COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2045 **Cir. Ct. No. 2004CF6133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY MENDRELL WELCH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Cory Mendrell Welch, *pro se*, appeals from orders denying his postconviction motion, filed under WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996) (per curiam). Welch contends that his postconviction counsel was

ineffective for failing to bring a postconviction motion arguing that: there had been a speedy trial violation; trial counsel was ineffective for failing to adequately cross-examine a witness; and trial counsel was ineffective for failing to seek a mistrial following certain police testimony. The circuit court denied the first two claims outright and denied the third claim after briefing. We affirm the orders.

BACKGROUND

¶2 In November 2004, an Information charged Welch with ten counts of armed robbery, two counts of attempted armed robbery, conspiracy to commit armed robbery, fleeing an officer, and two counts of misdemeanor bail jumping. On November 10, 2004, Welch filed a speedy trial demand. At a scheduling conference, defense counsel advised the trial court he would be unavailable between January 25 and March 2, 2005. To accommodate Welch's speedy trial request, the trial court attempted to calendar the case so that the trial could be completed by January 24, setting the trial to begin January 18.

¶3 On January 13, 2005, the State moved to sever counts 13-16 from counts 1-12 (the ten armed robberies and two attempted armed robberies) because of time constraints. Welch objected, but the circuit court granted the motion. The first trial proceeded on counts 13-16, and the jury convicted Welch on all four counts. The second trial began on November 28, 2005, lasting nine days. The State dismissed four counts, and the jury convicted Welch on the remaining eight counts.

¶4 Welch filed a postconviction motion, seeking a new trial on the grounds that the trial court erroneously exercised its discretion in severing the charges. The trial court denied the motion, and Welch appealed. The issues on appeal were whether the trial court erroneously exercised its discretion in severing

the charges and whether the trial court erred in admitting other acts evidence in each trial. In our opinion, we specifically noted that Welch was not arguing that the delay in trying him on counts 1 through 12 constituted a speedy trial violation. *See* ***State v. Welch***, No. 2007AP1688-CR, unpublished slip op. ¶12 (WI App June 17, 2008). Ultimately, we affirmed Welch's convictions.

¶5 In 2008, Welch filed the underlying, *pro se*, WIS. STAT. § 974.06 motion. As we have seen, he claimed that postconviction counsel should have argued there was a speedy trial violation and raised trial counsel's failures to adequately cross-examine a witness and to seek a mistrial.

¶6 The circuit court denied his speedy trial claim. It noted that the text of the motion indicated Welch was actually faulting *appellate* counsel's failure to include the speedy trial issue in the direct appeal. Thus, the circuit court concluded, Welch should have brought a claim of ineffective assistance of appellate counsel to this court through a ***Knight*** petition.[1] The circuit court also denied the claim relating to trial counsel's cross-examination of a witness, finding it was "conclusory at best and does not set forth a viable claim for relief." However, the circuit court then ordered briefing on Welch's allegation that trial counsel should have sought a mistrial. Following briefing, the circuit court denied that motion at a hearing on May 13, 2009. Welch appeals.[2] Additional facts will be discussed as necessary below.

[1] *See* ***State v. Knight***, 168 Wis. 2d 509, 519, 484 N.W.2d 540, 544 (1992).

[2] We previously issued an opinion in this matter on August 10, 2010. By order dated January 12, 2011, the supreme court vacated that decision and remanded the matter to this court for further consideration. At the request of both parties, we permitted supplemental briefing, and we have considered the original and supplemental briefs to arrive at the current decision.

DISCUSSION

The Speedy Trial Issue

¶7 After the circuit court ruled that Welch's speedy trial complaint should be the subject of a ***Knight*** petition, but before briefing on the final issue was completed, Welch filed a ***Knight*** petition with this court. We denied the petition, essentially because it was premature. *See* ***Welch v. Thurmer***, No. 2009AP508-W, unpublished order (WI App Apr. 27, 2009). We noted that the circuit court had not yet entered a final order on the WIS. STAT. § 974.06 motion. When a final order was eventually entered, Welch would have an opportunity to challenge, in his direct appeal of right, the circuit court's ruling that a ***Knight*** petition was the proper avenue for relief. In a footnote, we stated:

> Should Welch fail to obtain relief in the circuit court and pursue an appeal, and if he raises the question of the propriety of the circuit court's ruling on the ***Knight*** petition question, we invite Welch to address the merits of his ***Knight*** petition claim in the context of his brief.

¶8 On appeal, Welch argues that his speedy trial right was violated and that postconviction counsel was ineffective.[3] However, Welch does not "question

[3] Again, Welch appears to mean *appellate* counsel was ineffective. Welch writes:

> The defendant Not receiving his trial at a hasty pace was clearly strong that the Issues raised on his direct appeal. Postconviction counsel did not raise This issue. Instead, raised the issue that, 1) The trial court erroneously Exercised his discretion by severing twelve of the counts in the case For later trial. 2) the trial court judge erroneously exercised his Discretion by allowing The state to use four of the severed counts as other acts evidence[.] [Formatting as in original.]

The two issues to which Welch refers as previously raised were the two issues counsel raised on appeal.

the propriety of" the substance of the circuit court's ruling—that Welch was challenging appellate counsel's performance and, therefore, the speedy trial issue belonged in a ***Knight*** petition addressed to this court. We will not abandon our neutrality to develop an argument for Welch. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142–143 (Ct. App. 1987). We therefore affirm the portion of the circuit court's order concluding that the speedy trial issue was not properly before it and denying Welch relief.

The Cross-Examination Issue

¶9 In the first trial, a co-defendant named Marques Stephens testified against Welch.[4] Some of the testimony related to events constituting counts 9, 10, and 11 in this case. Trial counsel, evidently for strategic reasons, opted to limit his cross-examination to the four charges at issue in the first trial. When Stephens refused to testify at the second trial, the trial court declared him unavailable and found him in contempt. A portion of his direct examination testimony from the first trial was read to the jury in the second trial. At defense counsel's request, the cross-examination was not read.[5] Welch complains that postconviction counsel should have argued that trial counsel was ineffective for failing to better cross-examine Stephens in the first trial because the poor cross-examination meant that less information was available to the second jury.

[4] It appears that Stephens implicated Welch to police during their initial investigation, then recanted.

[5] At the second trial, the parties were attempting to avoid reference to the first trial. In introducing the transcript reading, reference was made to a prior proceeding without calling it a trial. Defense counsel was concerned that, when reading the cross-examination, it would be necessary to identify him as the person questioning Stephens, which might have led the jury to infer that the prior proceeding was, in fact, another trial on other charges.

¶10 Welch's postconviction motion alleged, in relevant part, that he:

> was prejudiced by counsel's failure to cross-examine Marques Stephens because, Stephens refused to testify at the defendants second trial. As a result of that failure to testify, the state was allowed to read to the jury, Stephens's prior testimony, as it related to the "other acts counts." … The jury heard only direct examination, and didn't hear any cross-examination from defense counsel, and as a result the defendant was denied his right to cross-examine the witness against him. … Had trial counsel cross-examined the witness on the "other act's counts at the first trial, the jury would've heard cross-examination from the defense in the reading of the hearsay transcript at the second trial. Therefore counsel was ineffective. … Postconviction counsel was also ineffective for failing to bring a postconviction motion before the trial court arguing that the defendant was denied his constitution right to effective assistance of counsel. Because trial counsel failed to cross-examine the states key witness, therefore postconviction counsel was also ineffective. [Formatting as in original.]

The circuit court denied the motion because it was too conclusory—Welch had not shown "what Stephens would have said that would have probably altered the outcome of the trial."

¶11 Whether a postconviction motion alleges sufficient facts to entitle a defendant to a hearing is a mixed question of fact and law. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. Whether the motion alleges sufficient facts is a question of law. ***Ibid.*** If the motion is insufficient, the circuit court may grant or deny a hearing on the matter at its discretion. ***Ibid.*** We are deferential to the discretionary decision. ***Id.***, ¶9, 274 Wis. 2d at 577, 682 N.W.2d at 437.

¶12 Here, while Welch attempts to refine his argument in his original appellate brief, and further still in his original reply, we are limited to the four corners of the original motion. *See* ***State v. Love***, 2005 WI 116, ¶27, 284 Wis. 2d

111, 124, 700 N.W.2d 62, 68–69; *see also* ***Allen***, 2004 WI 106, ¶23, 274 Wis. 2d at 585, 682 N.W.2d at 441. Welch's motion does not explain what the substance of the unasked cross-examination would be or how it would benefit his case.[6] It is therefore impossible to evaluate whether there is any potential merit to the complaint that would warrant relief. In the absence of the necessary specificity, the circuit court properly denied this portion of the motion.[7]

The Mistrial Issue

¶13 Finally, Welch complains that postconviction counsel was ineffective for failing to assert that trial counsel should have moved for a mistrial "when the defendant was improperly exposed to unfairly prejudicial information." In Welch's second trial, Officer Phillip Simmert gave testimony explaining why he approached Welch during his investigation and referred to "the things I know about [Welch], his character, the crimes I know that he committed[.]" Detective Willie Huerta made reference to "another proceeding with the defendant … where he was on trial for about 11, 12 other robberies[.]"

¶14 Welch's motion alleged that postconviction counsel should have argued "that the defendant was denied his constitutional right to effective assistance of counsel, because trial counsel failed to move for a mistrial when

[6] Welch calls Stephens the State's "key witness" but, as we shall see, this is a gross overstatement of Stephens's importance.

[7] It is entirely speculative to assert that, if counsel had cross-examined Stephens at the first trial regarding any testimony relating to the current counts 9, 10, and 11, the testimony would also have been read in at the second trial. We also question whether we could even consider trial counsel to be ineffective for failing to anticipate that a witness who testified at the first trial would improperly seek to invoke a Fifth Amendment privilege at the subsequent trial. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992) (counsel's performance evaluated at time he or she makes decision, not in hindsight).

defendant was improperly exposed to unfairly prejudicial information[.]" He asserted "that [Simmert's] statement was prejudicial because, the jury was told that the defendant had a bad character, and that he's committed [crimes] in the past. Therefore, the defendant was improperly exposed to unfairly prejudicial information." Welch asserted that Huerta's statement was prejudicial because "the jury was absolutely prohibited from knowing about the defendant's last trial." He contended that "justice has miscarried because the detective told the jury that [Welch has] committed prior crimes and the jury may have been influenced by Officer Simmert and Detective Huerta's prejudicial testimony" and, had it not been for their testimony, there would have been a different result. He also contended he was prejudiced because the jury was allowed to take notes during trial and rely on the notes in deliberations.

¶15 The circuit court ruled that Welch's contentions "must fail":

> Though it is understandable that the defendant would feel prejudiced by the testimony concerning the police officers' recognition of the defendant due to previous crimes, evidence pertaining to those previous crimes did not reach the jury. Further, the police officers were testifying to how – or specifically how they recognized the defendant. His response does not constitute inadmissible character evidence.
>
> It should also be noted that the defendant was charged with 16 counts of armed robbery and bail jumping and a significant amount of evidence existed. … [I]t is highly unlikely in this Court's opinion that the testimony at issue prejudiced the jury and that postconviction counsel was ineffective for not raising the issue.

¶16 Welch's appellate argument can be distilled to four parts, three of which have little actual merit. First, he contends that the circuit court was wrong to say evidence did not reach the jury because jurors were allowed to take notes. This argument is a *non sequitur*: just because the jurors could take notes does not

mean that they did. If they did, it does not mean they wrote down the prejudicial statements. If they did write down the statements, it does not mean that they were relied upon in deliberations.[8]

¶17 Second, Welch complains that the circuit court's ruling only addresses Simmert's testimony, not Huerta's. It is not difficult to see why Welch thinks the circuit court addressed only Simmert's testimony in light of the statement that "*[h]is response* does not constitute inadmissible character evidence." (Emphasis added.) However, it is evident that in globally rejecting the motion, the circuit court concluded that neither officer's testimony was prejudicial to Welch.

¶18 Third, Welch complains that contrary to the circuit court's ruling, the police were not testifying about recognizing Welch. We agree that it is not a fair characterization of Huerta's testimony to say that he was testifying about "how they recognized the defendant." Simmert's testimony was more identification testimony than Huerta's, although we would say that is only a loose description. However, simply calling the circuit court's representation inaccurate is insufficient to warrant relief: we may affirm a circuit court's decision if it reaches the right result with erroneous reasoning. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457, 463–464 (1973). As we shall see, the circuit court reached the proper result in this case.

¶19 The crux of Welch's argument on this issue is his fourth argument, which comes down to a fundamental claim that the officers' testimony was

[8] We also agree with the State that the circuit court meant that specific details about the other crimes did not reach jurors.

improper character or other-acts evidence under WIS. STAT. § 904.04, the erroneous admission of which would have resulted in a mistrial if pursued. Thus, Welch believes, postconviction and trial counsel were ineffective for not pursuing that theory.

¶20 Showing ineffective assistance of counsel requires showing deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We will assume without deciding that the failure to ask for a mistrial or to challenge trial counsel's failure to seek a mistrial was deficient performance. Welch's argument fails because he cannot show prejudice.

¶21 The decision to grant a mistrial is discretionary. *See* ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 317, 659 N.W.2d 122, 134. The circuit court must determine, "in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 252, 674 N.W.2d 894, 903. When the circuit court ruled it was unlikely that the officers' testimony prejudiced the jury, it implicitly concluded a mistrial would not have been warranted.

¶22 The improper admission of evidence can be evaluated under a harmless error standard. *See* WIS. STAT. § 805.18(2); ***State v. LaCount***, 2008 WI 59, ¶84, 310 Wis. 2d 85, 131, 750 N.W.2d 780, 803–804. "[E]rror is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *See* ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 676, 653 N.W.2d 276, 279 (internal quotation marks and citation omitted). Stated another way, we ask "whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 124, 644 N.W.2d 919, 931. In a harmless error analysis, we can

review the entire record. *See* ***Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d at 676, 653 Wis. 2d at 279.

¶23 Contrary to Welch's assertion that a jury could only have relied on the police officers' improper statements and Stephens's testimony to convict him, there was sufficient other evidence upon which the jury could have convicted Welch. In fact, much of this evidence had been presented to the jury before either officer testified.

¶24 Several robbery victims came to testify about how the robberies of their businesses occurred: two black men, with ski masks, hoodies, a duffle bag. In other words, the State established the robberies had the same *modus operandi*. A green Chrysler identified in many of the robberies belonged to Welch.

¶25 Welch had fled from officers, including Simmert, who approached him at a residence. He was later found hiding under a stranger's van by another officer. Welch told that officer that he had been carjacked while mailing a letter for Antoinette Brown, and that he had fled the scene of the carjacking. He ran past officers who were in the area because they had shotguns and he was afraid. This, he explained, was why he was hiding under the van. Brown denied that Welch was mailing anything for her that day. Later, Welch changed his story and told police he was unwittingly duped into being the getaway driver.

¶26 Co-actors other than Stephens testified to various facts as well, such as: Welch counseled his friends that closing time was the best time to commit a robbery, because fewer people would be in the business; Welch bragged about participating in forty-six robberies; Welch bought a car with robbery proceeds; and Welch called his car "the moneymaker" because he used it in robberies.

¶27 When police ultimately searched the Chrysler, they found ski masks and a black duffle bag in the trunk. One mask had Stephens's DNA on it. The other mask had DNA from two contributors. Richard Bass, one of the people who testified against Welch, was identified as one of the contributors to that DNA mix. Welch was identified as the other, and the likelihood of the DNA belonging to someone other than Welch was one in one million.

¶28 There is no reasonable probability that either officer's statement contributed to the conviction. Clearly, Welch would have been convicted without the two challenged statements. Therefore, the admission of those statements, even if improper, was not prejudicial. A mistrial would not have been granted even if trial counsel had asked for one. Because a mistrial would have been denied, trial counsel was not ineffective for not requesting it and postconviction counsel was not ineffective for failing to challenge trial counsel's failure to ask for it. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235, 246–247 (1987). Accordingly, the circuit court properly denied Welch's WIS. STAT. § 974.06 motion.

By the Court.—Orders affirmed.

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