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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 II

November 6, 2024

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Jacob J. Wittwer
Electronic Notice

Eric A. Judon #180295
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:

2022AP287 State of Wisconsin v. Eric A. Judon (L.C. #2000CF652)

Before Neubauer, Grogan and Lazar, 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).

Eric A. Judon appeals from an order denying his postconviction motion for a new trial on armed robbery charges. Judon alleges that the trial court erroneously exercised its discretion by directing him to stand up at the defense table at trial to allow a victim to indicate whether his height and weight resembled the robber's and that his counsel was ineffective for failing to object to Judon having to stand up. Based upon our review of the briefs and the Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] Because Judon forfeited the issue by not objecting at trial and because

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

he has not shown prejudice from trial counsel's failure to contemporaneously object, we summarily affirm.

The State charged Judon with multiple counts arising from seven armed robberies. Relevant to this appeal, count one charged Judon with being a party to the crime of armed robbery with threat of force in connection with the armed robbery of a Citgo gas station in Racine. According to evidence presented in Judon's eight-day jury trial, an armed robber entered the Citgo and pointed a gun at the gas station's clerk, demanding money. The jury found Judon guilty as charged on fifteen counts. The trial court ultimately sentenced Judon to a global consecutive sentence of fifty-one years' initial confinement and sixty years' extended supervision.

The facts giving rise to this appeal occurred on the third day of trial. During cross-examination, the defense questioned the clerk about the robber's physical characteristics. The clerk testified that the robber was "not much" shorter than 5'11" in height and weighed "somewhere around" 180 pounds. During redirect examination, the prosecution stated that it "would like to ask Mr. Judon to stand," and the trial court ordered him to "stand up, please." While Judon was standing, the prosecution asked the clerk whether Judon's height and weight were "consistent with what [he] observed at the time of the robbery." The clerk answered "[y]es." At no point in this exchange did defense counsel object, nor did counsel question the clerk during recross about his estimation of Judon's height and weight when compared to the robber's.

Two decades after his conviction, Judon filed a motion seeking a new trial on the grounds that the trial court erroneously exercised its discretion by having Judon stand up so that the State

could elicit testimony about whether the witness believed his height and weight were consistent with the perpetrator's. As a corollary, Judon argued that his counsel was constitutionally ineffective for failing to object to that procedure.[2]

The trial court denied Judon's motion, stating that "[h]is failure to file a direct appeal pursuant to statutory time lines [sic] in and of itself is dispositive of [Judon's] motion." The court elaborated that ***State v. Escalona-Naranjo***[3] barred Judon "from raising constitutional issues on [a] motion under WIS. STAT. § 974.06 when such claims could have been raised previously under motions under WIS. STAT. § 974.02 or direct appeal." Additionally, the court concluded that Judon's claim of constitutionally ineffective assistance lacked merit because "[Judon] has not demonstrated from his pleadings any reasonable probability that any of the claimed errors would have resulted in a different outcome in this matter." The court stated that the "stand-up" identification did not "violate any constitutional right, specifically the right [against] self incrimination," and that there was "no ineffective assistance of counsel in failing to object to what is not an objectionable matter."

Judon appeals, asserting that (1) his motion was not procedurally barred by ***Escalona-Naranjo*** because his motion raised "cognizable constitutional claims," (2) the stand-up

[2] Judon's original motion for a new trial also included claims based on allegations of judicial bias, prosecutorial misconduct, a conspiracy against him, and postconviction ineffective assistance. Except for prosecutorial misconduct, these claims were not raised during appeal and have been abandoned. In his reply brief, Judon states that he is not abandoning his prosecutorial misconduct claim. That claim is, however, undeveloped and Judon has not provided any supporting legal citations for his argument that prosecutorial misconduct occurred. This court will not address undeveloped and unsupported arguments. *See* ***Wal-Mart Real Est. Bus. Tr. v. City of Merrill***, 2023 WI App 14, ¶32, 406 Wis. 2d 663, 987 N.W.2d 764.

[3] ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

identification was impermissibly suggestive and unreliable and violated his right to due process, and (3) his counsel was constitutionally ineffective in failing to object to the stand-up identification, which undermined confidence in the trial's outcome. The State concedes that Judon's motion is not procedurally barred. It contends, though, that Judon's argument against the stand-up identification is underdeveloped and has been forfeited and that Judon's ineffective assistance of counsel claim is underdeveloped and fails to show how counsel's failure to object prejudiced Judon.

A constitutional challenge to an in-court identification and the procedure by which it was administered is reviewed in two parts: factual determinations are upheld unless they are clearly erroneous, and application of those facts to constitutional standards is reviewed de novo. *See* ***State v. McMorris***, 213 Wis. 2d 156, 165-66, 570 N.W.2d 384 (1997). The trial court's decision to allow an identification and its administration thereof are evidentiary issues reviewed for an erroneous exercise of the court's discretion. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

First, we address the procedural propriety of Judon's motion. Judon's postconviction motion is not barred by WIS. STAT. § 974.06(4), as the trial court held, because ***Escalona-Naranjo*** prohibits only *successive* postconviction motions and appeals. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (holding that WIS. STAT. § 974.06(4) compels prisoners to raise all grounds for postconviction relief in the "original, supplemental or amended motion," and that successive motions and appeals "run counter to the design and purpose" of the statute). Since this postconviction motion is Judon's first, and he did not pursue a direct appeal, Judon's motion is not prohibited by ***Escalona-Naranjo***'s procedural bar.

We next turn to the merits of Judon's motion regarding the in-trial identification procedure where the trial court ordered Judon to "stand up." Judon asserts that the court erred in allowing this form of identification, which Judon inappropriately calls a "show up."[4]

But Judon's trial counsel did not object to this procedure, and issues not preserved by a contemporaneous objection are generally deemed forfeited. *See* ***State v. Huebner***, 2000 WI 59, ¶11 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727; ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). This "rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." ***Huebner***, 235 Wis. 2d 486, ¶11. "Raising issues at the trial court level allows [that] court to correct or avoid the alleged error in the first place, eliminating the need for appeal." ***Id.***, ¶12. Additionally, raising issues at trial "gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection," thus preventing attorneys from "sandbagging" trial court errors. ***Id.***

Only in cases of plain error or ineffective assistance of counsel can an issue be raised on postconviction motion or appeal without having been preserved at trial. *See* ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (holding that a plain error is an "error so fundamental that a new trial or other relief must be granted" (citation omitted)); ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996) (holding

[4] A "show up" refers to an identification procedure that impermissibly suggests that the defendant is the perpetrator of a crime. *See* ***United States v. Vines***, 9 F.4th 500, 507 (7th Cir. 2021). An identification procedure is considered a "show up" when the procedure is "tainted by police arrangement;" examples include a line-up procedure where the other participants are "grossly dissimilar" to the defendant or a line-up where the participants are asked to try on clothing that only fits the defendant. ***Perry v. New Hampshire***, 565 U.S. 228, 238, 243 (2012). Unlike these examples, Judon's standing up so that a witness could testify about his height and weight was an in-court procedure that did not attempt to improperly single out Judon from other participants.

that ineffective assistance of trial counsel claims must be raised during a postconviction motion). Judon has failed to show, or even allege, that the identification procedure in his trial was so seriously suggestive that it constituted a plain error. *Cf.* ***Virgil v. State***, 84 Wis. 2d 166, 182-83, 192, 267 N.W.2d 852 (1978) (holding that a defendant could appeal, as plain error, the introducing of an unavailable co-conspirator's guilty plea into evidence because that act violated the defendant's confrontation rights). He asserts only that the trial court erroneously exercised its discretion by asking him to stand and allowing the witness to testify about his height and weight; he does not allege the deprivation of a constitutional right that could constitute plain error. Plainly, his argument was not preserved for appeal.

Judon's argument must therefore be addressed through the framework of a claim for ineffective assistance of trial counsel. To succeed on such a claim, Judon must show that his counsel's performance was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient only if it "fell below an objective standard of reasonableness." ***State v. Romero-Georgana***, 2014 WI 83, ¶40, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted). Prejudice is established when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (citation omitted). Both elements must be established. This, if the movant fails to show how counsel's performance was prejudicial, then the court does not need to consider whether that performance was deficient. *See* ***Strickland***, 466 U.S. at 687.

Here, Judon fails to show how his trial counsel's performance was prejudicial. *See* ***id***. He asserts that if his trial counsel had objected to the stand-up procedure at trial, the jury "would have had reasonable doubt about whether Judon committed … the robberies." Even assuming

the trial court would have sustained such an objection, Judon has not sufficiently developed his argument that allowing the witness to testify about his height and weight ultimately impacted the jury's decision on any of his charges. Judon fails to address the substantial other evidence against him, including that the clerk identified Judon's eyes as the robber's. Other evidence introduced at trial suggested that Judon was of "medium" size, as was the robber, according to the clerk's testimony. Therefore, the height and weight stand-up identification provided little additional inculpatory value. We are satisfied that the verdict would have been the same even if Judon's trial counsel had successfully objected to the stand-up identification. *See* ***Pitsch***, 124 Wis. 2d at 642. Since Judon has not demonstrated that his counsel's performance was prejudicial, we need not further address whether the performance was deficient. *See* ***Strickland***, 466 U.S. at 687.

For the foregoing reasons, we conclude that, while Judon's postconviction motion is not barred by ***Escalona-Naranjo***, he has forfeited the issue of whether the trial court erred in directing him to stand so that the victim-witness could testify how his height and weight was comparable to the robber's. We further conclude that his ineffective assistance of counsel claim lacks merit.

Therefore,

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

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

Samuel A. Christensen
Clerk of Court of Appeals