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**DISTRICT I**

September 12, 2023

To:

Hon. Jonathan D. Watts  
Circuit Court Judge  
Electronic Notice

Nicholas DeSantis  
Electronic Notice

Anna Hodges  
Clerk of Circuit Court  
Milwaukee County Safety Building  
Electronic Notice

David Thompson Jr. 564540  
Green Bay Correctional Inst.  
P.O. Box 19033  
Green Bay, WI 54307-9033

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

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2022AP1183

State of Wisconsin v. David Thompson, Jr. (L.C. # 2014CF1978)

Before White, C.J., Donald, P.J., and Dugan, J.

**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).**

David Thompson, Jr., *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 motion without a hearing. 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 (2021-22).<sup>1</sup> The order is summarily affirmed.

On May 13, 2014, Thompson was charged with multiple crimes stemming from the armed robberies of several people on the Marquette University campus. A jury found Thompson

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

guilty of armed robbery, attempted armed robbery, first-degree recklessly endangering safety, possession of a firearm by a felon, and two counts of armed robbery as a party to a crime. The circuit court sentenced Thompson to a combined thirty-four years of initial confinement and thirty years of extended supervision. Thompson filed a postconviction motion for a new trial, arguing that one of the jurors was objectively biased and, relatedly, that trial counsel was ineffective for not striking the juror. After an evidentiary hearing, the circuit court denied the motion. Thomson appealed, and we affirmed. *See State v. Thompson*, No. 2020AP689-CR, unpublished op. and order (WI App May 4, 2021).

In June 2022, Thompson filed the *pro se* postconviction motion underlying this appeal. First, he alleged there was a confrontation clause violation because two of the robbery victims had been unable to identify him as the robber. Second, he claimed that a photo array and a live line-up were unduly suggestive because the victims testified that they had selected Thompson because of the ways he “stood out” to them in the identification process. Third, he alleged that because of these identification issues, there was insufficient evidence to support the charges against him and the prosecutor should have known better than to issue them. Finally, Thompson alleged postconviction counsel was ineffective because she “did not do a ‘full investigation’” and thus did not pursue these issues.<sup>2</sup> The circuit court denied the motion as procedurally barred because Thompson had presented “only conclusory allegations of ineffective assistance of postconviction counsel.” Thompson appeals.

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<sup>2</sup> Thompson’s motion actually alleges his appellate counsel was ineffective for not raising the issues. Because Thompson’s postconviction counsel and appellate counsel were the same person, as is typical, the circuit court construed the motion to be alleging ineffective postconviction counsel. We do the same, because a WIS. STAT. § 974.06 motion is not the vehicle for challenging appellate counsel’s performance and because appellate counsel generally cannot raise issues on appeal that were not first preserved with a postconviction motion.

An issue that could have been raised on direct appeal or in a previous motion is barred, absent a sufficient reason for not raising the issue in the earlier proceedings. *See* WIS. STAT. § 974.06; *see also State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Thompson does not directly allege any reason for failing to raise his confrontation and identification issues earlier, but he implicitly faults postconviction counsel. “In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal.” *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668.

However, in order for Thompson to obtain an evidentiary hearing based on alleged ineffectiveness, he must do more than just assert that his postconviction counsel was ineffective for failing to raise certain issues. *See State v. Balliette*, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. “[A] defendant who alleges in a [WIS. STAT.] § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought.” *See Romero-Georgana*, 360 Wis. 2d 522, ¶73.

The circuit court correctly noted that Thompson made no comparison between the issues postconviction counsel actually raised in Thompson’s first postconviction motion and the issues Thompson now asserts counsel should have raised instead.<sup>3</sup> Consequently, Thompson has not

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<sup>3</sup> We note, however, that the purpose of the Confrontation Clause is to protect against the use of ex parte communications as evidence against the accused. *See State v. Reinwand*, 2019 WI 25, ¶¶20-21, 385 Wis. 2d 700, 924 N.W.2d 184. Its purpose “is to ensure the reliability of testimony by allowing the accused to challenge a witness’s statements ‘in the crucible of cross-examination.’” *Id.*, ¶21 (citation omitted). Both of the witnesses who were unable to identify Thompson were subjected to cross-examination by Thompson’s trial attorney.

(continued)

alleged sufficient material facts to avoid application of the *Escalona* procedural bar or otherwise garner relief. See *Romero-Georgana*, 360 Wis. 2d 522, ¶58.

Therefore,

IT IS ORDERED that the order summarily affirmed. See WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*

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Thompson’s argument regarding “unduly suggestive” identification procedures with other witnesses is conclusory. An unduly or impermissibly suggestive procedure is one that makes it “all but inevitable” that the defendant would be identified. See *Foster v. California*, 394 U.S. 440, 443 (1969). “Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves.” See *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). A unique identifying feature, such as eye shape or body build, is typically not considered, *ipso facto*, to be unduly suggestive without more persuasive proof by the defendant. See *id.* at 654.

Finally, Thompson contends that because of the issues with these identification processes and the witnesses, there is “no evidence” against him, and the State should have known there was insufficient probable cause to even file charges against him. However, in addition to relying on witness statements, the criminal complaint also details statements given by Thompson and a co-actor regarding their roles in the various robberies, which are sufficient to support at least the filing of the complaint.