COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP3031 **Cir. Ct. No. 2006CF564**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. WARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. William Ward appeals an order denying his WIS. STAT. § 974.06[1] motion in which he alleged ineffective assistance of both his trial

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

counsel, Wayne Fulleylove-Krause, and his postconviction and appellate counsel, Chris Gramstrup. The motion alleged that Ward's attorneys failed to cite federal cases when arguing that Ward was denied a fair trial by a witness's improper reference to a drive-by shooting. The motion also alleged that Fulleylove-Krause, in his closing argument, failed to mention that the police did not find any marijuana when they searched Ward and his property. Because we conclude that the motion was procedurally barred and meritless, we affirm the order.

¶2 Ward was convicted of armed robbery and pointing a weapon at a person, both as a repeater. Four robbers stole $100 and one and one-half pounds of marijuana. The victim of the robbery testified that Ward pointed a gun at a two-year-old in an attempt to persuade the victim to turn over money and drugs. In addition, one of Ward's accomplices testified against him and a gun found in Ward's car matched the description of the gun used in the robbery. At the trial, a retired detective, when asked how he came to have contact with Ward, responded:

> We were investigating a drive-by shooting that had occurred on July 4, and we had officers looking for a silver Sunfire which was operated by Mr. Ward owned by Jason Masterson. The victim of that drive-by shooting saw the vehicle go past her house, turn around--

At that point defense counsel objected and requested a mistrial. The trial court denied the motion for a mistrial, but struck the detective's statement and strongly instructed the jury to disregard the statement.

¶3 During the investigation, officers searched Ward and his property. They did not find any marijuana. In his closing argument, Ward's trial counsel did not call the jury's attention to this fact.

¶4 In Ward's initial appeal, his attorney argued that the court erroneously exercised its discretion when it denied Ward's motion for a mistrial. We rejected that argument, concluding:

> [T]he brief reference to the drive-by shooting did not reasonably contribute to the convictions. Here the evidence against Ward was overwhelming. …
>
> In light of the overwhelming evidence introduced throughout the course of the trial, it is also reasonable to conclude any prejudicial effect that could possibly have flowed from the inadmissible testimony was cured by the court's stern, no-nonsense curative instruction.

State v. Ward, No. 2008AP1080-CR unpublished slip op. ¶¶11-12 (WI App March 10, 2009).

¶5 Undeterred, Ward argues that his attorneys were ineffective for failing to cite three federal cases, ***Burton v. United States***, 391 U.S. 123 (1968); ***United States v. Murray***, 784 F.2d 188 (6th Cir. 1986); and ***United States v. Sands***, 899 F.2d 912 (10th Cir. 1990). Ward now employs the rubric of ineffective assistance of counsel, which requires a showing of prejudice to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). However, his claim that he was prejudiced by the references to the drive-by shooting was considered and rejected in his initial appeal. An issue already litigated on appeal cannot be the basis of a subsequent postconviction motion, regardless of how artfully it is rephrased. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶6 Furthermore, the federal cases would not have altered our decision. Ward cites these cases for the proposition that a curative instruction is inadequate because "you cannot unring the bell." However, in each of these cases, there was

little other evidence of the defendant's guilt. In contrast, there was overwhelming evidence of Ward's guilt.

¶7 Ward next argues that his trial counsel was ineffective for failing to call the jury's attention to the fact that police did not find the stolen drugs on Ward's person or his property when he was arrested three days after the crimes occurred. That argument is procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), because Ward does not offer sufficient reason for his failure to raise the issue in his initial postconviction motion and appeal. Ward's bald assertion that he can raise the issue at this time merely because Gramstrup failed to raise the issue would completely vitiate the ***Escalona-Naranjo*** bar. Furthermore, trial counsel's failure to mention the fact that police failed to find the marijuana has little probative value because Ward had three days to dispose of it.

By the Court.—Order affirmed.

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