

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0602-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AZIS KOCHIU,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO and RICHARD J. SANKOVITZ, Judges. *Affirmed.*

¶1 CURLEY, J.¹ Azis Kochiu appeals *pro se* from a judgment of conviction entered after a jury found him guilty of battery, contrary to § 940.19(1), STATS., and from an order denying his postconviction motion for a new trial. In

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

his postconviction motion, and again on appeal, Kochiu argues that: (1) the trial court erred by limiting Kochiu's cross-examination of the State's rebuttal witness, Officer Stratton; (2) there was insufficient evidence to convict Kochiu when the evidence offered against him was uncorroborated, untruthful and perjured; (3) the trial court erred by admitting "other acts evidence"; (4) the State failed to give Kochiu adequate notice of the accusation; (5) the prosecutor engaged in misconduct by making erroneous statements in his closing argument; (6) the prosecution failed to disclose exculpatory evidence; and (7) Kochiu's counsel was ineffective. The trial court denied Kochiu's postconviction motion without a hearing. After reviewing the record, this court has not found any grounds for reversal and, therefore, the trial court's decision is affirmed.

I. BACKGROUND.

¶2 On Easter Sunday, 1997, Azis Kochiu struck Astra Nies on the nose, causing Nies' nose to bleed. The events leading up to this confrontation began when Nies witnessed Kochiu chasing Nies' son and another neighborhood boy off the Kochiu's property. Kochiu reportedly caught one of the boys and shook him violently. Wishing to get to the bottom of this confrontation immediately, Nies walked to the Kochiu residence and knocked on the front door. Kochiu's brother, Naim Kochiu, answered the door and the two began to argue. At some point during the argument, Naim attempted to close the door in Nies' face, but she reportedly prevented him from doing so by placing her foot between the door and the door jam. At this point, Azis Kochiu appeared at the door, there was some pushing between Nies and Azis Kochiu, culminating in Azis striking Nies on the nose.

¶3 The criminal complaint charging Azis Kochiu with battery alleged that he had struck Nies, causing “pain, bleeding and other injury causing swelling to the nose.” Kochiu was convicted after a jury trial and sentenced. Kochiu, now acting *pro se*, filed a motion for postconviction relief seeking a new trial. In his postconviction motion, Kochiu purported to raise three issues; however, in its written decision the trial court identified and addressed seven different issues actually contained in the motion. The trial court denied the motion without a hearing and Kochiu appeals.

¶4 On appeal, Kochiu raises the same three main issues he identified in his postconviction motion: (1) whether the trial court erroneously limited Kochiu’s cross-examination of the State’s rebuttal witness, Officer Stratton; (2) whether the prosecution failed to make full and fair disclosure of exculpatory evidence; and (3) whether Kochiu’s counsel was ineffective. However, under the heading identifying the first issue, Kochiu raises four additional issues:² (a) the State failed to give him notice of the accusations regarding the “new allegations” against him; (b) there was insufficient evidence to convict him; (c) the prosecution erroneously introduced, and the trial court erroneously admitted, “other acts” evidence; and (d) the prosecutor engaged in misconduct by making erroneous statements in his closing argument. Kochiu has not provided this court with

² It is difficult to decipher the various issues and arguments raised in this section of Kochiu’s brief. For example, this court notes that under the first heading Kochiu has included seven subsections. Four of the subsections raise additional issues, and two could simply be subsumed under other subsections as they contain tangential arguments. However, one of the subsections is labeled “The Police Officers [sic] misidentification and inaccuracies in his police report and trial testimony contradicts a supplemental report he gave the defendant after trial, which is Newly Discovered Evidence.” Despite this heading, the section does not raise the issue of newly discovered evidence; however, it does contain arguments relevant to several of the other subsections.

sufficient grounds to reverse the circuit court's dismissal of his postconviction motion and, therefore, this court affirms.

II. ANALYSIS.

¶5 On appeal, Kochiu asks this court to reverse his conviction and grant him a new trial. The issues he raises and the arguments he makes mirror those contained in his postconviction motion. After a review of the record, this court is satisfied that the trial court properly denied Kochiu's postconviction motion and, therefore, this court adopts the thoughtful analysis of the trial court.

A. The trial court properly limited cross-examination of Officer Stratton.

¶6 Kochiu argues that the trial court erroneously limited his cross-examination of the State's rebuttal witness, South Milwaukee Police Officer David Stratton. The State called Officer Stratton as a rebuttal witness after the defense rested. The record reveals that Officer Stratton's testimony was limited to his observations of Astra Nies and her son and the statements Officer Stratton took from the defendant, compiled immediately after Officer Stratton arrived at the scene. However, Kochiu's attorney wished to cross-examine beyond these two topics. The State objected, asserting that Kochiu's attorney's questions were "[b]eyond rebuttal." The trial court called for a side bar and continued the discussion in chambers. Despite Kochiu's attorney's efforts *in camera*, the trial court would not permit Kochiu's attorney to explore areas beyond the scope of Officer Stratton's rebuttal testimony. Kochiu contends that these limitations violate his Sixth Amendment right to confrontation.

¶7 Generally, cross-examination is not limited to the scope of direct examination; however, cross-examination is limited to material or relevant

matters. See *State v. Rogers*, 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980). “[T]he test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony.” *Id.* A reviewing court will not reverse the trial court’s decision to limit cross-examination unless the limitation “impinges upon a substantial right of a party.” *Id.*

¶8 The trial court properly limited Kochiu’s attorney’s cross-examination of Officer Stratton to the two areas explored during the State’s examination. During the conference in chambers, the trial court noted that Kochiu’s attorney intended to explore topics that had already been explored during the case in chief. Furthermore, the trial court noted that the defense had ample opportunity to subpoena Officer Stratton or call him as a witness, but the defense had failed to do so. Therefore, this court concludes that the trial court properly concluded that the evidence Kochiu’s attorney wished to elicit on cross-examination was not relevant because it would not be useful to the trial court in appraising the witness’ credibility or evaluating the probative value of his direct testimony. This court is satisfied that the trial court’s decision to limit Kochiu’s attorney’s cross-examination of Officer Stratton did not impinge on any of Kochiu’s substantial rights.

¶9 Moreover, because the State presented Officer Stratton as a rebuttal witness, the trial court properly exercised its discretion in controlling the scope of his testimony. The trial court generally enjoys broad discretion when “controlling the evidence to be admitted in rebuttal.” *State v. King*, 75 Wis.2d 26, 42, 248 N.W.2d 458, 466 (1977). Here, the trial court exercised its discretion by limiting Kochiu’s cross-examination of the State’s rebuttal witness to the scope of the

questions asked during the direct examination. Generally on appeal, the reviewing court will uphold the trial court's discretionary decision if the trial court "examined the relevant facts; applied a proper standard of law; and using a demonstrative process, reached a conclusion that a reasonable judge could reach." *State v. Sullivan*, 216 Wis.2d 768, 780-81, 576 N.W.2d 30, 36 (1998). In determining whether the trial court properly exercised its discretion, this court adopts the analysis employed by the trial court in deciding Kochiu's postconviction motion. In its written decision, the trial court asserted:

I have reviewed the transcript of the chambers' conference in which Judge DiMotto made her ruling. She discussed with counsel the type of testimony the defense wished to elicit, she applied a proper standard of law ... she applied that rule to the facts before her in a reasoned way and she reached a conclusion that other reasonable judges often reach. Bolstering her conclusion is the fact that the apparent inconsistencies which the defense sought to elicit from Officer Stratton had already been explored with the other witnesses. Further, the inconsistencies that the defense sought to explore were fairly insignificant. In view of these facts, it was not an abuse of Judge DiMotto's discretion for her to foreclose further examination of Officer Stratton.

This court agrees and concludes that the trial court properly exercised its discretion in controlling the evidence admitted in rebuttal by limiting Kochiu's cross-examination of the State's rebuttal witness to the scope of direct examination.

B. There was sufficient evidence to support the conviction.

¶10 Kochiu argues that there was insufficient evidence presented at trial to support a guilty verdict. Kochiu contends that the evidence was insufficient

because the various witnesses' testimonies were inconsistent, uncorroborated, and even perjured. Kochiu dedicates a large portion of his brief to summarizing the testimony given at trial and generally highlighting the inconsistencies as he views them. Kochiu would have this court conclude that these inconsistencies undermine the validity of the jury's verdict. However, this court does not find Kochiu's arguments persuasive.

¶11 Kochiu has not met the burden placed upon him by *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990). Under *Poellinger*, for the evidence to be insufficient to support Kochiu's conviction, he would have to establish that "the evidence viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* at 501, 451 N.W.2d at 755. Kochiu argues that the inconsistent, uncorroborated, and perjured testimony of various witnesses renders it impossible for a trier of fact acting reasonably to find the requisite degree of guilt. However, the credibility of witnesses, the resolution of inconsistent testimony, and the weight of the evidence are the exclusive province of the jury, *see id.* at 506, 451 N.W.2d at 757, and, in this case, the jury resolved the inconsistencies against Kochiu.

¶12 In denying Kochiu's postconviction motion, the trial court asserted:

In this case, after reviewing the transcripts of the State's witnesses ... I am firmly convinced that the jury sorted through [the] inconsistencies and believed that Mr. Kochiu hit Ms. Nies in the nose intentionally and without her consent, and therefore decided that he was guilty as charged.

....

Further, the inconsistencies pointed out by Mr. Kochiu are not so grave as to lead a person to conclude that no reasonable jury could have come to the conclusion reached

by this jury. In fact, the inconsistencies pointed out by Mr. Kochiu are relatively trivial compared to the consistent testimony of Ms Nies and Matthew Marcil that they say the defendant hit Ms. Nies in the face. Either the jury would believe that version of events and reject the defendant's, or they would not. The jury apparently found Ms. Nies's story more believable than Mr. Kochiu's and that conclusion must stand.

This court agrees and concludes that there was sufficient evidence to support Kochiu's conviction. Kochiu has failed to establish that the evidence supporting his conviction "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis.2d at 501, 487 N.W.2d at 755.

C. The prosecutor did not engage in misconduct.

¶13 Kochiu argues that the prosecutor misled the jury during his closing argument when he asserted that Kochiu had broken or fractured Nies' nose. Kochiu contends that the prosecutor's comments not only lacked foundation, but also amounted to perjury. Specifically, Kochiu asserts: (1) "The prosecutor made these comments with no foundation contrary to the medical reports [sic]"; and (2) "Furthermore, a prosecutor cannot step outside of the bounds of law and commit perjury by testifying and commenting on facts that aren't true.... This is subornation of perjury and becomes misleading and prejudicial in the jury's minds." Kochiu concludes that because of the prosecutor's comments regarding the alleged broken nose, "the jury might have thought the defendant had used excessive force or he had gone too far in the situation" and, absent the comments, the jury's verdict "could have been much different." This court rejects Kochiu's arguments. This court concludes that Kochiu waived this issue by failing to object to the prosecutor's comments at trial. *See, e.g., Vollmer v. Luety*, 156 Wis.2d 1,

10, 456 N.W.2d 797, 801 (1990) (“This court has continuously emphasized the importance of making proper objections as a prerequisite to assert, as a matter of right, an alleged error on appeal.”); *State v. Schumacher*, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988) (“The court of appeals does not have the power to find that unobjected-to errors go to the integrity of the fact-finding process, and therefore may properly be reviewed by the court of appeals.”).

¶14 Moreover, even if Kochiu had objected, properly preserving the issue for appeal, this court is satisfied that the prosecutor’s comments were within the bounds of acceptable closing argument. Counsel is typically allowed considerable latitude in making closing arguments. *See State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). Also, a reviewing court will ordinarily hold the prosecutor’s comments harmless unless there is a reasonable possibility that the comments contributed to the conviction. *State v. Patino*, 177 Wis.2d 348, 383, 502 N.W.2d 601, 615 (Ct. App. 1993).

¶15 Kochiu fails to allege any facts that would demonstrate a reasonable possibility that the prosecutor’s comments contributed to the conviction. In her testimony at trial, Astra Nies indicated that her nose had been broken. This court notes, as did the trial court, that Judge DiMotto issued the standard jury instruction informing the jury that they were to disregard arguments made by counsel that were not supported by the evidence. Therefore, this court concludes that the prosecutor’s comments were harmless.

D. The State did not fail to disclose exculpatory evidence.

¶16 Kochiu asserts that he was deprived of a fair trial because the State failed to disclose evidence in its possession that would have led to his acquittal. Kochiu maintains that the State failed to disclose Astra Nies’ medical records that

allegedly show that she did not suffer a broken nose. Kochiu concludes that because the prosecutor based the entire case on Nies' broken nose, the medical records revealing that she had not suffered a broken nose were exculpatory. It is Kochiu's position that, under § 971.23, STATS., and the United States Constitution, the State was obligated to turn over Nies' medical records. Kochiu's argument fails for two reasons: (1) § 971.23 only requires the State to disclose certain evidence "upon demand" and Kochiu failed to request that the court order the State to produce the records; and (2) the State did not violate its constitutional obligation to reveal exculpatory evidence because the medical records were not material to Kochiu's guilt or punishment.

¶17 Section 971.23, STATS., requires the State to disclose certain evidence to a defendant "[u]pon demand." Kochiu argues that § 971.23 required the State to produce Nies' medical records. Although Kochiu claims that he requested the medical records prior to trial, there is no documentation of this request anywhere in the record. Therefore, this court must conclude that Kochiu failed to demand the records and, thus, the State was not obligated to produce them under § 971.23.³

¶18 Although the State is obligated to disclose exculpatory evidence within its exclusive possession or control, the obligation only applies when that evidence is material to either guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here, even if Nies' medical records did demonstrate that

³ Had Kochiu made a proper request under § 971.23, STATS., the State still would not have been required to produce Nies' medical records. Section 971.23, STATS., in pertinent part, only requires the State to produce evidence the district attorney intends to introduce at trial, or exculpatory evidence. The prosecutor never introduced Nies' medical records at trial, and there is no evidence that he ever intended to introduce the records.

Nies' nose was not broken, the medical records were not material to Kochiu's guilt or punishment. As the trial court explained:

Mr. Kochiu seems under the delusion that if he can prove that Ms. Nies' nose was not broken, therefore [sic] the crime could not have occurred. This is plainly wrong. To convict a person of the crime of battery, the State is not required to prove that the person suffered a particular injury, only that the person suffered some injury or pain. Even if the jury was persuaded that Ms. Nies' nose was not broken, they still could conclude – quite readily, in fact – that her nose was injured (hence, the profuse bleeding) and that she suffered pain (not a difficult inference to draw from the fact that someone has been hit so hard in the face that his or her nose begins to bleed profusely). Even if the medical records had been disclosed, the jury's verdict would have been the same.

This court agrees. The jury's verdict would have been the same even if Nies' medical records had been disclosed. Further, the records are not material to Kochiu's guilt or punishment, thus, the State was not obligated to disclose Nies' medical records.

E. Kochiu fails to establish a claim for ineffective assistance of counsel.

¶19 Kochiu contends that he was denied the effective assistance of counsel. Kochiu claims that his trial counsel was ineffective for five reasons: (1) counsel failed to cross-examine prosecution witnesses in any meaningful way; (2) counsel failed to subpoena Officer Stratton, the State's rebuttal witness; (3) counsel failed to subpoena other "key witnesses" despite Kochiu's requests; (4) counsel failed to introduce exculpatory evidence in his possession to contradict the State's witnesses' testimony; and (5) counsel failed to object to the prosecutor's references to Nies' allegedly broken nose. Kochiu concludes that

counsel “performed below the standards set for effective counsel and absent his mistakes the result would have been different.”

¶20 The familiar two-pronged test for ineffective assistance of counsel claims requires the defendant to prove (1) deficient performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984); *State v. Bentley*, 201 Wis.2d 303, 311-12, 548 N.W.2d 50, 54 (1996). If the defendant’s postconviction motion claiming ineffective assistance alleges sufficient facts which, if true, would entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary hearing. *See Bentley*, 201 Wis.2d at 310, 548 N.W.2d at 53. However, if the postconviction motion fails to allege sufficient facts, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has discretion to deny the motion without a hearing. *See id.* A reviewing court will only reverse this decision upon an erroneous exercise of discretion. *See id.* at 311, 548 N.W.2d at 53.

¶21 This court is satisfied that the trial court properly denied Kochiu’s postconviction motion without a hearing, and this court adopts trial court’s decision that, even if Kochiu’s attorney’s performance was substandard, Kochiu is unable to satisfy the second prong of the test—prejudice. Kochiu is unable to establish prejudice because, as the trial court asserted, “the errors Mr. Kochiu alleges either were not errors or, even if they were, were immaterial to the outcome of the trial.” This court, like the trial court, is satisfied that “even if Mr. Kochiu had been permitted to introduce all the evidence he wished to introduce and conduct all the examinations he wished his attorney to conduct, there would have been substantial evidence upon which the jury could have rested their verdict – guilty.” Therefore, this court concludes that the record conclusively demonstrates that Kochiu is not entitled to relief. To the extent that he has alleged

facts constituting deficient performance or prejudice, they are merely conclusory allegations. For these reasons, this court is satisfied that the trial court properly exercised its discretion in denying his postconviction motion for ineffective assistance without a hearing.

F. This court need not consider the remaining issues.

¶22 Kochiu raises additional conclusory and vague arguments throughout his brief. For example, Kochiu asserts: “(A) The trial prosecutor did not give the defendant Notice of Accusation regarding new allegations which surprised the defendant, thus not giving him the chance to fairly protect himself regarding the exact charge”; and “(B) The prosecution erroneously admitted other allegations.” Kochiu contends that the “new allegations” amount to “extrinsic other acts evidence,” and “[t]he defendant wasn’t allowed to present his defense by cross-examining the officer to show the jury that these allegations, which surprised the defense, were not stated to the officer.” This court need not address any of the remaining arguments interspersed sporadically throughout Kochiu’s brief because these arguments are amorphous and insufficiently developed. *See Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995).

¶23 Therefore, for all the aforementioned reasons, the trial court’s judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

