COURT OF APPEALS DECISION DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP1300

Cir. Ct. No. 2002CF3278

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERTO I. LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roberto I. Lopez appeals *pro se* from a circuit court order denying his postconviction motion filed pursuant to WIS. STAT.

§ 974.06 (2007-08).[1] Lopez contends that his postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel. The circuit court concluded that Lopez's claims fail on their merits, and we affirm.

BACKGROUND

¶2 The State charged Lopez in a criminal complaint with two counts of first-degree intentional homicide and one count of armed robbery, all as party to a crime. In an amended information, the State added a second count of armed robbery, also as party to a crime. The State alleged that Lopez and several co-actors robbed two occupants of a Milwaukee duplex at gunpoint, taking money and cocaine. The State further alleged that the robbers suffocated the victims by sealing their noses and mouths with duct tape.

¶3 The criminal complaint includes the statement of Joel Alvarado. Alvarado told a police detective that he was in a tavern on July 29, 2001, when he and four other men, Roberto Lopez, Luis Davila-Diaz, Jose Vargas, and Jose Dotel, agreed to rob another tavern patron, Juan Alex Delasantos. Alvarado described watching with Lopez while Davila-Diaz, Vargas, and Dotel forced Delasantos and his companion, Carmen Hernandez, into a car at gun point. Alvarado further stated that he and Lopez next drove together to Delasantos's home. According to the complaint:

> Mr. Alvarado stated that he then walked up some stairs to the second floor where Alex Delasantos lived. Mr. Alvarado then saw Alex Delasantos sitting on the floor of the bedroom with his hands tied behind his back. Alex Delasantos' feet were also tied with some cord ....

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> Jose Dotel and Jose Vargas then stated that they would kill Delasantos if he did not tell them where the drugs were hidden. Alex Delasantos finally told Jose Vargas and Jose Dotel that the drugs were hidden in a ceiling above the bed. Mr. Alvarado and Jose Vargas then stood on the bed and found two clear, plastic bags containing powder cocaine and crack cocaine. Jose Vargas, Jose Dotel and Luis Davila-Diaz then asked Alex Delasantos if he had any money. Alex Delasantos then took out his wallet from his pants and handed it to Joel Alvarado. Mr. Alvarado took out all the money, which was about $300.
>
> Mr. Alvarado gave the money and the cocaine to Roberto Lopez, who was present in the apartment of Alex Delasantos at 2577 South 30th Street. Roberto Lopez and Joel Alvarado then went to the car .... Luis Davila-Diaz and [Jose Dotel] told Roberto Lopez to get tape from Roberto Lopez's car. Roberto Lopez then went to his car and came back with some gray duct tape .... Jose Dotel and Jose Vargas then began to duct tape the woman, Carmen Hernandez, and Juan Alex Delasantos .... After he, Joel Alvarado, went to the car, he asked Mr. Davila-Diaz what had happened upstairs, and Mr. Davila-Diaz indicated that they had to kill Carmen Hernandez and Juan Alex Delasantos and that they did this by duct taping their faces. Present when Luis Davila-Diaz told this to Joel Alvarado were Jose Dotel, Jose Vargas, and Roberto Lopez. Mr. Alvarado further stated that it was now about 4:00 a.m. on July 30, 2001, and they all went to Robert[o] Lopez's house where Jose Vargas weighed the cocaine on Robert[o] Lopez's scale.

(Some paragraph breaks added.)

¶4 Lopez eventually pled guilty to two counts of felony murder. He moved to withdraw his pleas both before and after sentencing, but the circuit court denied his motions. Lopez appealed his convictions with the assistance of appointed counsel, and this court affirmed.

¶5 Lopez next filed the *pro se* postconviction motion that underlies this appeal. He asserted that his trial counsel performed ineffectively in two ways: (1) by failing to claim that the criminal complaint was insufficient; and (2) by

permitting Lopez to plead guilty to amended charges when the State lacked sufficient evidence to prove that he was guilty of the offenses charged in the complaint. Lopez asserted that his postconviction counsel performed ineffectively in turn by failing to challenge trial counsel's effectiveness. The circuit court denied Lopez's claims, and this appeal followed.

DISCUSSION

¶6 All grounds for relief under WIS. STAT. § 974.06, must, as a rule, be raised in a defendant's original, supplemental, or amended postconviction motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Any issue not raised in the first such motion is waived, "*unless* the court ascertains that a 'sufficient reason' exists" for the failure to raise the issue. ***Id.*** at 181-82 (emphasis in original). In some circumstances, ineffective assistance of the defendant's postconviction counsel may be a sufficient reason justifying the defendant's failure to raise the issue of trial counsel's ineffectiveness. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). When, however, a defendant alleges that postconviction counsel performed ineffectively by failing to challenge trial counsel's effectiveness, the defendant cannot prevail without establishing that trial counsel's assistance was, in fact, ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶7 The familiar two-pronged test for claims of ineffective assistance of counsel requires a defendant to prove both that counsel's performance was deficient and that the defendant was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the

wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Because a defendant must satisfy both components of the two-pronged test, failure to satisfy either component defeats the claim and permits the reviewing court to end its inquiry. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

¶8 Lopez first asserts that his trial counsel performed ineffectively by failing to challenge the criminal complaint in which the State alleged that he committed first-degree intentional homicide and armed robbery as a party to the crimes. According to Lopez, the criminal complaint "was insufficient to show probable cause that "he" was party to a "crime" on July 29, or July 30, 2001." (Punctuation as in original.)

¶9 A challenge to the sufficiency of the complaint presents a question of law that we review *de novo*. *See* ***State v. Reed***, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. To determine the sufficiency of the complaint, we examine the document to determine "whether there are facts or reasonable inferences set forth that are sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it." ***Id.***, ¶12. The complaint is sufficient if it answers five questions: "'(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or how reliable is the informant?'" ***Id.*** (citation omitted). The test is one "of minimal adequacy, not in a hypertechnical but in a common sense evaluation." ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226, 161 N.W.2d 369 (1968).

¶10 Pursuant to WIS. STAT. § 940.01(1)(a), a person commits first-degree intentional homicide by causing the death of another human being with intent to kill. Pursuant to WIS. STAT. §§ 943.32(1)(a) and 943.32(2), a person commits armed robbery by taking property from another human being, by force, with intent to steal, and while using or threatening to use a dangerous weapon. Pursuant to WIS. STAT. § 939.05, the State may charge and convict a person as a party to a crime when the person is concerned in the commission of a crime without directly committing it. A person is concerned in the commission of a crime when the person intentionally aids or abets the commission of the crime or conspires with another to commit it. *See* § 939.05(2)(b)-(c). Further, liability as a party to a crime "extends to the natural and probable consequence of the intended acts, as well as any other crime which, under the circumstances, was a natural and probable consequence of the intended crime." ***State v. Hecht***, 116 Wis. 2d 605, 624, 342 N.W.2d 721 (1984).

¶11 The complaint in this case sets forth sufficient facts to permit the conclusion that Lopez probably committed first-degree intentional homicide and armed robbery as a party to the crimes. The complaint includes a description of the crimes and shows that they were committed on or about July 29, 2001, and July 30, 2001, in the apartment of one of the victims. The complaint reflects that Alvarado, a participant in the crimes, gave statements implicating Lopez: according to Alvarado, Lopez participated in planning the armed robbery, he received the stolen money and cocaine at the crime scene, and he supplied the duct tape used as a murder weapon. Alvarado's statements are reliable because they are against Alvarado's penal interests and reflect Alvarado's personal knowledge and observations.

¶12 A motion challenging the sufficiency of the complaint would have lacked arguable merit. Accordingly, Lopez's trial counsel did not perform deficiently by failing to pursue such a claim. An attorney's performance is not ineffective for failing to make meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Because Lopez's trial counsel had no obligation to challenge the sufficiency of the complaint, postconviction counsel had no obligation to challenge trial counsel's performance in this regard. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶13 Lopez next contends that his trial attorney performed ineffectively by advising him to plead guilty because the State lacked the necessary proof to convict him. According to Lopez: "(1) there was no evidence that Lopez' [sic] gave a statement to [investigating officers] that he planned to do a robbery and not a murder on July 29 or July 30, 2001, [and] (2) there was no evidence that Lopez' [sic] was "aware" that a robbery was committed on July 29 or July 30, 2001." (Punctuation as in original.) Based on these assertions, Lopez argues that the evidence was insufficient to convict him of being party to the crime of either first-degree intentional homicide or armed robbery.

¶14 Lopez appears to argue that the State could not have prevailed at trial because he did not confess. Lopez is not correct. The State need not offer a confession to prove guilt. Indeed, "[i]t is well established that a finding of guilt may rest upon evidence that is entirely circumstantial." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶15 As to Lopez's assertion that the State could not have proved at trial that he "was 'aware' that a robbery was committed," Lopez fails to explain the basis for this claim. Although Lopez's guilty plea obviated the need for

testimony, the complaint contains Alvarado's statement that Lopez planned the robbery, took possession of the stolen goods, and supplied the duct tape used to murder the victims. Thus, the State had a witness whose testimony, if believed, could support a jury's reasonable inference that Lopez intended to commit both armed robbery and homicide.[2] Direct evidence of intent is not required; a jury may infer a defendant's intent from the circumstances. ***Jacobs v. State***, 50 Wis. 2d 361, 366, 184 N.W.2d 113 (1971).

¶16 A postconviction motion must include "sufficient material facts that, if true, would entitle the movant to relief." ***State v. Allen***, 2004 WI 106, ¶13, 274 Wis. 2d 568, 682 N.W.2d 433. The movant must allege with specificity "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶23. Conclusory assertions will not suffice. ***Id.***, ¶15. Here, Lopez did not demonstrate that the State lacked sufficient evidence to proceed to trial on the crimes charged. Accordingly, his postconviction motion was inadequate to sustain his claim that trial counsel performed ineffectively by counseling guilty pleas. Because Lopez failed to show ineffective assistance of trial counsel, he necessarily failed to show that his postconviction counsel had an obligation to raise such a claim. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. The circuit court properly denied his motion for postconviction relief.

[2] During Lopez's sentencing hearing, the State summarized some of the testimony offered at the co-actors' trials. According to the State, the testimony at those trials showed that Lopez brought the duct tape to the murder scene, that he possessed the cocaine and some of the money during the armed robbery, and that he was "the person that was at least at some point kind of in charge of what was going on." Both the State and Lopez's trial counsel confirmed that Alvarado testified at one of the trials.

By the Court.—Order affirmed.

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