COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP80-CR **Cir. Ct. No. 2011CF3261**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN P. O'BOYLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and GLENN H. YAMAHIRO, Judges. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Ryan P. O'Boyle appeals a judgment entered on a jury verdict convicting him of attempted second-degree intentional homicide with the use of a dangerous weapon. *See* WIS. STAT. §§ 940.05(1), 939.32 & 939.63(1)(b).

He also appeals the trial court's denial of his motion for postconviction relief. O'Boyle argues that: (1) the trial court erred when it denied without a hearing his claim that his trial lawyer gave him constitutionally deficient representation; (2) the police did not comply with proper photo array procedures when the victim identified O'Boyle as having stabbed him; (3) the prosecutor made improper statements during closing argument; (4) the trial court erroneously admitted hearsay evidence; and (5) the State improperly amended the charges.[1] We affirm.

I.

¶2 In July of 2011, O'Boyle stabbed Ricardo Moran twice, once in the abdomen and once in the chest, after Moran and O'Boyle bumped into each other at a Summerfest concert. O'Boyle fled after the incident, but as luck would have it, O'Boyle's friends from the concert lived with a Milwaukee police officer, who passed O'Boyle's name along to the detective investigating the stabbing. The police arrested O'Boyle after Moran identified O'Boyle from an out-of-court photo-array lineup. O'Boyle admitted to stabbing Moran, but claimed he acted in self-defense. On July 15, 2011, the State issued a criminal complaint against O'Boyle for one count of first-degree recklessly endangering safety with use of a dangerous weapon, and ten days later issued an information charging the same. On February 27, 2012, the State amended the information, adding one count of attempted first-degree intentional homicide with use of a dangerous weapon. O'Boyle sought to suppress evidence, arguing that when the police arrested him, they came into his home without consent. At the start of the suppression hearing,

[1] The Honorable Dennis R. Cimpl presided over the trial and sentencing. The Honorable Glenn Yamahiro handled the postconviction proceedings.

however, O'Boyle abandoned that issue because it was undisputed that the owner of the house in which O'Boyle lived gave police consent. The suppression hearing focused instead on O'Boyle's challenge to "how the officer conducted the photo array in coming to probable cause." O'Boyle argued that detective Barbara O'Leary did not have probable cause to arrest him because the police did not follow proper procedures in regard to the preparation or viewing of the photo-array lineup. O'Leary testified at the suppression hearing why the police suspected O'Boyle:

- Police officer Matthew Phillipson told O'Leary that Phillipson's roommate, Giles Gutowski, was at Summerfest with O'Boyle when O'Boyle stabbed Moran.

- According to O'Leary at the hearing, Gutowski told her that "he did not personally see the incident that occurred, but he stated that he heard loud voices and that when he turned around, he saw Mr. O'Boyle looking -- I think he described it as worried."

- After interviewing Gutowski, O'Leary put together the photo array with O'Boyle as the prime suspect, and showed the photo array to Moran who identified O'Boyle as the man who stabbed him.

¶3 After O'Leary's testimony, the trial court tried to clarify the issue:

> THE COURT: Are you-- Are you moving to suppress the photo array?
>
> [Defense lawyer]: I don't think identification at the trial is an issue. However, I think it's an issue as to whether or not there was probable cause.
>
> THE COURT: I don't….
>
> ….

> She's got the victim saying, That's the guy that stabbed me.
>
> [Defense lawyer]: Based on an improper photo array.
>
> ….
>
> THE COURT: She's got somebody going to a -- getting into a fight at Summerfest. She goes to the victim. She shows him a photo array, and the guys [sic] says, That's the guy that stabbed me. She also knows somebody was stabbed that night at Summerfest.
>
> I don't see where you're going, [defense lawyer].
>
> [Defense lawyer]: I'm just trying to establish whether the officer followed proper procedure for conducting a photo array.
>
> THE COURT: That's only relevant if you're going to challenge the photo array and want it suppressed. And you're telling me you're not going to do that, right?
>
> [Defense lawyer]: Yes.

¶4 The trial court ruled probable cause existed and O'Boyle's lawyer withdrew his objection.

¶5 At the trial, Moran, the stabbing victim, testified that:

- He and his wife "were walking through the crowds to get back to the concert area and the person in front of me bumped into me causing me to drop one of my beers on the left hand and I turned around to ask him" "[w]hat the fuck."
- He then walked toward the man "[w]ithout words. We, what I thought was a punch, but when I felt it I knew it was a stab, and I turned and that's when he hit me again."

- Moran "fell to the ground after the first hit. So as I was going down I got hit the second time." He called to his wife "I got stabbed" and she helped him to a clearing where medical personnel treated him until an ambulance arrived.

- At the hospital, the emergency room doctor made an incision "to do a procedure to determine if any organs were hit." No organs had been hit, so the abdominal wound was "sutured up" but Moran said that he was "not quite sure" why "the wound to my right chest area was left open." The hospital admitted Moran overnight.

- Moran showed the jury his wounds. The abdominal wound was an inch to an inch-and-a-half and the chest wound was about an inch long.

- Moran identified O'Boyle as the man who stabbed him from the photo array detective O'Leary brought to his home two days after the incident.

- Moran testified that he had previously been convicted of a crime three times.

¶6 Moran's wife, Monica Moran, testified that as she and her husband were walking back to a concert after getting beers, she heard her husband say "I'm stabbed" and as she turned, she "saw him falling down." She did not see who stabbed him, and she did not hear any confrontation.

¶7 Kate Esselman testified at the trial:

- At the time of this incident, she and O'Boyle were in a steady relationship and had a child together.
- She went to Summerfest with O'Boyle and "Giles Gutowski, Matt Tillman, Daryllann and I don't remember the other girl's name."
- She and O'Boyle were holding hands, watching the concert when Moran "pushed through" them, Moran said "fuck you" to O'Boyle, then O'Boyle and Moran "locked eyes" after which O'Boyle "punched [Moran] twice."
- She did not know Moran at the time but learned his name after the incident.
- Moran never touched O'Boyle. Moran started to fall after the first punch and Esselman realized O'Boyle used a knife "[w]hen I saw the blade go into his pocket."
- Immediately after, O'Boyle told her "he did stab him" and then "told me he was going to the bathroom but then he disappeared."

¶8 Next, the State called Gutowski, who testified at the trial:

- He and O'Boyle were "[n]eighborhood buddies." He, O'Boyle, "Jena Wissbroecker, Kate O'Boyle and Matthew Tillman" and

"Darylann" all went to Summerfest together on the night of this incident.[2]

- Both he and O'Boyle were drunk, O'Boyle being in a "crazy kind of drunk" state.

- From about "15 yards away" he saw O'Boyle get into a confrontation with someone, "saw a man grabbing [O'Boyle's] shirt," and he saw O'Boyle "swing at the man. Not overhand or underhand, just a swing. And then I saw the man stumble back a little bit and run into the crowd."

- If there were two swings, Gutowski "[p]robably" would have seen the second swing. He saw O'Boyle punch Moran once like "a jab."

- He did not realize O'Boyle had stabbed Moran until he "put two and two together" based on the ambulance and "the news the next day."

- Gutowski did not ask O'Boyle about it because he "didn't want to know." "Nobody told me anything because I didn't want to be a part of this."

- Gutowski's roommate, Matthew Phillipson, who is a Milwaukee police officer, asked Gutowski "if [he] was there and if [O'Boyle] had been in an altercation, and [Gutowski] said yes."

[2] In the Record, Kate Esselman is at times referred to as Kate O'Boyle.

- Gutowski never talked to O'Boyle about the incident because he "didn't want to be put in this kind of situation. I never wanted to have any part of it."

¶9 Milwaukee police officer Joshua Martinson also testified at the trial:

- He was off-duty the night of the incident, sitting in an upper deck overlooking the concert when he saw an oral altercation below.

- Martinson testified that Moran never touched O'Boyle, but that O'Boyle threw two uppercut punches into Moran, causing Moran to stumble backwards and fall.

- He was not asked to identify O'Boyle.

¶10 Jennifer Timm also testified at the trial:

- She saw a confrontation between two men at Summerfest the night of the incident. She saw one man punch another man twice. She did not see a weapon and she did not see the man getting punched touch the man who was punching him. From her perspective, it looked like the man who got punched was also thrown towards her, where he knocked over two girls and landed on the ground near her.

- She realized it was more than a punch "When the gentleman … -- lifted up his shirt to the girls, and then she goes, *Oh, my God, there's blood.*" (Italics in original because the court reporter italicized parts of the transcript dialogue; neither party raises that as an issue.)

- Timm followed the blood trail and told police what she saw.

- She was never asked to identify O'Boyle and when asked if she recognized O'Boyle at trial, she answered: "A little bit," and when asked: "Fair to say you can't be sure if that was the same guy?" she responded: "He looks very familiar."

Phillipson testified that he found out about the Summerfest stabbing the next day when his roommate, Jena Wissbroecker confronted him on their driveway: "she appeared to me like she had been crying and upset about something." Wissbroecker told Phillipson about the Summerfest incident. When Phillipson went into work that night, he verified there had been a stabbing and decided to talk to his other roommate, Gutowski, about it because Wissbroecker said Gutowski "may have more information." Phillipson asked Gutowski about it the next day. The following is from the trial:

> Q [Prosecutor] And did Mr. Gutowski tell you something?
>
> A He did.
>
> Q What did he tell you?
>
> [Defense lawyer]: Objection. Hearsay.
>
> [Prosecutor]: I believe there will be-- Do you want to argue this on the side?
>
> THE COURT: Yeah.
>
> (Whereupon, discussion held off the record at sidebar.)
>
> THE COURT: Overrule the objection.
>
> Q [Prosecutor]: In your conversation with Mr. Gutowski, what did he tell you?
>
> A He stated that-- I believe that he stated that --
>
> Q As best you recall.

> A He didn't witness it. However, he knew that [O'Boyle] stabbed someone twice.

Phillipson testified that he reported this information to his "superior officers" after which O'Leary interviewed Gutowski on July 10, 2011.

¶11 After giving the jury a break, the trial court explained its reason for overruling O'Boyle's objection: "We had the sidebar regarding the objection on hearsay from Officer [Phillipson] that was asked about the statement of Giles Gutowski. [The prosecutor] indicated that it was to show an inconsistency in the testimony of Mr. Gutowski. It, in fact, did, so I overruled the objection."

¶12 The defense called Dutch Johnson as an expert in "biomechanics, injury mechanics, and human acts" to opine that "the wounds sustained by Mr. Moran were actually very shallow. In fact, they are considered by definition to be cuts as opposed to stab wounds." Johnson's testimony supported the defense theory that O'Boyle did not intend to kill Moran, but rather, acted in self-defense.

¶13 O'Boyle testified in his own defense:

- "I saw Mr. Moran approaching me, and he was glaring at me a little bit. I didn't really know what was going on. I turned away for about three seconds. And then he was like a foot away, and he forcibly separated me and my fiancée, and he continued to glare at me. And as he turned -- or as he forcibly separated us, I turned with him, and I put my hands up, and I say, *What?* And he responded with, *Fuck you*. And he flinched at me and grabbed ahold of me, and he attempted to lift me off the ground and suplex me on to the concrete on to my back." (Italics in original because, as noted, the court

reporter italicized parts of the transcript dialogue; neither party raises that as an issue.)

- "He pinned my right arm against my body with his left hand and his right hand slipped off my left arm, and he grabbed me by my shirt, a little above my belt buckle, and he proceeded to try and force me backwards and lift me off the ground to slam me on to the concrete on my back."

- "I have a back injury previously from a service-connected injury … I have a permanent thoracal lumbar strain in my back."

- "I panicked and my fingertips touched the hilt of my knife, and I didn't know what to do. And I-- I feared for my -- my safety and my back, and I was afraid that if he -- you know, if I allowed him to slam me on to the concrete like that, I would, you know, maybe be paralyzed or I'd break some bones or crack my skull open or something. I thought something bad was going to happen, and he conveyed his intent by glaring at me the way he did and shouting *Fuck you* at me." (Italics in original because, as noted, the court reporter italicized parts of the transcript dialogue; neither party raises that as an issue.)

- O'Boyle admitted stabbing Moran with his knife: "I hit him one more time, and then when I hit him in the chest, he stood up and started backpedalling about ten or fifteen feet and he fell down. And I turned around immediately and put my knife back in my pocket."

- O'Boyle did not put much force behind the stabbings and that afterwards, he went to summon medical help and "wanted to go back to the scene" but could not find his friends and "didn't want to go without witnesses because I'm afraid of police."

¶14 During closing arguments, the prosecutor told the jury:

- "[W]hen you take a knife and you put it into a guy twice, which any of us if it happened to us would say, *That guy's trying to kill me.*" (Italics in original because, as noted, the court reporter italicized parts of the transcript dialogue; neither party raises that as an issue.)

- "And no disrespect to the guys on the jury, but guys have this -- oftentimes this kind of stupid, macho thing going on where we won't step back. We won't step down. And you add liquor into that equation, it gets ugly."

¶15 O'Boyle's lawyer argued in his closing:

> [O'Boyle] wanted this to kind of go away. It didn't go away. You heard Mr. Gutowski say that, "I wish I wasn't here. I don't want to be here." But when he talked to the officer, he told the truth; and when he was on that stand, he told the truth.

In rebuttal closing, the prosecutor argued:

> Why doesn't Giles Gutowski want to testify for his friend? *Hey, what I saw, this guy was defending himself.* Why doesn't he want to do that? Because it's not what he saw. What he realized was a punch, he now was, *Holly. He was stabbing him? That's outrageous. He stabbed that guy? And now I got to come in and testify about my friend who wasn't defending himself.* That's why he doesn't want to be here. To come in and say, *Hey, from what I saw, that Moran guy looked like he was about to kill my friend. My*

> *friend did the right thing. What any of us would have done.*
> No.

(Italics in original because, as noted, the court reporter italicized parts of the transcript dialogue; neither party raises that as an issue.)

¶16 The jury found O'Boyle guilty of the lesser-included offense of attempted second-degree intentional homicide. After sentencing, O'Boyle filed a postconviction motion. The trial court held a hearing on his claim that Detective O'Leary did not follow proper police procedures when Moran identified O'Boyle from the photo-array lineup. Specifically, O'Boyle argued: (1) the timestamp on the six-pack photo array used at a pre-trial hearing postdates the time O'Leary says she prepared it; (2) O'Boyle is listed as number five on the six-pack form, but Moran identified him as number three in the photo-array lineup; (3) a report refers to eight potential suspect numbers when there were only six photos; (4) Moran's signature on the photo-array identification form looks different than his signature on the restitution worksheet; and (5) O'Leary did not put each photo in a separate folder, but showed Moran one sheet with all six on it.

¶17 At the postconviction hearing, Moran testified that:

- He signed both forms, both signatures were his, and they look different because one was "more formal than the other."
- O'Leary came to his house on July 10, 2011, and had him look at eight manila envelopes. The first six had individual photos in them. The last two folders were blank. Moran identified O'Boyle's photo as the person who stabbed him. O'Boyle's photo was in envelope number three.

¶18 O'Leary testified at the postconviction hearing that:

- The paper with all six line-up suspects on it is called a "six-pack." The six-pack is "a form that's generated by the computer" and has nothing to do with the order in which the photos are shown to the victim or witness, because: "each of these photos is placed into an individual folder. That folder is then shuffled by another member of the department and that is what is actually shown to the victim."

- Moran never saw the six-pack form.

- Each of the six photos goes into a folder separately and two blank folders are added to the end "so that when the victim is viewing the folders they don't get to the last folder containing a photo and sort of panic and think that they have to make an identification so that there's still more folders in front of them that they think are going to contain additional photos."

- Another officer shuffles the folders so the presenting officer does not know in which folder the suspect's photo is so as to prevent any attempt to influence the identification.

- No one forged Moran's signature.

- Moran viewed the individual photo folders one at a time and identified O'Boyle as the man in the third folder.

- O'Leary did not know what folder O'Boyle was in before Moran identified him.

- O'Leary prepared the photo-array lineup on July 10, 2011, but the six-pack photo-array form was regenerated in preparation for trial. It is time-stamped October 10, 2011 "[b]ecause this Exhibit [] which is the actual one that was placed on inventory was already inventoried with the Property Control Bureau, and so rather than pulling that document from property control, making a copy of it and then sending it I utilized the number that it was saved under which is the 15383, pulled that up, printed it and sent it, and apparently --I don't recall specifically doing that on October 10th --but based on the fact that's the date listed on that document I would speculate that's when it was done."

- O'Leary showed Moran the photo array pictures one at a time.

¶19 At the end of the postconviction hearing, the trial court denied O'Boyle's postconviction motion:

> [B]ased upon the testimony of the victim and Detective O'Leary where I think it's quite clear that there was nothing done that was so defective and so far afield from the established procedures both of the Milwaukee Police Department and also the office of the Attorney General such as to render this identification unusable for the purpose of probable cause, so even if it was --there was some defects that would rise to the level of suppressing this identification which I don't believe there were it would take an even greater --the amount of deviation would be required here in my view to eliminate probable cause would be something dishonest or basically something that was liberally done to either taint the process, mislead the victim or some other way make the whole process so defective as to be unusable which in my view would be something substantially worse than what might constitute the basis for suppression of this case so I'm not going to subject counsel to testifying in this case based on what I've heard.

II.

A. *Ineffective Assistance*.

¶20 O'Boyle argues his trial lawyer gave him constitutionally deficient representation by not asking for jury instructions on eyewitness identification and general impeachment of witnesses, and that the trial court erred in denying his ineffective assistance claim without having a hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979) (normally, the trial court must hold an evidentiary hearing to decide whether a trial lawyer gave his or her client constitutionally ineffective representation). To establish constitutionally ineffective assistance, O'Boyle must show: (1) deficient performance; and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, O'Boyle must identify specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." *See* ***id.***, 466 U.S. at 690. To prove prejudice, O'Boyle must establish that his lawyer's errors were so serious that O'Boyle was deprived of a fair trial and a reliable outcome. *See* ***id.***, 466 U.S. at 687.

¶21 To get a ***Machner*** hearing, O'Boyle has to show facts that, if true, would entitle him to the relief he seeks. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576–577, 682 N.W.2d 433, 437–438 (The trial court has the discretion to deny a postconviction motion for a ***Machner*** hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief."). Our review on whether the motion raised sufficient facts to get a hearing is *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996).

¶22 There was no basis for O'Boyle's trial lawyer to request either jury instruction. First, the eyewitness identification instruction, WIS JI—CRIMINAL 141 instructs as material: "If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime." This instruction is only relevant when the identity of the defendant is contested. That was not the case here. Rather, O'Boyle admitted that he stabbed Moran, albeit allegedly in self-defense. O'Boyle did not argue that the State had the wrong guy or deny that he stabbed Moran. O'Boyle's trial lawyer had no basis upon which to request the eyewitness identification instruction.

¶23 Second, the general impeachment instruction, WIS JI—CRIMINAL 330 provides: "Evidence has been received regarding a witness' character for truthfulness. You may consider this evidence in weighing the testimony and determining credibility." Here, there was no basis for this impeachment instruction. The trial court properly read the instruction for impeachment of a witness with prior convictions because Moran testified that he had three prior convictions. *See* WIS JI—CRIMINAL 325 ("Impeachment of witness: prior conviction or juvenile adjudication: Evidence has been received that one of the witnesses in this trial has been convicted of crimes. This evidence was received solely because it bears upon the credibility of the witness. It must not be used for any other purpose.").

¶24 Accordingly, O'Boyle has failed to prove any claim of ineffective assistance, and the trial court did not err in denying O'Boyle's the motion on this ground without holding an evidentiary hearing.

B. *Photo Array*.

¶25 O'Boyle next argues that O'Leary failed to comply with proper police procedures in conducting the out-of-court photo-array lineup with Moran at his home on July 10, 2011. As we have seen, he claims a litany of problems with the photo array: (1) the timestamp on the photo array used at trial post-dates the time O'Leary says she prepared it; (2) O'Boyle is listed as number five on the six-pack form photo array, but Moran identified him as number three at the time of the photo-array lineup; (3) a report refers to eight potential suspect numbers when there were only six pictures; (4) Moran's signature on the photo-array identification form looks different than his signature on the restitution worksheet; and (5) O'Leary did not put each photo in a separate folder, but showed Moran one sheet with all six pictures on it.

¶26 As we have seen, however, O'Boyle lost on his pre-trial challenge to the photo array and his lawyer then told the trial court he did not want the photo array suppressed. We have further seen that all of the problems O'Boyle raises with the photo array were explained away at the postconviction hearing: (1) the timestamp had October 10, 2011, because O'Leary reprinted it instead of copying the one that was printed on July 10, 2011; (2) O'Boyle's placement as number five on the six-pack form was not inconsistent with him being in folder number three; (3) the report refers to eight folders because two extra blanks are always added to the six with photos; (4) both signatures were Moran's, as Moran admitted; and (5) Moran did not pick O'Boyle out of the six-pack; rather, one photo was put in each of the six folders for individual viewing. Accordingly, this issue has no merit and we do not discuss it further.

C. *Closing Argument.*

¶27 O'Boyle next contends that the prosecutor crossed the line in closing argument by stating his opinion as fact and inaccurately paraphrasing Gutowski's testimony. O'Boyle's trial lawyer did not object to these allegedly improper comments, and therefore, our review will be under the ineffective-assistance standards set forth above. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 (in the absence of an objection we address forfeited issues under the ineffective-assistance-of-lawyer rubric).

¶28 A prosecutor is allowed wide latitude in closing argument and "may comment on evidence and argue from it to a conclusion." ***State v. Cockrell***, 2007 WI App 217, ¶41, 306 Wis. 2d 52, 76, 741 N.W.2d 267, 278. Objecting to fair comment would be frivolous and therefore not constitutionally deficient representation.

¶29 Here, O'Boyle complains about three comments made by the prosecutor. The first is the prosecutor's argument that if someone puts a knife into you twice, we would all think "That guy's trying to kill me." The second is the prosecutor's commentary about guys being macho and not wanting to "step back" or "step down" from a confrontation. Both of these are fair comments based on the evidence and reasonable inferences from the evidence.

¶30 The third challenged comment came during the prosecutor's rebuttal closing. As we have seen, O'Boyle objected to the prosecutor's explanation about why Gutowski testified that he did not want to be in court. O'Boyle's trial lawyer brought this up in the defense closing to explain why O'Boyle initially claimed he did not stab Moran, but later said he stabbed Moran in self-defense—because he was afraid and "wanted this to kind of go away" just like Gutowski wanted it to go

away as evidenced by Gutowski's testimony that he did not want to be in court. In response, the prosecutor gave another potential explanation for why Gutowski might not want to be in court—he did not want to hurt his friend, and he felt bad that he did not see things consistent with what the defense theory proposed. The prosecutor's comment on Gutowski's testimony was a fair comment based on the evidence and a fair response to the defense closing. *See* ***United States v. Anderson***, 303 F.3d 847, 854 (7th Cir. 2002) (greater latitude allowed in rebuttal closing when defense invites the comments).

¶31 Accordingly, O'Boyle's trial lawyer did not give him ineffective representation when he did not object during the prosecutor's closing. Moreover, the trial court instructed the jury that closing arguments are not evidence and the case should be decided based solely on the evidence. We presume the jury followed the instructions given and by doing so, "minimize[d] the potential for unfair prejudice." ***State v. Hammer***, 2000 WI 92, ¶36, 236 Wis. 2d 686, 709, 613 N.W.2d 629, 640. We reject O'Boyle's claim that his trial lawyer gave him constitutionally ineffective when he did not object to the prosecutor's closing comments challenged on this appeal.

D. *Hearsay*.

¶32 O'Boyle seeks a new trial on the ground that the trial court erroneously allowed hearsay evidence to be introduced. Specifically, he complains about O'Leary's testimony at the pre-trial hearing about things Gutowski and Esselman told O'Leary during police interviews. He also complains about Phillipson's testimony during trial about what Wissbroecker and Gutowski told Phillipson.

¶33 We review the trial court's decision to admit or exclude evidence as a discretionary determination that will not be upset on appeal as long as it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). Hearsay evidence is generally inadmissible at trial unless a hearsay exception applies. Statements made by someone other than the declarant when testifying at trial are hearsay when offered to prove the truth of the matter asserted. ***State v. Britt***, 203 Wis. 2d 25, 38, 553 N.W.2d 528, 533 (Ct. App. 1996); WIS. STAT. RULE 908.01(3). Hearsay is inadmissible unless a recognized hearsay exception applies. ***Ibid.***; WIS. STAT. RULES 908.02, 908.03.

¶34 With regard to O'Leary's pre-trial testimony, the trial court specifically ruled at the pre-trial hearing that the statements about which O'Boyle complains were not being admitted for the truth of the matter, but, rather, to show how the "police are gathering information." This testimony, then, was not hearsay because it was not offered for its truth, but to explain the conduct of the police and how the police found O'Boyle because O'Boyle challenged those procedures. Thus, the assertion was accordingly specifically excluded from the "hearsay" definition. *See* WIS. STAT. RULE 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); ***State v. Medrano***, 84 Wis. 2d 11, 19–20, 267 N.W.2d 586, 589 (1978) (testimony is proper when not offered for the truth but to explain subsequent actions). This was a fair and reasonable ruling and the trial court did not erroneously exercise its discretion in allowing O'Leary's testimony.

¶35 With regard to Phillipson's testimony, O'Boyle objects to what Phillipson testified about Gutowski.[3] The trial court found Phillipson's testimony admissible as an inconsistent statement under the hearsay exclusion in WIS. STAT. RULE 908.01(4). That provision reads:

> **(4)** STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> (a) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> 1. Inconsistent with the declarant's testimony[.]

This is what happened here and the trial court did not err in viewing this testimony as an inconsistent statement. As we have seen, Gutowski testified to something different than he told Phillipson. Gutowski told Phillipson he did not see the incident, but Gutowski told the jury that he saw O'Boyle hit Moran one time and saw Moran holding onto O'Boyle's shirt. Phillipson's testimony therefore was within RULE 908.01(4).

E. *Amendment of Charge*.

¶36 O'Boyle argues that the State violated WIS. STAT. § 971.29(1) when it amended the information after arraignment without leave of the trial court. WISCONSIN STAT. § 971.29 provides:

> **(1)** A complaint or information may be amended at any time prior to arraignment without leave of the court.

[3] O'Boyle also objects to Phillipson's testimony about Wissbroecker, but does not develop this argument most likely because the defense lawyer did not object when Phillipson testified about Wissbroecker. We reject this argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (We may reject undeveloped arguments that are supported by only general statements.).

> **(2)** At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.
>
> **(3)** Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

¶37 The Record shows that at the motion hearing on March 8, 2012, the following occurred:

> [Prosecutor]: And are we going to arraign him on the amended Information today?
>
> THE COURT: Yeah.
>
> ….
>
> [Prosecutor]: Or do you want to do it on the 30th?
>
> THE COURT: That was filed on February 27th. Thank you, [prosecutor]. The last time we were in court was February 24th.
>
> You've got the amended Information, [defense lawyer]?
>
> [Defense lawyer]: Yes. And we waive--
>
> THE COURT: And you waive reading?
>
> [Defense lawyer]: Yes, sir.
>
> THE COURT: And your client's plea to the amended Information?
>
> [Defense lawyer]: Not guilty.
>
> THE COURT: Okay. So we've done the arraignment on the amended Information.

¶38 From this recitation, the trial court appears to have granted leave on the amended Information. O'Boyle did not object, thereby cutting off further argument and trial court explication. Moreover, O'Boyle's argument on appeal is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (We may reject undeveloped arguments that are supported by only general statements.).

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.