COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2725-CR **Cir. Ct. No. 2011CF147**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE T. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Lawrence Davis, pro se, appeals from a judgment of conviction for armed robbery, armed burglary, and nine counts of false imprisonment, and an order denying his motion for postconviction relief. Davis

raises a number of arguments regarding his trial and the postconviction proceeding, which we reject for the reasons discussed below.

BACKGROUND

¶2 Davis was charged with two counts of armed robbery, one count of armed burglary, and nine counts of false imprisonment, all as party to a crime. The complaint alleged that on May 7, 2011, Davis and another individual, who were both masked and armed, invaded a residence where they ordered the occupants "to the ground." The complaint alleged Davis and the other man stole a phone and approximately $180.

¶3 The case was tried before a jury over five days. Evidence at trial included: testimony from Rosaline Kelly, who testified that Davis had asked her to provide an alibi for him for May 7, 2011; testimony from Sharon Peters, who testified that she lived near the residence where the home invasion occurred, that she called 911 to report the incident, that she observed the masked men enter the residence where the home invasion occurred, that she observed the masked men remove their masks in front of her house, that she had a "[v]ery good" look at the faces of the masked men, and that Davis was one of the men she observed; and testimony and exhibits regarding the usage and general location of Davis's cellular phone around the time of the home invasion.

¶4 The jury found Davis guilty of one count of armed robbery, one count of armed burglary, and nine counts of false imprisonment. Following trial, Attorney Michael Covey was appointed as Davis's postconviction/appellate counsel. In August 2012, Attorney Covey moved the circuit court to withdraw as counsel on the basis that he and Davis had "differences of opinion about the case" and Davis wished to pursue postconviction relief pro se. In a motion to extend the

time in which Davis had to file a postconviction motion, Attorney Covey explained that he had "review[ed] [] the file and found no postconviction issues … [and] had planned to file a no-merit report." The circuit court granted Attorney Covey's motion to withdraw, but before doing so, failed to ascertain whether Covey's waiver of counsel was knowing, intelligent, and voluntary, and that Davis was competent to proceed without counsel.

¶5 Following Attorney Covey's withdrawal, Davis filed a number of pro se motions, including a motion seeking to subpoena certain telephone records on the basis that they had been manipulated by police, and a pro se motion for postconviction relief. Davis appeared pro se at the multiple hearings held on his motions. Following those hearings, the circuit court denied Davis's motion to subpoena the phone records and his motion for postconviction relief.

¶6 Thereafter, Davis filed a notice of appeal and a request for the appointment of appellate counsel. In an April 2014 order, we stated that if Davis had validly waived his right to postconviction and appellate counsel, he was not entitled to appointment of counsel on appeal. We further stated, however, that we were unable to tell from the information before us (the circuit court docket entries) whether Davis had validly waived his right to counsel, and we ordered Attorney Covey to provide further explanation of the circumstances under which Davis waived his right to counsel. In Attorney Covey's response to this court, he conceded that the record was insufficient to demonstrate the validity of Davis's waiver of postconviction and appellate counsel. Accordingly, we ordered Attorney Covey to seek reconsideration of the circuit court's order allowing him to withdraw as postconviction counsel.

¶7 Pursuant to our order, Covey moved the circuit court for reconsideration of the court's order allowing him to withdraw as Davis's attorney. Following a hearing on the motion, the circuit court vacated its order allowing Attorney Covey to withdraw. Thereafter, in October 2014, Attorney Covey informed the circuit court that Davis had again asked Attorney Covey to withdraw from the case and that Davis would be proceeding with his appeal pro se. Following a hearing, the circuit court found that Davis was competent to represent himself and that he was aware of the possible difficulties of doing so, and the court granted Attorney Covey's motion to withdraw. Davis appeals.

ANALYSIS

¶8 In many instances, Davis's briefing is difficult to understand and his arguments are not well developed. To the extent that we have not addressed an argument or sub-argument, those arguments are denied because they are inadequately briefed, even under the liberal threshold for a pro se appellant, and lack any discernable merit. *See* ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998) ("We cannot serve as both advocate and judge."); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address insufficiently developed arguments).

¶9 Turning to arguments that we can discern at some level, even if some are not sufficiently developed, Davis contends that: (1) he was improperly denied legal counsel during "critical stages" of the postconviction proceeding; (2) the circuit court wrongly denied his postconviction motion without a hearing; (3) at trial, the circuit court erred in admitting into evidence an in-court identification of Davis; (4) at trial, the circuit court erred in admitting evidence Davis characterizes as other acts evidence; (5) the State engaged in prosecutorial

misconduct at trial; (6) the evidence at trial was not sufficient to sustain his conviction; and (7) this court should exercise its discretionary authority and grant him a new trial. We address, and reject, each of Davis's arguments in turn below.

A. Right to Counsel

¶10 Davis contends that he was wrongly denied his right to postconviction counsel following Attorney Covey's initial withdrawal as his attorney in August 2012.

¶11 "A person convicted in Wisconsin of committing a crime has a constitutionally guaranteed right to appeal his or her conviction to this court." ***State v. Thornton***, 2002 WI App 294, ¶12, 259 Wis. 2d 157, 656 N.W.2d 45; *see* WIS. CONST. art. I, §21(1). If a defendant is indigent, he or she is "constitutionally entitled to the appointment of counsel at public expense for the purpose of prosecuting his or her 'one and only appeal … as of right' from a criminal conviction." ***Id.*** (quoting ***Douglas v. California***, 372 U.S. 353, 357-58 (1963)). A defendant may waive his or her right to counsel and elect to proceed without counsel. However, if a defendant chooses to do so, the circuit court "must insure that the defendant: (1) has knowingly, intelligently, and voluntarily waived [his or her] right to counsel; and (2) is competent to proceed without counsel." ***State v. Coleman***, 2002 WI App 100, ¶13, 253 Wis. 2d 693, 644 N.W.2d 283. Whether a defendant has been wrongfully deprived of his or her right to counsel is a question of constitutional fact, which this court reviews independently as a question of law. ***State v. Cummings***, 199 Wis. 2d 721, 748, 546 N.W.2d 406 (1996).

¶12 It is undisputed that before granting Attorney Covey's August 2012 request to withdraw as Davis's attorney, the circuit court failed to ascertain whether Davis's waiver of his right to counsel was knowing, intelligent and

voluntary, and whether Davis was competent to proceed without counsel. However, the circuit court later vacated its order granting Attorney Covey's motion to withdraw and informed Davis that he had three options: proceed with Attorney Covey as his attorney with the possibility of relitigating issues raised while Davis was unrepresented, if Attorney Covey agreed that doing so was appropriate; hire a private attorney; or proceed pro se. Davis indicated that he wished to proceed pro se and the court granted Davis's second motion to withdraw after first determining that Davis's decision to proceed pro se was knowing, intelligent, and voluntary and that Davis was competent to represent himself.

¶13 As best as we can tell, Davis is arguing that because Attorney Covey's initial withdrawal as his attorney was not valid, Davis should have been permitted to relitigate, pro se, those issues that were litigated by Davis, pro se, following Attorney Covey's August 2012 withdrawal. However, Davis has not argued, nor has he made a showing, that had he been permitted to relitigate those issues, he would have proceeded differently or that the outcome of those proceedings would have been different. Because Davis has not given this court any reason to conclude that relitigation of those issues would matter, we reject Davis's argument.

B. Denial of Postconviction Motions

¶14 In denying Davis's postconviction motions, the circuit court adopted the legal analysis set forth in the State's brief. Davis argues that by doing so, the court failed to properly consider his postconviction submissions and to independently analyze the issues before it. We disagree.

¶15 Judges must make their own independent analyses of issues presented to them for decision, and must also explain their rationales to the parties

and to the public. *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 541-52, 504 N.W.2d 433 (Ct. App. 1993) (improper to "simply accept[] [a party's] position on all of the issues of fact and law without stating any reasons for doing so").

¶16 In the order denying Davis's postconviction motions, the circuit court made clear that it had reviewed and considered Davis's submission, but that it rejected Davis's arguments for the reasons set forth in the State's brief. The court stated:

> The Court has reviewed [Davis's] submissions and a lengthy brief submitted by the State … After reviewing those submissions, the Court agrees with the State's analysis and adopts the analysis set forth in [the State's] … brief. Rather than exhaustively restating the State's analysis, the Court will summarize its decision regarding the primary claims made by [Davis].

The circuit court then went on to address each of the issues raised by Davis in his postconviction motions and to briefly explain the court's reason for rejecting each of Davis's contentions. We agree with the State that the record supports a conclusion that the circuit court independently analyzed the issues before it and that the court sufficiently explained its rationale to the parties.

C. In-Court Identification

¶17 Davis argues that the circuit court erred in allowing into evidence an in-court identification of Davis by Peters. We understand Davis to be arguing that Peters' in-court identification was inadmissible because it was tainted by a prior out-of-court identification of him by photograph.

¶18 An in-court identification may be inadmissible if the identification is preceded by an illegal, prior out-of-court identification. In ***Simmons v.***

United States, 390 U.S. 377, 384 (1968), the United States Supreme Court stated that an in-court identification following an out-of-court identification by photograph is inadmissible "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantive likelihood of irreparable misidentification." *See also* ***State v. Roberson***, 2006 WI 80, ¶32, 292 Wis. 2d 280, 717 N.W.2d 111 ("The admissibility of an in-court identification depends upon whether that identification evidence has been tainted by illegal activity.").

¶19 To prove that the in-court identification was inadmissible, Davis bears the burden of demonstrating that the prior out-of-court identification was impermissibly suggestive. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). Davis has not argued, nor has he made a showing, that the out-of-court photograph identification in this case was impermissibly suggestive, or that it was otherwise unlawful. Accordingly, we reject Davis's argument.

D. Evidence of Prior Convictions

¶20 At trial, Davis advised the circuit court that he intended to present character witnesses who would testify that he had a reputation for peacefulness. In response, the State informed the court that on cross-examination it would ask those character witnesses if they were aware that Davis had prior convictions for battery by an inmate, domestic abuse, and battery.

¶21 Davis argues that the circuit court erred in determining that the State would be permitted to cross-examine his character witnesses about their knowledge of his prior convictions for battery and domestic abuse. Davis argues that because the court ruled that the State could cross-examine his character witnesses about their knowledge of his prior convictions, he decided not to call

those witnesses and as a result, was deprived of his right to put on a defense. Davis characterizes evidence of his witnesses' knowledge of his criminal convictions as other acts evidence that is inadmissible under WIS. STAT. § 904.04(2) (2013-14),[1] and, as best we can tell, challenges the circuit court's ruling on the basis that the court failed to conduct a ***Sullivan***[2] analysis of the admissibility of this evidence.

¶22 We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold the court's decision if the court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Id.***

¶23 In ***Sullivan***, our supreme court set forth a three-step framework for analyzing the admissibility of other acts evidence. Here, however, the evidence was admissible under WIS. STAT. § 904.04(1)(a) to rebut Davis's character evidence, not as other acts evidence under § 904.04(2).

¶24 Under WIS. STAT. § 904.04(1)(a),[3] an accused may produce evidence of his or her good character as substantive evidence of his or her innocence. Davis

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

[2] ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998) (spelling out a three-step framework for analyzing the admissibility of other acts evidence under WIS. STAT. §§ 904.04(2) and 904.03).

[3] WISCONSIN STAT. § 904.04(1)(a) provides:

(continued)

sought to present evidence that he has a character for peacefulness. If a defendant offers evidence of his or her character, the State may rebut the character trait established by the defendant's evidence. ***Id.***; ***State v. Brecht***, 143 Wis. 2d 297, 323, 421 N.W.2d 96 (1988). The State sought to rebut Davis's evidence that has a character for peacefulness with evidence that Davis has prior convictions for domestic violence and battery.

¶25 We agree with the State that because the evidence was admissible under WIS. STAT. § 904.04(1)(a), the circuit court was not obligated to conduct a ***Sullivan*** analysis prior to determining the evidence's admissibility. Davis has not presented this court with a developed argument that the court erred in admitting the evidence under § 904.04(1)(a), or that the evidence was inadmissible for any other reasons. We therefore reject this argument.

E. Alleged Prosecutorial Misconduct

¶26 Davis argues that his conviction should be overturned due to prosecutorial misconduct. Davis argues that the prosecutor engaged in prosecutorial misconduct by suborning perjury at trial by Rose Kelly and Officer Jonathon Caucutt.[4]

> Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (a) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same.

[4] Davis also asserts that the prosecutor engaged in prosecutorial misconduct by asking the witnesses leading questions, but does not develop a persuasive argument in support of that assertion and, therefore, we do not address this topic further.

¶27 We review allegations of prosecutorial misconduct in light of the entire record of the case. *See* ***State v. Lettice***, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996). We will overturn a conviction for prosecutorial misconduct only if the prosecutor's conduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (quoted source omitted). It is the defendant's burden to establish prosecutorial misconduct. *See* ***State v. Harrel***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978).

¶28 In support of his argument that the prosecutor engaged in prosecutorial misconduct, Davis points out that both Kelly and Officer Caucutt testified that Kelly initially told police that Davis was at her home on May 7, but that Kelly later admitted to police that Davis had not been at her house on that date. Davis argues that Kelly's and Officer Caucutt's testimony is inconsistent with a police report prepared by Officer Caucutt. In his report, Officer Caucutt stated that he "told Kelly [he] thought Davis had been [at her home the day the crime was committed through the weekend] and she said that he had not but that he had been in Eau Claire visiting one of his children and had never come out to her house."

¶29 As best as we can tell, Davis is arguing that Kelly and Officer Caucutt's testimony that Kelly initially told Officer Caucutt that Davis was at her house on May 7, 2011, constituted perjury because that testimony was inconsistent with the police report, and that because the State was aware, or should have been aware, of the discrepancy, the State suborned the perjury.

¶30 "Not all false statements [made] under oath constitute perjury. A person who testifies falsely but in good faith with the honest belief that he is

telling the truth is not guilty of perjury. " ***State v. Rivest***, 106 Wis. 2d 406, 424, 316 N.W.2d 395 (1982) (internal citations omitted). That evidence exists that is inconsistent with a witness's testimony does not necessarily prove that the defendant committed perjury. ***Id.*** "Perjury requires proof of scienter," and the witness's lack of belief as to the truth of his or her statements "must be discerned by the trier of fact from the totality of the evidence before it." ***Id.***

¶31 Davis's sole reliance on the inconsistencies between Officer Caucutt's report and his testimony to support his argument that Officer Caucutt's testimony is insufficient to establish that Kelly and Officer Caucutt did not believe the truth of their testimony. Moreover, Davis has failed to make any showing that the prosecutor was aware of perjury (that Kelly and Officer Caucutt knew they were testifying falsely), or that any prosecutorial misconduct so infected the trial with unfairness that his convictions were a denial of due process. *See* ***Neuser***, 191 Wis. 2d at 136. Accordingly, we reject Davis's argument.

F. Sufficiency of the Evidence

¶32 Davis argues that the evidence was insufficient to support his convictions. Our review of the sufficiency of the evidence is de novo. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. This court may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the verdict. *See* ***id.*** at 507. It is the jury's province to fairly resolve

conflicts in the testimony, weigh the evidence, and to draw any reasonable inferences from the facts. *See* ***id.*** at 506. If more than one inference can be drawn from the evidence, the inference that supports the jury's finding must be followed unless the evidence relied upon by the jury was inherently or patently incredible. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988); ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983).

¶33 Davis argues that the evidence was insufficient to sustain his convictions because: (1) Kelly's "statement" is "unreliable as a matter of law" for the reasons discussed in his postconviction briefs; (2) Peters' identification was "unreliable as a matter of law" for the reasons discussed in postconviction briefs; and (3) unspecified phone records were altered and expert testimony on those records was unreliable.

¶34 Davis references arguments raised before the circuit court below to support his assertion that the evidence was insufficient to support his convictions, but has not developed any arguments applying relevant authority to the facts of record supporting his insufficiency of the evidence argument before *this court.* We need not address Davis's argument on appeal based on the inadequacy of Davis's brief. *See generally* WIS. STAT. Rule 809.19(1)(d) and (e) (setting forth the requirements for briefs); ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (regarding unsupported arguments); and ***Pettit***, 171 Wis. 2d at 646-47 (regarding undeveloped arguments).

¶35 However, even if we were to address his argument, we would reject it. Evidence is inherently or patently incredible if it "conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). Davis's arguments that the

phone records had been altered, and that Kelly's "statement," Peters' in-court identification, and expert testimony on those phone records were "unreliable" is really an attack on the credibility of that evidence. It is the trier of fact, in this case the jury, and not this court that is the ultimate arbiter of credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.,*** 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Davis has not developed a persuasive argument that the testimony of Kelly, Peters, or the expert who testified regarding his phone records was incredible. Accordingly, we conclude that Davis has not established that the evidence was not sufficient to sustain his convictions.

G. Discretionary Reversal

¶36 Davis argues that this court should exercise its discretionary power of reversal under WIS. STAT. § 752.35 because the real controversy was not fully tried. We exercise our discretionary reversal power only in exceptional cases. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). This is not such a case.

¶37 Davis argues that the real controversy was not fully tried because he was pro se during postconviction hearings but had not properly waived his right to counsel. However, Davis has not argued, nor made a showing, that the results of the postconviction proceeding would have differed had he been represented by counsel.

¶38 Davis argues that the real controversy was not fully tried because police failed to record an interview with Tommie Plummer, whose image was part of a photo array shown to Peters. The circuit court found that although the interview of Plummer was never recorded, Plummer was available for trial and would have testified if asked. The circuit court also found that there was no indication that the interview was exculpatory. Davis does not explain to this court why the absence of the recording resulted in the real controversy not being tried.

¶39 Davis argues that real controversy was not fully tried because Davis requested a recording of Peters' 911 call, but the State did not, or was not able, to provide him with it because the recording had been automatically destroyed by the 911 system. Davis asserts that the 911 call was "vital impeachment evidence," but does not explain how or why we should conclude that is the case. Moreover, defense was provided a copy of the CAD report, which contained an "accurate summary" of the 911 call, and Peters was available at trial for cross-examination on the 911 call. We conclude that there is no reasonable probability that the absence of the 911 call recording resulted in the real controversy not being fully tried.

¶40 Finally, Davis argues that the real controversy was not fully tried because phone records admitted at trial had been altered by police. The circuit court found that this assertion is without merit, and Davis fails to show that this finding was clearly erroneous.

CONCLUSION

¶41 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.