, we conclude that Jensen is not entitled to relief based on the two issues he has raised on appeal.[3] We summarily affirm the judgment.

IT IS ORDERED that the judgment of the trial court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*

[3] Jensen also asserts that "[t]he [c]ourt erred in not granting a motion to dismiss based on the fact that the [S]tate had not proven all elements of the charged offense" and that his "conviction and thusly his sentence was based on inaccurate information." To the extent that Jensen means to raise additional issues via these assertions, we decline to consider them because he fails to develop them with any explanation or references to the record or legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (1992) (holding that this court may decline to consider arguments inadequately briefed or unsupported by citations to legal authority).