COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2013

Diane M. Fremgen
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. 2011AP1249

Cir. Ct. No. 2002CF4131

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. JORDAN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 BRENNAN, J. Joseph J. Jordan appeals, *pro se*, from the circuit court's orders denying his WIS. STAT. § 974.06 (2011-12)[1] postconviction motion

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

for a new trial and his subsequent motion for reconsideration. For the reasons which follow, we affirm.

BACKGROUND

¶2 In July 2002, the State filed a complaint, alleging that on June 22, 2002, Jordan shot and killed David A. Robinson. According to the complaint, Jordan was in a vehicle, driven by Michael Blake Jones,[2] along with Jones's girlfriend, parked behind a gas station to "roll some blunts." Jones pulled away from the gas station when Jordan spotted a car he mistakenly believed was being driven by a man with whom he had had a disagreement over a gun deal. Robinson, along with three other men, was travelling in the other vehicle. Jordan's vehicle approached the car in which Robinson was riding from the rear, and Jordan reached over Jones and began shooting at the other vehicle. One of the bullets struck Robinson in the head and killed him.

¶3 At trial, the State admitted into evidence an eight-page statement, created by one of the detectives that interviewed Jordan, detailing Jordan's confession to police. Jordan signed the statement. In the statement, Jordan states that "he wanted to tell the truth about his involvement in this incident." He then goes on to detail the events leading up to the shooting, consistent with the complaint, and tells police that as Jones pulled alongside the car in which Robinson was riding, he (Jordan) "reached over [Jones] with the handgun in his right hand and began to fire at the back of the auto near the lower portion of the auto through the open driver's window."

[2] The complaint simply refers to Michael Blake Jones as "Blake." Later, it is revealed that "Blake" and Jones are one in the same.

¶4 A jury found Jordan guilty of one count of first-degree reckless homicide, three counts of first-degree recklessly endangering safety, and one count of being a felon in possession of a firearm. He was sentenced to thirty-six years of confinement and twenty years of extended supervision, to be served concurrent to any other sentence.

¶5 Jordan, proceeding *pro se*, filed a motion for postconviction relief, claiming that he was denied his constitutional right to represent himself and that his trial counsel was ineffective. The circuit court denied his motion. Jordan filed a *pro se* motion for reconsideration, which the circuit court also denied. Jordan, still proceeding *pro se*, appealed both orders, claiming that: (1) the trial court used the wrong standard when it found that he was not competent to represent himself at the trial; (2) he was denied the effective assistance of counsel because his trial lawyer did not object when the prosecutor allegedly vouched for the police detectives' credibility during closing arguments; and (3) the trial court did not ask about an alleged conflict of interest because Jordan's trial lawyer was paid by the taxpayers without Jordan's knowledge or consent. We affirmed in August 2005.

¶6 Several years later, on January 6, 2009, Jordan filed a *pro se* WIS. STAT. § 974.06 motion for postconviction relief, requesting a new trial based on newly discovered evidence, ineffective assistance of trial counsel, and the interest of justice. More specifically, he alleged: (1) to have newly discovered evidence—affidavits from numerous witnesses—which he argued conclusively demonstrated that Quincy Grant committed the crimes of which Jordan was convicted; (2) that his trial counsel was ineffective for failing to interview several witnesses that Jordan claimed were key to his defense; and (3) that, at the very least, the prior alleged errors entitled him to a new trial in the interest of justice.

¶7 In addition to his motion for a new trial, Jordan also filed a motion asking the circuit court to appoint him counsel, explaining to the court that "[t]he prosecution of this motion involve [sic] legal situations that are complex and beyond the realm of the abilities [sic]" and that he "is unable to represent himself in this matter[.]" Shortly thereafter, on January 28, Jordan filed a second motion for the appointment of counsel, complaining that the circuit court had not yet acknowledged his first motion. On February 9, Jordan filed a third motion asking the circuit court to stay proceedings until it acknowledged his motion for counsel, stating that he was "in dire need of counsel." The circuit court issued an order denying Jordan's motions for the appointment of counsel, declining to decide the issue until it knew whether it would need to hold an evidentiary hearing on Jordan's motion. However, soon thereafter, Jordan was able to secure retained counsel, and in March 2009, counsel filed a notice of appearance on Jordan's behalf.

¶8 The circuit court held a ***Machner*** hearing[3] at which Jordan's new witnesses and Jordan's trial counsel all testified. In October 2009, on the second day of the hearing, Jordan's counsel informed the circuit court that Jordan wished to proceed *pro se* with standby counsel. After a colloquy with Jordan, the circuit court denied his request, finding that Jordan was not competent to proceed *pro se*.

¶9 In January 2010, while the ***Machner*** hearing was still ongoing, Jordan's retained counsel moved to withdraw, citing Jordan's lack of good-faith cooperation with counsel. About the same time, Jordan again moved to proceed *pro se*. The circuit court granted counsel's motion to withdraw, but denied

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Jordan's motion to proceed *pro se* on the same grounds as before. The circuit court then appointed Attorney Richard Hart to represent Jordan.

¶10 In December 2010, Jordan filed yet another *pro se* motion, asking the circuit court to appoint him new counsel or to allow him to proceed *pro se*. The circuit court again denied his motion and declined to discharge Attorney Hart. Attorney Hart continued to represent Jordan until the circuit court denied Jordan's WIS. STAT. § 974.06 postconviction motion, at which time the circuit court discharged Attorney Hart from further representing of Jordan.

¶11 Again proceeding *pro se*, Jordan filed a motion for reconsideration, arguing that the circuit court should have granted his motion for new trial and raising a new claim of ineffective assistance of postconviction counsel. The circuit court denied Jordan's motion. Jordan, *pro se*, appeals both orders.

DISCUSSION

¶12 As best we can tell, Jordan raises the following issues on appeal: (1) whether the circuit court erred in denying him a new trial based on newly discovered evidence; (2) whether his trial counsel was ineffective; (3) whether the circuit court erred when it denied Jordan's motions to represent himself during the WIS. STAT. § 974.06 proceedings; (4) whether Jordan's court-appointed postconviction counsel was ineffective; and (5) whether Jordan is entitled to a new trial in the interest of justice.[4] We address each issue in turn.

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[4] To the extent that Jordan may raise other issues in his appellate submissions that we do not address, we conclude that such issues are inadequately briefed and lack discernible merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Therefore, we do not address them.

I. Newly Discovered Evidence.

¶13 Jordan first argues that the circuit court erred in denying him a new trial based on newly discovered evidence, specifically the affidavits[5] and testimony (taken at the ***Machner*** hearing) of Quincy Grant, Jason Hohnstein, Deyon Lee, Lonnie Davis, and Charley Grant. Jordan argues: (1) that Quincy (who invoked his Fifth Amendment right not to testify at the ***Machner*** hearing) admitted to committing the crimes of which Jordan was convicted; and (2) that each of the other witnesses now claim that they either have evidence demonstrating that Jordan was not at the crime scene or that Quincy admitted to them that he was the shooter, not Jordan. Jordan contends that the circuit court erred when it found the testimony of each of the witnesses incredible.

¶14 "'Motions for a new trial based on newly discovered evidence are entertained with great caution.'" ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. We review the circuit court's determination for an erroneous exercise of that discretion. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A court erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record. *See* ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811

[5] Not all of the statements Jordan submits are "affidavits." *See* BLACK'S LAW DICTIONARY (9th ed. 2009), affidavit (defining "affidavit" as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths"). Some are at best unsworn statements signed by the alleged affiant. However, for purposes of this appeal, we refer to all of the statements as affidavits, because, even if we accept Jordan's argument that they are proper affidavits, they are not sufficient to entitle him to a new trial.

N.W.2d 756. Thus, we will not overturn a discretionary determination merely because we would have reached a different result. Rather, "'[b]ecause the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary decisions.'" ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (citation omitted; first set of brackets in ***Burkes***).

¶15 To obtain a new trial based on newly discovered evidence, Jordan must establish, by clear and convincing evidence, that: "'(1) the evidence was discovered after conviction; (2) [he] was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). If those four criteria have been established, we then determine "'whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted). "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Id.***

¶16 In determining the reasonable probability of a different result on retrial, the circuit court may determine the credibility of the new testimony proffered by the moving party. *See* ***State v. Carnemolla***, 229 Wis. 2d 648, 660-61, 600 N.W.2d 236 (Ct. App. 1999); *see also* ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (1996). If the circuit court finds the newly discovered evidence credible, the court determines whether a jury, after hearing all of the evidence, would have a reasonable doubt as to the defendant's guilt. ***Edmunds***, 308 Wis. 2d 374, ¶18. In making this latter determination, the circuit court does not weigh the evidence. ***Id.*** We review the circuit court's credibility finding for clear error. ***Terrance J.W.***, 202 Wis. 2d at 501.

¶17 Here, after reviewing the affidavits submitted by Jordan and hearing the testimony of the witnesses, the circuit court concluded that the affidavits "appear[ed] to be contrived and put together by the same person." The circuit court stated that, in its experience, the level of detail in each of the affidavits and the similarity in those details between each of the affidavits was uncommon when witnesses were being truthful.[6] Because the circuit court had "deep concern as to the truth and the veracity" of Jordan's newly discovered evidence, the court concluded that there was not a reasonable probability that the evidence would have changed the outcome of the trial.

¶18 The record supports the circuit court's finding that Jordan's newly discovered witnesses were untruthful. *See **id.*** However, even with respect to the witnesses whose untruthfulness is less obvious, the record supports the circuit court's conclusion that a new trial would not result in a different outcome.[7] *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983) (we may search the record to determine if it supports the circuit court's discretionary decision). We look to each witness in turn.

¶19 *Quincy Grant's Evidence.* In Quincy's affidavit, he claimed responsibility for the Robinson homicide and stated, "I am willing to testify in any

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[6] In the affidavits, all signed one to seven years after the shooting, the affiants are allegedly able to recall the make, model, and color of the cars involved in the shooting, the model of a gun they observed, and exacting details of conversations they had with other newly discovered witnesses and actors in the shooting.

[7] We do not consider whether Jordan has adequately established the four factors set forth in ***State v. Edmunds***, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590, by clear and convincing evidence, because regardless, we conclude that the circuit court did not erroneously exercise its discretion when it found that the evidence would not result in a different outcome at a new trial. *See **id.***, ¶13; *see also* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("appellate court should decide cases on the narrowest possible grounds").

proceeding on behalf of Joseph Jordan [and at] any of those hearings subjecting [sic] myself to the penalties of perjury." However, while Quincy took the stand at Jordan's hearing, he refused to testify, repeatedly invoking his Fifth Amendment privilege. Quincy's attorney subsequently confirmed that, despite Quincy's promise in the affidavit "to testify in any proceeding on behalf of Joseph Jordan," Quincy would not testify at a new trial and that Quincy "has maintained that to any question that he would be asked in regard to this matter, he would assert his Fifth Amendment right."

¶20 Quincy's evidence does not establish any probability of a new result at trial. Quincy refused to testify, even to the question of whether he in fact signed the affidavit attributed to him. And his invocation of the Fifth Amendment privilege is not evidence. Quincy's affidavit, even if admissible, a question we do not reach, creates no reasonable probability of a different result at trial. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13.

¶21 *Jason Hohnstein's Evidence.* Jordan relies on Hohnstein's affidavit to support his contention that he did not shoot Robinson because he (Jordan) was not in the car involved in the shooting. Hohnstein's affidavit purports to be a detailed firsthand account of who was in the car at the time of the shooting and of the shooting itself. However, at the hearing, Hohnstein testified that he had known Jordan "[a]ll his life," that "I don't know who gave [the affidavit] to me," and that "I was drunk when I signed it. … I was intoxicated when I signed this thing." He testified that he signed the affidavit because "I was just trying to help someone out, I known him all his life, you know." Hohnstein confirmed that the handwritten signature was his but said the contents of the statement were "all bullshit." He denied being at the scene at the time of the shooting or knowing anything about the crime.

¶22 The circuit court's assessment of Hohnstein's affidavit as fabricated is aptly supported by the record. Furthermore, we agree with the State's assessment that if Jordan were to admit Hohnstein's evidence at a retrial it would only serve to enhance the State's case by demonstrating Jordan's willingness to proffer fabricated evidence, which shows evidence of guilt. As such, Hohnstein's evidence is insufficient to warrant a new trial. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13.

¶23 *Deyon Lee's Evidence.* In Lee's affidavit, he claimed to have met with Jones, the driver of the car from which Jordan fired the fatal shots, immediately after the shooting. Lee claimed that he saw three men in the car (Jones and two men in the back seat), but that Jordan was not one of them. At the hearing, Lee identified one of the three men in the car as Quincy, and testified that he had identified Quincy in a photo shown to him by police. Milwaukee Police Detective Jeremiah Jacks later testified that the individual in the photo, who Lee identified as Quincy, was actually Lonnie Davis, who had been in prison since 1997.

¶24 First, even assuming without deciding that Lee's evidence is truthful, the fact that Jordan was not in Jones's car at the time Lee met with Jones *after* the shooting does not mean that Jordan was not in the car *at the time* of the shooting. Furthermore, Lee's testimony in support of Jordan's new theory that Quincy was the shooter is undermined by Lee's faulty identification. Lee's testimony does not raise a reasonable probability that a retrial would end in a different result. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13.

¶25 *Lonnie Davis's Evidence.* In his affidavit, Davis asserted that in January 2007 Quincy admitted to Davis that he (Quincy) committed the homicide

for which a jury convicted Jordan. On the stand, Davis testified consistent with his affidavit. However, Davis also admitted to telling Milwaukee police detectives that the threat of perjury "did not mean anything to [him], and that [he was] serving a sentence of 140 years[.]" Even though Davis then testified that he "was jokin'" with the detectives, the record supports the circuit court's conclusion that his affidavit and testimony were untruthful. In short, Davis's evidence does not establish any probability of a different result at a new trial.[8] *See* ***Edmunds***, 308 Wis. 2d 374, ¶13.

¶26 *Charley Grant's Evidence.* In his affidavit, Charley claimed to know that Jordan was not the shooter because he (Charley) was at the gas station at the time of the shooting and witnessed both of the cars involved in the shooting "30 seconds" before shots were fired. Charley claimed in the affidavit that the car Jones was driving contained four men, but that Jordan was not one of them. In the affidavit, Charley does not mention ever personally speaking with Quincy about the shooting.[9]

¶27 At the hearing, Charley testified that sometime between April and June 2003, Quincy told Charley that he (Quincy) committed the homicide, and not Jordan. Charley never explains why he omitted this important information from

[8] We also note that Davis's evidence, even if true, is hearsay. *See* WIS. STAT. § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Jordan does not allege that Davis's statement falls within an exception to the general rule prohibiting the admission of hearsay at trial. *See* WIS. STAT. § 908.02 (hearsay is not admissible).

[9] There are two affidavits in the record from Charley. The substance of each is exactly the same. However, one is dated August 8, 2003, and is not notarized, and the other is dated February 23, 2009, and is notarized. Charley testified that one of the affidavits was a forgery. However, the substance of each is the same, and he agreed that the contents of each were accurate. In neither statement does he ever mention speaking with Quincy.

his affidavit. Furthermore, at the hearing, Charley claimed that he knew Jordan was not the shooter based on his conversation with Quincy, and not because he allegedly personally observed the parties involved in the shooting just moments before it occurred. He also claimed at the hearing that the car he observed Jones driving at the gas station moments before the shooting had three people in it, rather than four, and that not all of them were male.

¶28 Charley's contradictory testimony and failure to explain why he omitted Quincy's confession from his affidavit supports the circuit court's conclusion that his testimony was untruthful. This evidence would not result in a new outcome at trial. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13.

¶29 Finally, in the context of his newly-discovered-evidence claim, Jordan contends that the circuit court improperly adopted the State's position and brief without explaining the facts or legal standards upon which its decision was based. This argument is without merit.

¶30 As we just explained, the circuit court did not erroneously exercise its discretion when it concluded that the evidence submitted by Jordan's newly discovered witnesses was inadequate to entitle him to a new trial. The circuit court found that there was "[n]o reasonable probability a jury hearing all of the evidence, the trial evidence and newly discovered evidence, would have a reasonable doubt as to the defendant's guilt." The circuit court rested its decision on its finding that the affidavits on which Jordan's newly-discovered-evidence claim relied "appeared to be contrived and put together by the same person." As we set forth in detail above, the circuit court aptly explained its decision and that decision is supported by the record. *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 541-42, 504 N.W.2d 433 (Ct. App. 1993) (requiring the circuit court "not

only state its findings of fact and conclusions of law, but also state the factors upon which it relied in making its decision").

¶31 In sum, we agree with the circuit court that Jordan's allegedly newly discovered evidence does not entitle him to a new trial.[10]

II. Ineffective Assistance of Trial Counsel.

¶32 Jordan next complains that his trial counsel was ineffective for: (1) failing to engage in proper pretrial preparation; (2) failing to call important witnesses, including Lee and Charley; and (3) failing to submit evidence that Jordan is right-handed. Because Jordan has failed to allege a sufficient reason for not raising these issues in his direct appeal, we do not address their merits and affirm.

¶33 ***State v. Escalona–Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), requires that a defendant raise all grounds for postconviction relief in his or her first postconviction motion or in the defendant's direct appeal. *See* ***id.*** at 185. A defendant may not pursue claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "'sufficient reason'" for not raising the claims previously. ***Id.*** at 181-82 (citation omitted). Whether a defendant's successive appeal is

[10] Within the context of his newly-discovered-evidence claim, Jordan takes issue with the circuit court's characterization of Jordan's pretrial behavior as "uncooperative" and argues that the circuit court's finding is unsupported by the record. First, we disagree that the circuit court's conclusion in that regard is unsupported by the record. The record shows that Jordan fired numerous attorneys prior to trial and was uncommunicative with many of those attorneys while they represented him. Second, even if we accept Jordan's argument that the record does not support a finding that he was uncooperative prior to trial, we fail to see how that finding is relevant to any issue before us on appeal, particularly Jordan's newly-discovered-evidence claim. To the extent that Jordan believes it is relevant, he has failed to adequately brief the issue such that we can address it. *See* ***Pettit***, 171 Wis. 2d at 646.

procedurally barred is a question of law that we review *de novo*. ***State v. Fortier***, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893.

¶34 In his reply brief, Jordan responds thusly to the State's argument that his ineffective-assistance-of-trial-counsel claims are barred by ***Escalona-Naranjo***:

> Remarkably, the state declares a dry argument that Jordan is procedurally barred from raising the issues against trial counsel[.] The crux of this argument is that Jordan knew about the information in the police reports that were "possible leads"[[11]] and that the newly discovered evidence is not correlated[.]
>
> However, the Circuit court has long addressed this issue and gave the parties a chance to reply, in which the state waived and therefore, conceded[.] Most of all[,] appointed counsel was ordered to address all identified errors of trial counsel by the 7th circuit[.[12]]

(Citations and footnote omitted.) In other words, Jordan provides no explanation at all for failing to raise these issues in his direct appeal. As such, we conclude his claims are barred by ***Escalona-Naranjo***.

III. Self-Representation.

¶35 Next, Jordan complains that the circuit court erroneously denied him "a meaningful oppo[r]tunity to be heard when it refused to allow him to represent himself through the [WIS. STAT. §] 974.06 proceedings." (Formatting altered.)

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[11] Jordan argues that he notified his trial counsel of several potential witnesses, including Lee and Charley, based on his (Jordan's) review of the police reports prior to trial, and that his trial counsel was ineffective for failing to follow up on Jordan's leads.

[12] As best we can tell, Jordan's reference to "the 7th circuit" is to the Seventh Circuit Court of Appeals. Jordan alleges in his brief that at one time he filed a petition for *habeas corpus* in federal court, which may be why he references "the 7th circuit." However, it is unclear to us, and Jordan does not elaborate, how any ruling by that court bears upon his current WIS. STAT. § 974.06 motion for postconviction relief or upon whether he met the procedural requirements of ***State v. Escalona–Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

The State argues that, although § 974.06 proceedings are civil, we should look to ***State v. Imani***, 2010 WI 66, 326 Wis. 2d 179, 786 N.W.2d 40, setting forth the test for self-representation in criminal cases, and apply that test to determine that the circuit court did not err when it found that Jordan was not competent to represent himself.

¶36 "Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact, which this court determines independently." ***Id.***, ¶19. "[A] circuit court's determination that a defendant is incompetent to proceed pro se 'will be upheld unless totally unsupported by the facts.'" ***Id.*** (citations omitted).

¶37 In ***Imani***, the supreme court noted the apparent tension between the constitutional right to self-representation and the right to the assistance of counsel in criminal cases. ***Id.***, ¶¶20-21. In order to resolve that tension, the supreme court held that before permitting a defendant to represent himself "the circuit court must ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.***, ¶21. ***Imani*** notes that, absent a showing that a defendant knowingly, intelligently, and voluntarily waived the right to counsel, we presume in criminal cases that a defendant has not waived that right. ***Id.***, ¶22.

¶38 The State contends that we should apply the spirit of ***Imani*** here, even though it asserts that WIS. STAT. § 974.06 motions for postconviction relief, while part of the original criminal action, are actually considered civil in nature. *See* § 974.06(2), (6). In civil actions, while the Wisconsin Constitution confers a right of self-representation and the right to retain an attorney of the party's choosing, there is no right to the assistance of counsel as there is in criminal cases.

See WIS. CONST. art. I, § 21(2) & § 7. However, regardless of what rights may or may not be bestowed upon Jordan as part of his § 974.06 motion, Jordan has not responded to the State's argument that ***Imani*** should apply here and unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). As such, we turn to ***Imani*** and the circuit court's conclusion that Jordan was not competent to represent himself.

¶39 In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial. ***Imani***, 326 Wis. 2d 179, ¶36. "In determining whether a defendant is competent to proceed pro se, the circuit court may consider the defendant's education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense." ***Id.***, ¶37. However, "[a] defendant of average ability and intelligence may still be adjudged competent for self-representation, and accordingly, a defendant's 'timely and proper request' should be denied only where the circuit court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense." ***Id.*** (citation omitted).

¶40 When reviewing a circuit court's conclusion that a defendant is competent to proceed *pro se*, we defer to the circuit court's judgment. ***Id.*** "'It is the [circuit court] judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at least a meaningful defense.'" ***Id.*** (citation omitted). "Our review is limited to whether the circuit court's determination is 'totally unsupported by the facts apparent in the record.'" ***Id.*** (citation omitted).

¶41 Here, following a discussion with Jordan's postconviction counsel and a colloquy with Jordan, the circuit court explained its reasons for denying Jordan's motion to proceed *pro se* thusly:

> The Court is going to make a finding that the defendant is not competent to represent himself in this matter. He's had an opportunity to do so in the past and once he did that he sought advice and representation by counsel in the continuation of the appeal of this matter.
>
> The Court believes that the defendant has a limited education [Jordan testified that he completed the eighth grade]. That doesn't necessarily mean that he is not a bright person but that he has limited education and that it would not be in his best interests to proceed pro se under all of the circumstances and their [sic] request to proceed pro se is denied.

¶42 Jordan does not contend that the circuit court's findings—that Jordan had represented himself *pro se* before but then sought representation and that he had a limited education—are wrong, rather he conclusorily complains that despite the circuit court's findings, the circuit court should have permitted him to proceed *pro se*. That is simply not the case. The circuit court's findings are supported by the record and are sufficient to support the circuit court's conclusion that Jordan was not competent to proceed *pro se*. *See* ***Imani***, 326 Wis. 2d 179, ¶37. As such, we affirm.

IV. Ineffective Assistance of Postconviction Counsel.

¶43 Jordan also argues that he "was denied fundamental fair proceeding [sic] when forced appointed counsel at evidentiary hearing failed to be effective assistance [sic]." (Formatting altered.) He then goes on, in a rambling and

somewhat incoherent manner, to set forth a patchwork of claims against Attorney Hart, his court-appointed postconviction counsel.[13]

¶44 The State responds that because Jordan did not have a federal or State constitutional right to the effective assistance of postconviction counsel pursuant to WIS. STAT. § 974.06, he cannot now argue that postconviction counsel was ineffective. *See* ***Coleman v. Thompson***, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") (internal citations omitted). Because Jordan fails to respond to the State's argument in his reply brief—instead focusing on what he believes to be Attorney Hart's errors—we accept the State's argument for purposes of this appeal, and affirm the circuit court. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109 (unrefuted arguments are deemed admitted).

¶45 However, even if we were to address Jordan's ineffective-assistance-of-postconviction-counsel claims on their merits, Jordan would not have prevailed. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). At the very least, Jordan has failed to show any prejudice, making only conclusory and incoherent assertions against

[13] We note that while Attorney Hart appears to bear much of Jordan's wrath, he is not alone. Many of Jordan's claims against Attorney Hart seem to contend that Attorney Hart should have corrected the alleged errors made by his many predecessors.

Attorney Hart.[14] In some instances Jordan's arguments simply ignore the reality of the case. For instance, Jordan faults Attorney Hart for not recalling Quincy to cross-examine him (Jordan was represented by different counsel at the time Quincy took the stand at the ***Machner*** hearing), even though Quincy repeatedly asserted his Fifth Amendment privilege when on the stand and even though Quincy's attorney informed the court that he would continue to invoke his Fifth Amendment privilege at any future hearings.

¶46 In short, we affirm the circuit court's decision to deny his ineffective-assistance-of-postconviction-counsel claims.

V. New Trial in the Interest of Justice.

¶47 As a last-ditch effort to save his appeal, Jordan argues that the cumulative effect of the foregoing alleged errors entitle him to a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. We disagree. The controversy here was fully tried and this is not an "'exceptional case[.]'" *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). There was ample evidence admitted at trial suggesting that Jordan killed Robinson, including Jordan's signed statement to police admitting to the crime. Jordan has now had two opportunities to convince us that the trial was unfair. He has not done so. As such, we affirm the circuit court.

[14] We also agree with the State's contention that "the incoherence of Jordan's reconsideration motion [and his current argument before this court] confirms the circuit court's decision not to allow Jordan to represent himself during the postconviction-motion proceedings. The motion more than hints at the likely chaos the court would have confronted during the evidentiary portion of the proceeding."

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.