

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 14, 2000

Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-2879-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARIO HARRIS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge, and RUSSELL W. STAMPER, SR., Reserve Judge. *Affirmed.*

¶1 SCHUDSON, J.<sup>1</sup> Mario Harris appeals from the judgment of conviction for disorderly conduct—use of dangerous weapon, following a jury

---

<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1997-98).

trial,<sup>2</sup> and from the circuit court order denying his motion for postconviction relief. He argues that trial counsel was ineffective for failing to request a jury instruction on eyewitness identification, and that the circuit court erred in denying his motion for postconviction relief. This court affirms.

¶2 The postconviction court reviewed the trial record and also considered trial counsel's affidavit acknowledging that he "was surprised to realize that [he had] failed to request such an [eyewitness identification] instruction" and, further, that he "had no tactical or strategic reason for failing to request such an instruction." The court noted that counsel's performance was deficient in that regard but concluded that Harris was not prejudiced by counsel's failure. This court agrees.

¶3 In evaluating an ineffective assistance of counsel claim, this court applies the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Whether counsel's performance was deficient and prejudicial are issues of law this court reviews *de novo*. *State v. Sanchez*, 201 Wis. 2d 219, 236-37, 548 N.W.2d 69 (1996).

¶4 This court has examined the record, the briefs on appeal, and the postconviction court's written decision and order denying postconviction relief.

---

<sup>2</sup> Noting that the judgment of conviction erroneously indicates that Harris pled guilty, this court directs the trial court to enter a corrected judgment of conviction upon remittitur of the record.

The postconviction court’s decision accurately sets forth the factual background and the law and adequately expresses this court’s view of the issue on appeal. Therefore, this court attaches and incorporates the postconviction court’s decision and affirms, in substantial part, on the basis of that decision. *See* WIS. CT. APP. IOP VI(5)(a) (October 1, 1999) (“When the trial court’s decision was based upon a written opinion ... that adequately express[es] the panel’s view of the law, the panel may incorporate the trial court’s opinion ... and affirm on the basis of that opinion.”).<sup>3</sup>

¶5 Additionally, this court notes that the State concedes that trial counsel “made a mistake when he thought he’d asked for the instruction on eyewitness identification” but had failed to do so. The State vigorously argues, however, that Harris is absolutely wrong in contending that his conviction rested entirely on eyewitness identification, and that trial counsel failed to “educate the jury about the inherent shortcomings and risks of eyewitness identification.” The State is correct. With analysis corresponding closely to that of the postconviction court’s decision, the State refutes both of Harris’s contentions. Harris offers no reply. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

*By the Court.*—Judgment and order affirmed.

---

<sup>3</sup> Rarely does this court adopt a circuit court decision. In this case, however, the postconviction court’s decision is carefully drawn, complete with relevant references to the trial record and appropriate references to the applicable law.

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)4 (1997-98).

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT  
CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE  
WISCONSIN COURT OF APPEALS.

**COURT OF APPEALS**  
OF WISCONSIN  
ROOM 215, 110 E. MAIN STREET  
POST OFFICE BOX 1688  
MADISON, WISCONSIN 53701-1688  
TELEPHONE: (608) 266-1880  
FAX: (608) 267-0640

Cornelia G. Clark, Acting Clerk  
Court of Appeals

