COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal Nos. 2014AP1566
2014AP1567

Cir. Ct. Nos. 2011CF001566
2011CF003695

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROYCE L. HAWTHORNE,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

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

¶1 BRENNAN, J. Royce Hawthorne, *pro se*, appeals the orders denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2013-14)[1] and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). Hawthorne raises a laundry list of issues all related to the alleged ineffective assistance of his postconviction/appellate counsel.[2] For the reasons which follow, we conclude that all of the issues Hawthorne raises are without merit, and affirm.

BACKGROUND

¶2 In April 2011, the State filed a criminal complaint charging Hawthorne with one count of first-degree recklessly endangering safety by use of a dangerous weapon as an act of domestic abuse, and one count of being a felon in possession of a firearm. According to the complaint, Hawthorne shot his brother, Corneil Hawthorne, at the home they shared with their mother, Grace Hawthorne.

¶3 At the preliminary hearing, Grace appeared and testified but Corneil did not. Subsequently, an investigator from the district attorney's office learned about three telephone calls made from the jail where Hawthorne was housed to a third Hawthorne brother and two women, including Hawthorne's girlfriend. During those calls, the man calling from the jail identified himself as "Royce" and asked the listeners to convince his mother and brother not to show up for court. The investigator played "snippets" of the calls for Grace, who identified

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] As we explain in more detail in Section II, Hawthorne's claims that he received ineffective assistance of appellate counsel were not properly brought in his WIS. STAT. § 974.06 motion; rather, the claims should have been brought in a *habeas corpus* petition pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

Hawthorne as the speaker. The State then filed a second complaint, charging Hawthorne with two counts of witness intimidation based upon the phone calls. Both cases were joined together for trial.

¶4 On the morning of trial, both Grace and Corneil failed to appear despite being personally served with subpoenas. The State sent investigators out to look for them, but when the investigators failed to locate them, the State sought to have statements Grace and Corneil made to police admitted pursuant to the forfeiture-by-wrongdoing doctrine. A hearing was held on the State's motion.

¶5 At the hearing, Anna Linden, an investigator for the district attorney's office, testified that she listened to recordings of three telephone calls made from the jail. She was able to verify that each call corresponded to Hawthorne's housing assignment in the jail. In the recordings, she heard a male inmate "ordering" another individual "to go speak to the witness and the victim and tell 'em not to show up to court." Linden testified that she played "snippets" of the recordings to Grace, who identified the male voice as Hawthorne's.

¶6 Milwaukee Police Detective Michael Washington also testified at the forfeiture-by-wrongdoing hearing. He testified that he had briefly spoken to Hawthorne on two occasions while investigating the shooting. He testified that he was familiar with Hawthorne's voice, and recognized the voice in the telephone recordings as Hawthorne's.

¶7 Hawthorne's trial counsel objected to admission of the recordings on two grounds. First, he argued that the State failed to "authenticate" the recordings, in that counsel contended that "there's no evidence to show that it was [Hawthorne] on those phone calls"; counsel also contested the manner in which Detective Washington was asked to authenticate Hawthorne's voice. Second, trial

counsel argued that the State failed to show "cause," that is, trial counsel argued that "there was insufficient evidence that the calls led to the witnesses' non-appearance at trial."

¶8 After listening to the testimony and the three jailhouse recordings, the trial court granted the State's motion and permitted into evidence at trial the statements Grace and Corneil made to police. In doing so, the trial court found:

> On each call, the voice identifies himself as Royce, not a real common name. He --
>
> The call is made from a location where the defendant was housed at the time of each call.
>
> He has a great deal of factual information about this particular case, including the date of the prelim, and a -- he talks about his mother, he talks about his brothers, he talks about the two of them cannot testify. They are the main witnesses in the case by the State against the defendant.
>
> ….
>
> But what we do have is a great deal of anger and -- directed at two potential witnesses in this case.
>
> He goes on and on about, fuckin' holler at them, make sure they don't come, make sure his ass doesn't come to court. If he do that, shit's gonna happen. Ain't nothing gonna happen to you if you don't come.
>
> It goes on and on.
>
> You make sure they don't come to court. Go across the alley and holler at 'em, 'holler at 'em, holler at 'em. Do what a bitch is supposed to do. Tell my mama to do what a bitch is supposed to do.
>
> The information is very coercive, it's very threatening. And it was meant to be. It wasn't a polite, nice conversation discussing what might happen if somebody doesn't come to court.

The case then proceeded to trial.

¶9 At trial, Milwaukee Police Detective Joseph McLin testified that he was dispatched to the hospital in April 2011, to meet Corneil, who had been shot in the leg. Detective McLin testified that Corneil told him that Hawthorne had shot him during an argument.

¶10 Detective McLin also testified that he met with Grace, who told him Corneil and Hawthorne had been arguing earlier that day and that she saw Hawthorne leave Corneil's basement bedroom holding a gun. She told Detective McLin that she tried to stop her sons from arguing, but when she was unsuccessful, she left the scene. Grace then heard a loud shot, returned to the scene, and saw Corneil seated on the floor. Grace saw Hawthorne then open the back door, still holding the gun. Hawthorne later told Grace that he had taken Corneil to the hospital for a "graze gunshot wound," and Hawthorne apologized to her for shooting his brother.

¶11 Investigator Linden testified consistent with her testimony at the forfeiture-by-wrongdoing hearing. She told the jury that she had listened to the telephone calls from jail between a man who identified himself as "Royce" and someone else, in which the man told the listener to "make sure mom and DoNo don't come to court." Linden also testified that she had played "snippets" of the recordings to Grace who identified the voice in all three recordings as Hawthorne's.

¶12 The jury found Hawthorne guilty of all counts. He was sentenced to two concurrent terms of three years of initial confinement and three years of extended supervision for the shooting and firearm possession, consecutive to two concurrent terms of two years of initial confinement and two years of extended supervision for the two counts of witness intimidation.

¶13 Through counsel, Hawthorne filed a postconviction motion and a direct appeal pursuant to WIS. STAT. § 809.30, arguing that the trial court erred when it applied the forfeiture-by-wrongdoing doctrine to allow Grace's and Corneil's statements to police officers to be introduced at trial. Hawthorne's postconviction/appellate counsel argued that the witnesses were not legally "unavailable" for confrontation because the State failed to demonstrate good faith and due diligence to compel the witnesses' appearance at trial. The postconviction court denied Hawthorne's motion and we affirmed.

¶14 Thereafter, Hawthorne filed a *pro se* postconviction motion for relief pursuant to WIS. STAT. § 974.06 and ***Rothering***, alleging that his postconviction/appellate counsel was ineffective. The postconviction court addressed Hawthorne's claims that his postconviction counsel was ineffective, and denied the motion based upon those claims; however, the postconviction court declined to address Hawthorne's claims that his appellate counsel was ineffective, concluding that those claims were raised in the wrong forum pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). Hawthorne appeals.

DISCUSSION

¶15 Hawthorne alleges on appeal that the postconviction court erred in denying his WIS. STAT. § 974.06 motion for postconviction relief. He raises a multitude of claims that can be divided into two categories: (1) claims that his postconviction counsel was ineffective for failing to raise claims alleging trial counsel's ineffectiveness; and (2) claims asserting that he received ineffective assistance of appellate counsel. We will address each in turn.

I. Ineffective Assistance of Postconviction Counsel.

¶16 Hawthorne first alleges that his postconviction counsel was ineffective for failing to allege that his trial counsel was ineffective. He contends that trial counsel was ineffective for: (1) conceding Hawthorne's guilt during counsel's opening and closing statements; (2) failing to object to the applicability of the forfeiture-by-wrongdoing exception on confrontation clause grounds; (3) failing to adequately cross-examine a witness; (4) failing to object to the reasonable-doubt jury instruction; (5) failing to object to the amended information; (6) failing to object to joinder; (7) failing to object to the State's selective prosecution; and (8) failing to object to the State's opening and closing statements. We address each in turn.

¶17 A motion brought under WIS. STAT. § 974.06 is typically barred when filed after a direct appeal unless the defendant shows a sufficient reason why he did not or could not raise the issues previously. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may constitute a sufficient reason. *See* ***Rothering***, 205 Wis. 2d at 677-78.

¶18 To prevail on a claim that postconviction counsel was ineffective for failing to argue ineffective assistance of trial counsel, a defendant must establish that trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. In other words, the defendant must show that trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Id.***, ¶¶14-15. To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668,

690 (1984). To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶19 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the postconviction court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

A. *Trial Counsel's Opening and Closing Statements.*

¶20 Hawthorne first complains that his trial counsel allegedly conceded that Hawthorne was guilty of the witness intimidation charges when trial counsel said the following during opening statements: "I can tell you that this trial is going to be mostly about the first degree recklessly endangering safety charge" and "[w]hat they're going to show or try to show is that based on some statements of others and based on some jail recordings, jail phone call recordings, that Mr. Hawthorne is guilty of first degree recklessly endangering safety." Hawthorne also claims that the following statement by trial counsel during closing statement "operated like a directed verdict":

> Exhibit Number 9 is the interior shot from the common hallway that shows where the shotgun hole, according to the State, is in relation to the floor. Remember, there's a window up above and there's the hole. Maybe -- I mean, you'll see the photograph. You've seen the photograph. Maybe -- I'm estimating two and-a-

> half, three feet, something like that above the floor through the doorway. I submit to you that that's consistent with an accidental discharge.

Hawthorne's claim that trial counsel's opening and closing statements were improper is without merit.

¶21 To begin, trial counsel's opening statements were not deficient. The statements that Hawthorne challenges merely explained to the jurors what they would likely hear from the State, in order to place trial counsel's explanation of Hawthorne's defense in context. Trial counsel never conceded any of the charges.

¶22 Trial counsel's closing statement was also not deficient. Hawthorne complains that his trial counsel conceded guilt during his closing statement by suggesting to the jury that the shooting could have been accidental. Given the overwhelming evidence at trial suggesting Hawthorne's guilt, it was not deficient performance for trial counsel to attempt to mitigate the damages by providing the jury with an alternate explanation for the evidence, that is, that the shooting could have been accidental.

¶23 Because Hawthorne has not shown us that his trial counsel's performance during opening and closing statements was deficient, we need not examine whether he was prejudiced by that performance. *See* ***Strickland***, 466 U.S. at 697. Furthermore, because trial counsel's performance was not ineffective, Hawthorne's postconviction counsel was not ineffective for failing to argue otherwise. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583 (An attorney is not ineffective for failing to raise a meritless issue.).

B. *Confrontation Clause*.

¶24 Hawthorne also complains that his trial counsel was ineffective for failing to challenge, on confrontation clause grounds, the trial court's application of the forfeiture-by-wrongdoing doctrine to permit into evidence Grace's and Corneil's statements to police.[3] We disagree.

¶25 "The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" ***Giles v. California***, 554 U.S. 353, 357-58 (2008) (citation omitted; alterations in ***Giles***). The forfeiture-by-wrongdoing doctrine is an exception to that right that allows the admission of hearsay statements by a witness who does not testify at trial once the court determines that the defendant has forfeited his or her right to confront the witness due to improper conduct. *See* ***State v. Baldwin***, 2010 WI App 162, ¶¶34-35, 330 Wis. 2d 500, 794 N.W.2d 769. For the doctrine to apply, the State must prove by a preponderance of the evidence "that the defendant prevented the witness from testifying" and "that the defendant *intended* to prevent the witness from testifying." *See* ***id.***, ¶¶37-39. In addition, the witness must be "[u]navailab[le] for confrontation," which requires that he or she did not appear at trial and "that the State [made] a 'good-faith effort' to produce that [witness] at trial." *See* ***State v. King***, 2005 WI App 224, ¶6, 287 Wis. 2d 756, 706 N.W.2d 181 (citation omitted); *see also* ***Baldwin***, 330 Wis. 2d 500, ¶48 ("WISCONSIN STAT. § 908.04(1)(e) requires the proponent of a witness to secure

[3] Trial counsel did raise objections to the admission of Grace's and Corneil's statements to police on the grounds that: (1) the State had not properly authenticated the jailhouse recording; and (2) the State had not established that Hawthorne's alleged intimidation caused Grace's and Corneil's non-appearance. However, trial counsel did not explicitly object to the admission of the recording on confrontation clause grounds.

the witness's appearance by process or other reasonable means. The proponent must make a good-faith effort and exercise due diligence to secure the witness's presence.") (citations and internal quotation marks omitted).

¶26 The evidence in the record easily meets the State's burden of showing that Hawthorne prevented both Grace and Corneil from testifying and that he did so intentionally. *See* ***id.*** After listening to testimony from Linden, the investigator from the district attorney's office who listened to the jailhouse recordings, and the jailhouse recordings themselves, the trial court found that on each call, the caller identified himself as "Royce," an uncommon name; that each call was made from a location where Hawthorne was housed at the time of the call; and that the caller had a great deal of factual information about the case, including the date of the preliminary hearing. The trial court also found that "Royce" had "a great deal of anger" that was "directed at two potential witnesses in this case," and that the tone of the conversations was "coercive" and "threatening." Furthermore, the State presented evidence that two people familiar with Hawthorne's voice identified the voice in the recordings as Hawthorne's.

¶27 We agree that the evidence found by the trial court is sufficient to show that Hawthorne intentionally acted to prevent Grace and Corneil from testifying. We need not address here whether the State met its burden of demonstrating that the witnesses were unavailable for confrontation because we addressed that issue on Hawthorne's direct appeal and concluded that it had. *See* ***State v. Hawthorne***, Nos. 2012AP1463-CR/1464-CR, unpublished slip op. (WI App May 7, 2013).

¶28 Because the State met its burden to prove the forfeiture-by-wrongdoing exception to the confrontation clause applies, trial counsel's

performance was not deficient for failing to raise a challenge to the admissibility of the evidence on confrontation clause grounds, and postconviction counsel was not ineffective for failing to raise an issue of trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

C. *Failure to Properly Cross-Examine Detective McLin.*

¶29 In his *pro se* postconviction motion, Hawthorne, without elaboration, claimed that "[t]rial counsel was ineffective for not asking Detective McLin more about the other person who was also in the victim's house at the time of the alleged shooting on cross-examination." Hawthorne did not explain this claim in his opening brief, and the postconviction court denied the claim on the grounds that it was conclusory and undeveloped.

¶30 Hawthorne attempted to elaborate upon his claim that trial counsel was ineffective for failing to properly cross-examine Detective McLin in both his reply brief before the postconviction court and in his brief before this court. However, the postconviction court was not required to consider a claim raised for the first time in reply, and we are not required to consider a claim not properly brought before the postconviction court. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (need not address issues raised for the first time in a reply brief); *see* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (need not address issues not properly raised before the circuit court).

¶31 Furthermore, even if Hawthorne had properly raised his claim concerning trial counsel's cross-examination of Detective McLin, he has not shown that trial counsel's performance was prejudicial. The evidence against Hawthorne was overwhelming. The State presented evidence that Corneil said

Hawthorne shot him, that Hawthorne's mother saw him fighting with Corneil and carrying a gun, and that Hawthorne apologized to his mother for shooting Corneil. The State also presented the three jailhouse recordings of Hawthorne attempting to threaten Grace and Corneil to prevent them from testifying, and Hawthorne's mother identified the voice in the recordings as Hawthorne's. The postconviction court did not err in denying the claim.

D. *Failure to Object to the Reasonable Doubt Jury Instructions*.

¶32 Next, Hawthorne complains that the trial court's instruction to the jury that it "search for truth" "misdescribed the Government's burden of proof." That is simply not the case.

¶33 The trial court read the standard jury instruction explaining the State's burden to prove each element of the crimes beyond a reasonable doubt and explaining the presumption of innocence. *See* WIS JI–CRIMINAL 140. As part of that instruction, the trial court stated: "This presumption requires a finding of not guilty, unless in your deliberations you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty. The burden of establishing every fact necessary to constitute guilt is upon the State."

¶34 In short, the jury instruction did not improperly instruct the jury on the burden of proof, and as such, Hawthorne's trial counsel did not act deficiently in failing to object to the instruction, and postconviction counsel did not err in failing to raise an issue of trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

E. *Failure to Object to the Amended Information.*

¶35 Hawthorne argues that his trial counsel should have objected to the State's motion to amend the information just prior to trial. On the first day of trial, the State moved to amend the information to reflect that one count of witness intimidation concerned Grace and the other count of witness intimidation concerned Corneil; the original information mistakenly stated that both counts concerned Grace. When asked if he had any objection to the amendment, Hawthorne's counsel responded: "No. It's -- It was what I thought was a typographical mistake, which I had noticed earlier, but clearly, we're not taken by surprise. … We're not taken by surprise that one of the alleged victims of the attempt dissuasion is Mr. Corneil Hawthorne. …" Hawthorne does not now allege that his trial counsel's assertion that he was prepared to defend against a witness intimidation count concerning Corneil was erroneous. As such, Hawthorne has not shown that trial counsel's failure to object to the amendment was deficient or prejudicial, and subsequently, he cannot show that postconviction counsel acted deficiently in failing to raise an issue regarding trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

F. *Failure to Object to Joinder.*

¶36 Hawthorne also argues that his trial counsel should have objected to joinder of the charges because he believes that the charges "are not so inextricably intertwined that proof of one is impossible without proof of the other." We disagree.

¶37 We review whether joinder was proper under WIS. STAT. § 971.12(1), which allows joinder if the crimes charged "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or

transactions connected together or constituting parts of a common scheme or plan." That statute is construed broadly in favor of initial joinder. ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). For crimes to be of the same or similar character, they must be the same type of offense occurring over a relatively short period of time, and the evidence as to each must overlap. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Whether the charges are properly joined is a question of law that we decide without deference to the trial court. ***Hoffman***, 106 Wis. 2d at 208.

¶38 It is clear in this case that the recklessly endangering safety charge was intertwined with the witness intimidation charges. The basis for the witness intimidation charges was that Hawthorne attempted to prevent witnesses from testifying at his trial on the recklessly endangering safety charge. The witness intimidation charges would not exist but for the recklessly endangering safety charge. As such, Hawthorne has not shown that trial counsel was deficient for failing to object to joinder of the charges or that postconviction counsel was deficient for failing to raise an issue regarding trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

G. *Failure to Object to the State's Alleged Selective Prosecution.*

¶39 Hawthorne also claims that his trial counsel performed ineffectively for failing "to alert the court about selective prosecution." According to Hawthorne, the State violated his equal protection rights when it charged him with witness intimidation, but did not charge the other actors who assisted him. There is no merit to this argument.

¶40 "To establish a prima facie showing on a selective prosecution claim, a defendant must show that the prosecution had a discriminatory effect and

that it was motivated by a discriminatory purpose." ***State v. Kramer***, 2001 WI 132, ¶18, 248 Wis. 2d 1009, 637 N.W.2d 35. The first prong is satisfied if the defendant can show he was singled out for prosecution while others similarly situated were not. ***Id.***

> Under the discriminatory purpose prong, a defendant is not limited to proving his or her case through proof of discriminatory selection based on suspect or arbitrary classifications. In cases involving solitary prosecutions, a defendant may also show that "the government's discriminatory selection for prosecution is based on a desire to prevent the exercise of constitutional rights or motivated by personal vindictiveness on the part of a prosecutor or the responsible member of the administrative agency recommending prosecution."

Id. (citation omitted).

¶41 Hawthorne has made no attempt to demonstrate that his trial counsel could have made a *prima facie* showing of selective prosecution. While Hawthorne alleges that he was "singled out" as the only participant of the intimidation to be charged, he has not alleged that he was similarly situated to the other actors who partook in the crimes or provided any evidence demonstrating the prosecution was motivated by a discriminatory purpose. As such, he has not shown that it was deficient for his trial counsel to fail to raise the issue or that postconviction counsel was deficient for failing to raise an issue of trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

H. *State's Closing and Opening Statements.*

¶42 Hawthorne argues that his trial counsel failed to object to the State's "improper" opening and closing statements. We disagree.

¶43 *Opening statement.* Hawthorne first argues that the State's opening statement was improper because the prosecutor "explained the whole case from the beginning to the end all in his opinion." Hawthorne complains that the prosecutor "made statements like '*Royce went down in the basement, grabbed a sawed-off shotgun, fired the shotgun in the air. He also possessed the firearm, a person prohibited from possessing the weapon*.'" We discern no problem with the opening statement.

¶44 The purpose of an opening statement is to advise the jury of the questions of fact in the case so as to prepare them for the evidence they will hear. ***Beavers v. State***, 63 Wis. 2d 597, 606, 217 N.W.2d 307 (1974). The prosecutor is allowed reasonable latitude when making his opening statement but should be limited to statements based on facts that are admissible and can be proved. *See* ***id.***

¶45 Our review of the State's opening statement reveals that the prosecutor merely set forth the facts of the case and what the State in good faith believed the evidence would show. Trial counsel did not act deficiently for failing to object to an opening statement that was not erroneous nor did postconviction counsel act deficiently for failing to raise an issue regarding trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

¶46 *Closing Statement.* Hawthorne complains that his trial counsel should have objected to the prosecutor's closing statement because the prosecutor "vouched for his witnesses" and gave his "personal opinion." Hawthorne specifically points to the following statements from the prosecutor's closing statement to support his position that the closing statement was improper:

- "Anna Linden, Investigator, you heard from Mrs. Linden. She had no vested interest in this case."

- "Based upon the totality of those circumstances and the stipulation that he's a felon, he's possessing a gun."

- "[Grace] said, yes. That's my son Corey. That's my son Royce, she said, and the women on the phone, one of them came and talked to me or talked to me via the phone and told me not to come to court. Now you have Grace's own words."

We do not find fault with the prosecutor's statements.

¶47 In closing statement, counsel is allowed considerable latitude. ***State v. Burns***, 2011 WI 22, ¶48, 332 Wis. 2d 730, 798 N.W.2d 166. Counsel may "comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). However, counsel may not "suggest that the jury arrive at its verdict by considering factors other than the evidence." ***Id.***

¶48 While some of the prosecutor's remarks during closing asked the jury to infer certain conclusions, those conclusions were reasonably based upon the evidence presented at trial. The prosecutor did not give his personal opinion about the credibility of certain witnesses, but provided fact-based reasons why he believed the jury should credit the testimony of certain witnesses. In short, the prosecutor's remarks were not improper and trial counsel was not ineffective for

failing to object to them; furthermore, postconviction counsel did not act deficiently in failing to raise an issue of trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

I. *Redacted Recordings.*

¶49 Finally, Hawthorne argues that his trial counsel was ineffective for failing to object to the trial court's request that the State make the digital recordings of the jailhouse telephone calls "nicer." At the forfeiture-by-wrongdoing hearing, the trial court requested the State "clean[] up" the recordings so that it would be easier for the jury to follow along with the transcript that had been prepared. The trial court told the State:

> And then, if you want to play -- if you want to play the whole thing, so that they can hear it all in context, you're free to do so. …
>
> But there's no way the jury can follow your transcripts unless that's all they're listening to. They can't guess when it's starting, because it's total chaos on there.

¶50 In so arguing, Hawthorne admits that he heard the recordings in their entirety during the forfeiture-by-wrongdoing hearing, but has not explained how those recordings heard during the hearing were substantively different from those heard by the jury. In short, he has not explained how he was prejudiced by the "cleaned up" versions of the recordings. Without establishing prejudice, he cannot show that his trial counsel was ineffective for failing to object to the "cleaned up" recordings or that his postconviction counsel was ineffective for failing to raise an issue of trial counsel's ineffectiveness. *See* ***Strickland***, 466 U.S. at 697; ***Maloney***, 281 Wis. 2d 595, ¶37.

II. Ineffective Assistance of Appellate Counsel.

¶51 Hawthorne also argues that his "postconviction counsel" should have raised the following issues in Hawthorne's WIS. STAT. § 809.30 appeal: (1) that the State failed to properly authenticate the jailhouse recordings; (2) that the State failed to show that Hawthorne caused the witnesses' unavailability; and (3) that the evidence was insufficient to support the jury's verdict. However, the issues Hawthorne raises above actually concern the performance of his *appellate* counsel, as opposed to his *postconviction* counsel. As such, those claims must be brought in the form of a petition for a writ of *habeas corpus* with this court. *See* ***State v. Starks***, 2013 WI 69, ¶4, 349 Wis. 2d 274, 833 N.W.2d 146; ***Knight***, 168 Wis. 2d at 520. By bringing his claims in a postconviction motion before the circuit court, he pursued his claims in the wrong forum. *See* ***Starks***, 349 Wis. 2d 274, ¶4. However, in the interest of judicial efficiency, we address his claims as if they were properly brought in a *habeas corpus* petition pursuant to ***Knight***. *See* ***Starks***, 349 Wis. 2d 274, ¶4.

¶52 Due process requires that a defendant be afforded the effective assistance of appellate counsel on direct appeal. ***Knight***, 168 Wis. 2d at 511-12. "The purpose of a ***Knight*** petition is to challenge the lawfulness of a defendant's imprisonment based on the denial of effective assistance of counsel on direct appeal." ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶14, 296 Wis. 2d 580, 724 N.W.2d 692. As set forth above, in order to show ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. Appellate counsel is ineffective when he or she ignores issues that "are clearly stronger than those presented." *See* ***Starks***, 349 Wis. 2d 274, ¶¶57, 60 (citation and italics omitted).

¶53 In his direct appeal, Hawthorne's appellate counsel argued that:

> the trial court erred when it applied the forfeiture by wrongdoing doctrine to allow [Grace's and Corneil's] statements to police officers to be introduced at trial. Specifically, Hawthorne argue[d] that the witnesses were not legally "unavailable" for confrontation because the State failed to demonstrate good faith and due diligence to compel the witnesses' appearance at trial.

See ***Hawthorne***, Nos. 2012AP1463-CR/1464-CR, ¶1. We denied his claim on two grounds: First, because Hawthorne forfeited the issue when he failed to raise it before the trial court; second, because even if Hawthorne had not forfeited the issue, the State demonstrated good cause and due diligence by showing that it personally served each witness with a subpoena and also sent its investigators out to look for the witnesses on the morning of the scheduled trial. ***Id.***, ¶¶20-21. Now, Hawthorne raises three new issues he believes should have been raised by his appellate counsel. We address each in turn.

¶54 First, Hawthorne argues that his appellate counsel should have argued, as did his trial counsel, that the jailhouse recordings were not properly authenticated pursuant to WIS. STAT. § 909.01. We review a trial court's decision to admit or exclude evidence for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Pursuant to § 909.01, "[t]he requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

¶55 Here, there was plenty of evidence supporting the trial court's finding that the voice in the jailhouse recordings was Hawthorne's. The speaker identified himself as "Royce"—an uncommon name—in each call, each call was made from a location in the jail where Hawthorne was located, and the speaker

had a great deal of factual information about the case, including the date of the preliminary hearing. Furthermore, Detective Michael Washington, who briefly interviewed Hawthorne on at least two occasions in connection with this case, testified that he had listened to the jailhouse recordings and identified the voice on the recordings as Hawthorne's. Linden also testified that Grace listened to the recordings and identified the voice as Hawthorne's. Collectively, this evidence is sufficient to support the trial court's finding that the voice was Hawthorne's. As such, appellate counsel was not deficient for failing to raise the issue in Hawthorne's direct appeal. Because the issue is without merit, Hawthorne cannot establish that it is "clearly stronger" than the issue raised by appellate counsel on appeal. *See* ***Starks***, 349 Wis. 2d 274, ¶¶57, 60.

¶56 Second, Hawthorne argues that his appellate counsel, like his trial counsel, should have argued that his confrontation rights were violated when the trial court admitted Grace's and Corneil's statements to police into evidence without first showing by a preponderance of the evidence that Hawthorne *caused* Grace and Corneil from appearing at trial. There is no merit to this argument.

¶57 Under the doctrine of forfeiture by wrongdoing, the statement of an absent witness is admissible against a defendant who the trial court determines by a preponderance of the evidence caused the witness's absence. ***State v. Jensen***, 2007 WI 26, ¶57, 299 Wis. 2d 267, 727 N.W.2d 518. Applying the long-established legal definition of causation, the trial court must find that "the defendant's conduct was a substantial factor in producing" the absence of the witness, keeping in mind that "there may be more than one cause" of the witness's absence, and "the acts of two [or] more persons might jointly produce" the absence. *See* WIS JI—CRIMINAL 901. Thus, a trial court need only determine that the defendant's actions were *a* cause of the witness's absence; a defendant's

conduct need not be the *only* cause. *See* ***State v. Block***, 170 Wis. 2d 676, 683, 489 N.W.2d 715 (Ct. App. 1992).

¶58 "Although a [trial] court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." ***Jensen***, 299 Wis. 2d 267, ¶12 (citations and quotation marks omitted). On review, we accept the trial court's findings of fact unless they are clearly erroneous. ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). A trial court properly exercises its discretion when the record shows it "'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted).

¶59 There was plenty of evidence in the record to show that Hawthorne was, at the very least, *a* cause of Grace's and Corneil's failure to appear at trial. After listening to the jailhouse recordings, the trial court found:

> [W]hat we do have is a great deal of anger and -- directed at two potential witnesses in this case.
>
> He goes on and on about, fuckin' holler at them, make sure they don't come, make sure his ass doesn't come to court. If he do that, shit's gonna happen. Ain't nothing gonna happen to you if you don't come.
>
> ….
>
> You make sure they don't come to court. Go across the alley and holler at 'em, 'holler at 'em, 'holler at 'em. Do what a bitch is supposed to do. Tell my mama to do what a bitch is supposed to do.

The trial court found that Hawthorne's behavior, as reflected in the jailhouse recordings "was meant to be" "very coercive" and "very threatening." We agree.

¶60 The threatening and abusive language that the trial court found Hawthorne directed at the witnesses, coupled with their absence from the trial, was sufficient to meet the State's burden of showing that Hawthorne caused Grace's and Corneil's failure to appear to testify at trial. The causation evidence need not be direct, circumstantial evidence can be sufficient. Here, the evidence created a reasonable inference that his threats caused their absence. As such, appellate counsel was not deficient for failing to raise the issue in Hawthorne's direct appeal. Because the issue is without merit, Hawthorne cannot establish that it is "clearly stronger" than the issue raised by appellate counsel on appeal. *See* ***Starks***, 349 Wis. 2d 274, ¶¶57, 60.

¶61 Third, Hawthorne claims that without Grace's and Corneil's statements admitted pursuant to the forfeiture-by-wrongdoing doctrine there is insufficient evidence to support the jury's verdict. However, as we have set forth above, the statements were properly admitted. As such, the evidence was more than sufficient to support the jury's verdict.

¶62 In short, Hawthorne did not show that his appellate counsel was ineffective under the ***Strickland*** standard for failing to raise any of these

arguments, as none is "clearly stronger" than the issue he did raise. *See* ***Starks***, 349 Wis. 2d 274, ¶¶57, 60.[4]

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[4] Hawthorne also claims in his appellate submissions, without further explanation, that his appellate counsel "was ineffective for not raising the issues that the defendant wrote in his letters to post-conviction counsel." Hawthorne's claim that all of the issues raised in the unidentified letters "had merit and would have changed the outcome of the trial" is conclusory. He does not identify what issues he set forth in his letter much less explain the merits of such issues. As such, his claims are undeveloped and we will not address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider on appeal undeveloped arguments). To the extent that Hawthorne may raise additional issues in his brief that we do not address, those issues are also undeveloped and we similarly decline to address them.