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DISTRICT IV

June 27, 2024

To:

Hon. John M. Wood
Circuit Court Judge
Electronic Notice

Michael J. Conway
Electronic Notice

Amanda Nelson
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Jimmy Roland Thomas 290821
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You are hereby notified that the Court has entered the following opinion and order:

2023AP264-CR	State of Wisconsin v. Jimmy Roland Thomas
2023AP265-CR	(L.C. ## 2017CF1667, 2018CF120, 2018CF540)
2023AP266-CR	

Before Kloppenburg, P.J., Blanchard, and Taylor, 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).

Jimmy Thomas, pro se, appeals judgments of conviction in three circuit court cases that were tried together to a jury. Thomas also appeals the circuit court's order denying his motion for postconviction relief under WIS. STAT. § 974.02 (2021-22).¹ He argues that: (1) the evidence was insufficient to support his conviction for possession of cocaine with intent to deliver, as party to a crime; (2) trial counsel was ineffective on multiple grounds; and (3) the court erred by ordering joinder of his three cases. Based on our review of the briefs and the record, we

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

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We affirm.

We refer to the three circuit court cases as Case 1, Case 2, and Case 3. The facts of each case as set forth below are based on the evidence introduced at trial.

In Case 1, Thomas was charged with three counts of delivering a controlled substance based on allegations that he sold cocaine to a confidential informant on three separate occasions. After these controlled drug buys, the police executed a search warrant at a home where Thomas and a woman named Dazhane Savage were present. Both were arrested. A strip search of Savage revealed that she had four bags of drugs concealed in her underwear, including two bags containing 65 chunks of individually wrapped “crack” cocaine. Thomas was released on bond with conditions including that he have no contact with Savage and commit no crimes.

In Case 2, Thomas was charged with one count of felony bail jumping based on allegations that he violated his bond in Case 1 by having contact with Savage in a hotel room. A hotel desk clerk reported that individuals, who were later identified as Thomas and Savage, had been asked to leave the hotel based on suspected drug activity. According to the clerk, people had been coming and going from their hotel room at all hours over the course of an entire night. A police officer reviewed surveillance footage showing that the people would go to the room for just two to five minutes, an activity that the officer associated with drug transactions. Thomas was released on bond again, with the same conditions that he have no contact with Savage and commit no crimes.

In Case 3, Thomas was charged with one count of possession of cocaine with intent to deliver, as party to a crime; one count of possession of clonazepam with intent to deliver, as party to a crime; and four counts of bail jumping. All of the charges were based on allegations of further drug trafficking activity in which Thomas, Savage, and another woman were together in a car that the police had stopped. All three individuals were found to have drugs on their persons, and the car contained numerous items associated with drug manufacturing or trafficking. Thomas had a bag of clonazepam pills that a police officer observed him stuffing down his pants while he was still in the car. A later strip search of Savage revealed that she had a bag with over 40 grams of cocaine in her underwear. The other woman in the car was found to have inserted heroin into her rectum. The items found in the car included a bundle of sandwich baggies commonly used to package narcotics; a measuring glass; coffee filters containing a white, powdery substance; one or more strainers; a digital scale; and a 100-gram testing weight for the scale. A police officer testified that he associated a number of these items with the manufacture of “crack” cocaine. Also found in the car was a leather bag containing \$10,050 in cash with two pieces of mail addressed to Thomas.²

Prior to trial, the State moved to join Thomas’s three cases. The circuit court granted the motion over Thomas’s objection. The case was tried to a jury.

In Case 1, the jury found Thomas guilty on one of the three charges of delivering a controlled substance. In Case 2, it found him guilty on the charge of bail jumping. In Case 3, it found him guilty on the charge of possession of cocaine with intent to deliver; the charge of

² In addition to the bag containing cash that appeared to belong to Thomas, the police found \$2,272 in cash on Thomas’s person.

possession of clonazepam, as a lesser included offense of possession of clonazepam with intent to deliver; and all four charges of bail jumping.

Thomas filed a postconviction motion. He argued that: (1) the evidence was insufficient to support his conviction in Case 3 for possession of cocaine with intent to deliver, as party to a crime; (2) trial counsel was ineffective on multiple grounds; and (3) the circuit court erred by ordering joinder of the three cases. The court denied the motion without a hearing.

On appeal, Thomas renews his same arguments. For the reasons we now explain, we reject each of these arguments.

We first address Thomas’s argument that the evidence was insufficient to support his conviction for possession of cocaine with intent to deliver, as party to a crime. Although sufficiency of the evidence is a question of law subject to our de novo review, we “consider the evidence in the light most favorable to the State and reverse the conviction only where the evidence ‘is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.’” *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410 (quoted source omitted). We “will uphold the conviction if there is any reasonable hypothesis that supports it.” *Id.*

Here, according to Thomas, the evidence was insufficient to support his conviction for possession of cocaine with intent to deliver, as party to a crime, because there was no evidence that he was aware that Savage was concealing a large quantity of cocaine in her underwear when they were together in the car. We disagree. The evidence summarized above strongly supports an inference that Thomas was involved in an ongoing drug trafficking enterprise involving

Savage, and that he therefore knew about the cocaine concealed in her underwear. Moreover, there was evidence to support an inference that Thomas directed Savage to conceal the cocaine in her underwear. A police officer testified that drug dealers commonly have female drug users hold the dealers' drugs because of the perception that females can more easily conceal the drugs, and also so that the dealer can attempt to disclaim possession.

We turn next to Thomas's argument that trial counsel was ineffective. To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, "a defendant must show that counsel's representation fell below an objective standard of reasonableness considering all the circumstances." *State v. Ruffin*, 2022 WI 34, ¶30, 401 Wis. 2d 619, 974 N.W.2d 432. "Courts afford great deference to trial counsel's conduct, presuming that it 'falls within the wide range of reasonable professional assistance.'" *State v. Savage*, 2020 WI 93, ¶28, 395 Wis. 2d 1, 951 N.W.2d 838 (quoted sources omitted). To demonstrate prejudice, "a defendant must show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Id.*, ¶32 (quoted source omitted).

Here, the circuit court rejected Thomas's ineffective assistance of counsel claims without holding a hearing. Therefore, the relevant question for our review is whether Thomas alleges sufficient material facts that, if true, would show ineffective assistance of counsel. *See State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. We review this question de novo. *Id.*, ¶9. A hearing is not required if the defendant "does not raise facts sufficient to entitle the [the defendant] to relief, or presents only conclusory allegations, or if the record conclusively

demonstrates that the defendant is not entitled to relief.” *Id.* In order to allege sufficient facts, the defendant must “allege the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *Id.*, ¶23.

Thomas alleges that counsel was ineffective on a number of grounds, but he develops arguments as to only two of those grounds. Therefore, we limit our analysis to these two grounds. *See State v. Pettit*, 171 Wis.2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (explaining that the court of appeals need not consider undeveloped arguments).

First, Thomas alleges that trial counsel was ineffective by failing to impeach a police officer with the officer’s inconsistent statements from the preliminary hearing and with video from the officer’s body camera. However, Thomas does not persuade us that he has identified any inconsistent statements by the officer, and he also does not make any specific allegations as to what the body camera video would have shown. Accordingly, we conclude that he has not sufficiently alleged deficient performance or prejudice based on counsel’s failure to impeach the officer.³

Second, Thomas alleges that counsel was ineffective by failing to call Savage as a witness. According to Thomas, this was an unreasonable strategic decision. Thomas’s more specific arguments relating to Savage’s potential testimony are difficult to understand. He

³ The State argues that there is nothing in the record to suggest that a body camera video exists. Thomas has not filed a reply brief and has not addressed the State’s argument regarding the lack of existence of a video. We may take Thomas’s lack of a reply as a concession, *see United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578, and we do so here. We conclude that this concession provides an additional, independent ground to reject Thomas’s argument that counsel was ineffective by failing to impeach the officer with body camera video.

appears to argue that Savage would have denied that she had a large amount of cocaine concealed in her underwear. However, he provides no allegations to support an objective belief that Savage would have denied her possession of the cocaine or that her possession of the cocaine was a plausibly deniable fact. Testimony from Savage might have supported Thomas's defense if Savage would have testified that the cocaine was hers and that Thomas had no knowledge of, or involvement with, the cocaine, but Thomas provides no allegations to support an objective belief that Savage would have testified that way. For these reasons, we conclude that Thomas has not sufficiently alleged deficient performance or prejudice based on counsel's failure to call Savage as a witness.⁴

We turn to Thomas's argument that the circuit court erred by ordering joinder of the three cases prior to trial, over his objection. We review this "initial joinder" decision by the circuit court de novo. *State v. Salinas*, 2016 WI 44, 369 Wis. 2d 9, ¶30, 879 N.W.2d 609.⁵

⁴ The State argues that Savage would have almost certainly invoked her right against self-incrimination and been declared unavailable as a witness because she was facing federal charges arising from the same incident. As previously noted, Thomas has not filed a reply brief, and he also has not addressed the State's argument regarding Savage's availability as a witness. We take this lack of a reply as a concession, see *United Coop.*, 304 Wis. 2d 750, ¶39, and we conclude that this concession provides an additional, independent ground to reject Thomas's argument that counsel was ineffective by failing to call Savage.

⁵ In *State v. Salinas*, 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609, our supreme court drew a distinction between a circuit court's decision on "initial joinder," which appellate courts review de novo, and a circuit court's decision on a motion to sever charges after initial joinder, which appellate courts review for an erroneous exercise of discretion. *Id.*, ¶30. Here, in addition to arguing that the circuit court erred in its initial joinder decision, Thomas has also alleged that counsel was ineffective by failing to file a motion to sever. We decline to address this ineffective assistance of counsel allegation because Thomas has not developed any arguments relating to severance that take into account the legal standards for ineffective assistance of counsel. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (explaining that the court of appeals need not consider undeveloped arguments).

“The joinder statute is to be broadly construed in favor of initial joinder.” *Id.*, ¶31. Our supreme court “‘has historically favored’ initial joinder particularly when the charged crimes were all ‘committed by the same defendant.’” *Id.*, ¶36. The instances in which joinder is appropriate include “when two or more crimes are based on two or more acts or transactions that constitute ‘a common scheme or plan.’” *Id.*, ¶31 (quoting WIS. STAT. § 971.12(1)).

Here, we agree with the circuit court that initial joinder was appropriate. All of the joined charges were brought against the same defendant and were based on allegations that are reasonably viewed as part of a common scheme, namely, an ongoing drug trafficking enterprise. Some of the charges were bail jumping rather than drug trafficking offenses, but the bail jumping charges were all based on allegations that Thomas violated his bond conditions by committing drug trafficking offenses or by having contact with Savage, who was involved in the drug trafficking.

Thomas argues that joinder of the charges was prejudicial to his defense. We are not persuaded by this argument for two reasons. First, Thomas has not replied to the State’s argument that he is precluded from raising prejudice on appeal because he failed to file a motion to sever in the circuit court. *See State v. King*, 120 Wis. 2d 285, 293, 354 N.W.2d 742 (Ct. App. 1984) (“A defendant can waive a claim of prejudicial joinder by failing to particularize the reasons for severance in the trial court.”). We take this lack of a reply as a concession by Thomas that he has waived review of the prejudice issue.⁶ Second, we conclude that Thomas’s prejudice argument is not persuasive on its merits. Thomas does not explain with any specificity

⁶ *See United Coop.*, 304 Wis. 2d 750, ¶39.

how he may have been prejudiced by joinder of the charges. Instead, he relies on a general argument that joinder “piled [on] the facts for the jury” and on an inaccurate assertion that the charges had “no provable connection.” Thomas’s arguments do not persuade us that joinder was prejudicial.

Therefore,

IT IS ORDERED that the circuit court’s judgments and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals