COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1596-CR **Cir. Ct. No. 2010CF3179**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADRIAN CASTANEDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN and DENNIS P. MORONEY, Judges.[1] *Reversed in part; affirmed in part and cause remanded with directions*.

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

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[1] The Honorable Thomas P. Donegan presided over the trial and entered the judgment of conviction. The Honorable Dennis P. Moroney issued the order denying Castaneda's motion for postconviction relief.

¶1 CURLEY, P.J. Adrian Castaneda appeals the judgment convicting him of felony bail jumping and misdemeanor battery, contrary to WIS. STAT. §§ 946.49(1)(b) and 940.19(1) (2009-10).[2] Castaneda argues that his felony bail jumping conviction should be reversed because the State failed to prove all the elements of felony bail jumping. Castaneda also argues that he is entitled to a new trial on the misdemeanor battery offense in the interest of justice, and argues that the trial court erred in denying his postconviction motion, which alleged that Castaneda's trial attorney was ineffective, without an evidentiary hearing. Because we agree that the State failed to prove one of the elements of felony bail jumping—specifically, that Castaneda was previously charged with a felony—we reverse the felony bail jumping conviction and remand to the trial court with directions to enter a judgment of acquittal. As for the misdemeanor battery conviction, we are satisfied that the controversy was fully tried and that the trial court did not err in denying Castaneda's postconviction motion without a hearing; consequently, we affirm that conviction.

BACKGROUND

¶2 On June 29, 2010, Castaneda was charged with felony bail jumping, substantial battery, and misdemeanor battery. The two battery charges stemmed from an incident that occurred on June 12, 2010, outside the Monkey Bar on South 1st Street in Milwaukee. Off-duty Milwaukee Police Officer Joseph Serio attempted to break up a fight between a couple. As he was doing so, an unknown Hispanic male punched him in the face with a closed fist, which resulted in two

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

broken bones in his nose. Luis Garcia, who was working that evening as a bouncer at the bar, witnessed Castaneda hit Officer Serio in the face. Garcia then chased Castaneda down an alley. When he caught up with Castaneda, Castaneda punched Garcia in the eye, causing pain and bruising. The felony bail jumping charge stemmed from the fact that Castaneda had been charged, several weeks earlier, with a felony—delivery of a controlled substance (tetrahydrocannabinols) in an amount not more than 200 grams—and released on bond, one of the conditions of which was that Castaneda "shall not commit any crime." On February 14, 2011, after the Monkey Bar incident, the earlier felony charge was amended to a misdemeanor possession of marijuana charge, to which Castaneda pled guilty and received a time-served sentence.

¶3 On the first day of the trial on the Monkey Bar incident, March 28, 2011, the parties entered into a stipulation concerning the felony bail jumping charge outside of the presence of the jury.

> THE COURT: We are on the record. I've been informed all the jurors are out there. We will be continuing the voir dire. And it won't be an issue at voir dire, but eventually, as to these charges, is there any stipulation? Is there any stipulation at all?
>
> [ASST. DISTRICT ATTORNEY]: No. Okay, Judge –
>
> THE COURT: What about to there being a prior felony?
>
> [DEFENSE COUNSEL]: There will be a stipulation to that.
>
> THE COURT: Okay. Stipulation to the prior felony? And have you talked that over with your client? Does he understand what that means?
>
> (Discussion at counsel table.)
>
> [DEFENSE COUNSEL]: Yes.

> THE COURT [to Castaneda]: I have to address you personally, sir, just so it is clear, because this is an element of proof for the State. If they are going to be able to try to prove the bail jumping offense, there are two elements, and one is that in fact there was a prior felony. So if they have to prove it, then they get to put in evidence when the felony was, and it can be talked about in front of the jury. If you stipulate to it, you are just agreeing, yes, there was one. That's all that gets discussed. You are not going to have the jury being told what or how many priors.
>
> [DEFENSE COUNSEL]: Your Honor, just for clarification, of prior pending felony?
>
> THE COURT: Pending felony.
>
> [DEFENSE COUNSEL]: Okay.
>
> [ASST. DISTRICT ATTORNEY]: Judge, just how I put it into my opening stuff, we are just going to refer to it as a crime. I think that's the safest way to do that.
>
> THE COURT: Charged crime?
>
> [ASST. DISTRICT ATTORNEY]: Right. That he was charged – He had – He was charged with a crime that occurred on the date, and that that case – he was put on bail, and that case was pending when this case came up. But it would just be a crime.
>
> THE COURT: Those are all okay with the defense?
>
> [DEFENSE COUNSEL]: That's fine.
>
> THE COURT: Okay. Very good. I'll accept the stipulation of the parties. Possibly later we can put it in writing. But defendant did personally stip[ulate], and I accept that. Nothing else then? We can bring back in the jury.

¶4 Although the trial court addressed Castaneda, Castaneda was never asked at this time whether he agreed to the stipulation, and the record is silent as to any response from him. His attorney told the judge, "[t]hat's fine" in response to the trial court's question whether the assistant district attorney's suggestion, to call Castaneda's prior charge a "crime," was acceptable to the defense. The trial

court's remarks indicate the court believed that Castaneda agreed to the stipulation, and the trial court suggested that the stipulation possibly be put in writing later.

¶5 On March 30, 2013, near the end of testimony, the trial court again addressed the stipulation, stating:

> I have the stipulation. It now has the word "crime" rather than "felony." I also changed the jury instruction to reflect the word "crime." Though, you do note the instruction indicates normally that a felony is an act for which a prison sentence can be given, and so I just changed it to "A crime is punishable by imprisonment in the Wisconsin State Prison," so I don't think that goes against the spirit of the stipulation….

¶6 While the trial court stated that it changed the jury instruction to read: "A crime is punishable by imprisonment in the Wisconsin State Prison," the parties point to no evidence that this language was ever read to the jury.

¶7 Additionally, although the trial court stated it had the stipulation, no signed stipulation appears in the record. At the postconviction motion hearing, an unsigned stipulation—bearing a signature line for the assistant district attorney, Castaneda's attorney and Castaneda—was put into the record. The stipulation stated:

> 1. That on May 4, 2010, Mr. Castaneda was charged with a crime.
>
> 2. That subsequent to being charged with a crime Mr. Castaneda was released from custody on bond.
>
> 3. That Mr. Castaneda was released from custody under conditions established by a court commissioner which included: "shall not commit any crime."
>
> 4. On June 12, 2010, the conditions of Adrian Castaneda's bond were in effect.

SO STIPULATED.

¶8 Once the jury was chosen, the trial court instructed it that the first element of the felony bail jumping charge had been stipulated to by the parties:

> Now, I said sometimes there are stipulations. The parties agree, as to that first element, that the defendant had been charged with a crime prior to this date and he was on a bond order at that time. He was released on bond, so they are not arguing about that, that's a fact you can accept. The rest of the elements are subject to proof.

¶9 At the close of testimony, the trial court again instructed the jury that the parties had stipulated to the first element of the bail jumping charge, and also noted that the parties had stipulated to the second element as well:

> So what is it that the State has to prove beyond a reasonable doubt in the crime of bail jumping? Well, bail jumping is defined in the Criminal Code of Wisconsin as being committed by one who has been released from custody, on bond, and intentionally fails to comply with the terms of that bond. And so before you can find the defendant guilty of this offense, bail jumping, the State must prove by evidence that satisfies you beyond a reasonable doubt that three elements were present.
>
> So, when you are examining the bail jumping charge, that's your starting point, the State has to prove. It is their burden. They have to prove it beyond a reasonable doubt. What they have to prove consists of three elements. The first is that in fact at that time, on June 12th of 2010, the defendant was someone who had been charged with a crime.
>
> And as to that element, as I told you, sometimes there are stipulations. In this case there is no dispute about the fact that on a previous time he had been charged with a crime and he was out on bond. That has been stipulated to by a stipulation, which I read you earlier and which you are to accept as a fact. That as of that date Mr. Castaneda had been charged with a crime, and subsequent to being charged with that crime, he was released on bond. He was released under conditions that were established by a court commissioner that included the requirement that he shall not commit any crime and that in fact on June 12th, 2010, the conditions of his bond were so in effect.

> So that stipulation was signed by the defendant and the attorneys. So, regarding the first element of the crime of bail jumping, the State does not have to put on any further proof to prove it. It is a fact. It is stipulated to.
>
> Then, the second thing the State has to prove was that he was released from custody on bond. That's also covered by the stipulation, because the requirement is that after being charged, the defendant was released from custody, on bond, under conditions established by a judge or court commissioner. You just heard the stipulation. Again, that's not needing further proof. So elements one and two are stipulated to.
>
> As to element 3, the State still has the burden to prove beyond a reasonable doubt that the defendant intentionally failed to comply with the terms of the bond. And the terms of the bond are the ones I read to you, that he shall not commit any crime. This requires that the defendant knew of the terms of the bond and knew that his actions did not comply with those terms.

¶10 Not surprisingly, given that the trial court instructed the jury that two of the three elements for bail had been stipulated to, the jury found Castaneda guilty of felony bail jumping. The jury also found him guilty of misdemeanor battery. Castaneda was found not guilty of the substantial battery charge. As noted, Castaneda's appellate attorney brought a postconviction motion, which was ultimately denied. Castaneda now appeals. Additional background information will be developed as necessary below.

ANALYSIS

¶11 On appeal, Castaneda challenges both his felony bail jumping conviction and his misdemeanor battery conviction, as well as the order denying his postconviction motion. As he challenges each conviction on different grounds, we discuss each in turn.

A. The felony bail jumping conviction must be reversed because it was not supported by sufficient evidence.

¶12 Castaneda argues that his felony bail jumping conviction must be reversed because it is not supported by sufficient evidence. The question of whether the evidence is sufficient to support a conviction is a question of law we review *de novo*. *See* ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶13 "The standard for determining whether sufficient evidence supports a finding of guilt … is … well established." ***State v. Watkins***, 2002 WI 101, ¶67, 255 Wis. 2d 265, 647 N.W.2d 244. We cannot reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, "'is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***Booker***, 292 Wis. 2d 43, ¶22 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn the verdict, even if we believe that the jury should not have found Castaneda guilty. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶14 Specifically, Castaneda argues that the evidence was insufficient to prove that he was guilty of felony bail jumping because there was no evidence that

he had been charged with a felony. Rather, the evidence adduced at trial—the parties' stipulation—was that Castaneda had been charged with a "crime."[3]

¶15 The State agrees that the evidence was insufficient to prove that Castaneda was guilty of felony bail jumping and agrees that there was no evidence that he had been charged with a felony adduced at trial. The State takes the position, however, that the bail jumping conviction should not be reversed and vacated, but instead should be remanded for modification of the judgment of conviction and resentencing. The State argues that although there is no evidence in the record to support a finding that Castaneda was charged with a felony, the proper remedy is to modify his conviction to a misdemeanor.

¶16 We agree with the parties that the evidence adduced at trial was insufficient to prove that Castaneda was guilty of felony bail jumping. WISCONSIN JI—CRIMINAL 1795 sets forth the three elements of the crime of bail jumping. As pertinent to our discussion, the State was required to prove that Castaneda: (1) was charged with a felony; (2) that he was released from custody on bond; and (3) that he "intentionally failed to comply with the terms of the bond." *See* ***id.***; *see also* ***State v. Dawson***, 195 Wis. 2d 161, 170-71, 536 N.W.2d 119 (Ct. App. 1995). The standard jury instruction defines a felony as being "a crime punishable by imprisonment in the Wisconsin state prisons." WIS JI—CRIMINAL 1795. It defines a misdemeanor as being "a crime punishable by imprisonment in the county jail." ***Id.*** Nowhere in this record is there any

[3] Again, we note that the parties have pointed to no evidence showing that the jury was ever instructed that a "crime" could be defined as something "punishable by imprisonment in the Wisconsin State Prison"—*i.e.*, as a felony. It also appears that no written instructions were filed as part of the record in this case. In the future, it would be helpful for the parties to confirm this fact in their briefs.

evidence to permit a jury to find that Castaneda was charged with either a felony or a misdemeanor.[4] The only reference in the record states that Castaneda was charged with a "crime." We have no way of knowing what the jury believed was a crime.

¶17 As can be seen by the quotes from the transcript, the State and the defense attorney decided—outside the presence of the jury—to stipulate to the fact that Castaneda had been charged with a felony; however, the jury was only told that Castaneda had committed a "crime." Moreover, as noted, it is not clear that the jury was given any instruction from which it could understand a crime to fit the definition of felony. Unfortunately, the faulty stipulation before the jury never

[4] In its instructions to the jury at the beginning of trial, the trial court made the following passing reference to a felony:

> Regarding the first count, that is, bail jumping, which I read to you at the beginning, which says that on the date in question … the defendant had already been charged with a crime and then released from custody under a bond or bail order. And that's the first fact that has to be proven.
>
> The second element that has to be proven is that the defendant was released from custody on that bond. And then, thirdly, that the defendant intentionally failed to comply with the terms of that bond. And this requires that the defendant knew of the terms of the bond and knew that his actions did not comply with those terms.
>
> *So the first is that he was charged with a felony.* Second is that he was released from custody on bond. And the third is that he intentionally failed to comply with the terms of the bond.
>
> Now, I said sometimes there are stipulations. The parties agree, as to that first element, that the defendant had been charged with a crime prior to this date….

(Emphasis added.) However, it appears that this is the only time the word "felony" was used in connection with the elements of bail jumping, and, as noted, at no point was the jury instructed regarding the definition of "felony" or "crime."

identified the crime or whether it was a misdemeanor or a felony. Yet the jury was told the "State does not have to put on any further proof to prove [the felony bail jumping charge]." This was reversible error.

¶18 Support for our holding comes from the "Comment" following WIS JI—CRIMINAL 1795. The comment states that, "[t]he nature of the underlying crime for which the defendant was in custody determines the penalty range, *see* [WIS. STAT.] § 946.49(1)(a) and (b), *and must be established at trial*." *See* WIS JI—CRIMINAL 1795 comment n.3 (emphasis added). The comment also notes, "the jury may be told that a certain crime is in fact a felony or a misdemeanor." *See* ***id.***, comment n.5.

¶19 Moreover, we disagree with the State's contention that Castaneda's bail jumping conviction should not be reversed and vacated, but instead should be remanded for modification of the judgment of conviction and resentencing. The State argues that although there is no evidence in the record to support a finding that Castaneda was charged with a felony, the proper remedy is to modify his conviction to misdemeanor bail jumping. In support, the State cites ***Dickenson v. State***, 75 Wis. 2d 47, 51-52, 248 N.W.2d 447 (1977), a case in which the defendant's conviction was remanded for modification and resentencing of a lesser included offense. As our supreme court noted in ***State v. Myers***, 158 Wis. 2d 356, 372, 461 N.W.2d 777 (1990), however, the jury in ***Dickenson*** "was apparently instructed on the lesser included offense." The ***Myers*** court held that "[w]hen a conviction is reversed because of insufficient evidence and no instruction on lesser included offenses had been given, a court should not use the guilty verdict as the basis for a conviction on a lesser included offense." ***Id.***, 158 Wis. 2d at 363.

¶20 ***Myers*** is directly on point here. Under the facts before us, the jury, knowing that Castaneda had been charged with a "crime," could have found Castaneda guilty of misdemeanor bail jumping had it been properly instructed. However, the jury was not instructed on misdemeanor bail jumping. The verdict form states that the jury found Castaneda "guilty of bail jumping as charged in the first count of the information" (some capitalization omitted) and the only bail jumping charge in the information is a felony bail jumping charge. Like the defendant in ***Myers***, *see* ***id.***, 158 Wis. 2d at 365, and unlike the defendant in ***Dickenson***, *see* ***Myers***, 158 Wis. 2d at 372, the jury trying Castaneda's case was not instructed on the lesser-included charge. Therefore, simply modifying the conviction and remanding the case for resentencing is not appropriate.

¶21 Therefore, we reverse Castaneda's felony bail jumping conviction and remand with directions to enter a judgment of acquittal. *See* ***State v. Henning***, 2004 WI 89, ¶22, 273 Wis. 2d 352, 681 N.W.2d 871 ("[D]ouble jeopardy principles prevent a defendant from being retried when a court overturns his conviction due to insufficient evidence. Where the evidence is found insufficient to convict the defendant at trial, the defendant cannot again be prosecuted.") (internal citation omitted). Because we conclude that there was no evidence before the jury that Castaneda had been charged with a felony, we need not address Castaneda's arguments regarding whether the second and third elements of felony bail jumping were established. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible grounds).

B. The misdemeanor battery conviction is affirmed because the real controversy was fully tried, and because trial counsel was not ineffective for failing to request a self-defense instruction.

¶22 Castaneda also submits that his misdemeanor battery conviction must be reversed. Castaneda argues that because he testified at one point that he was "protecting" himself, and trial counsel did not request a self-defense instruction, the real controversy was not fully tried. He also, contending that trial counsel was ineffective for failing to request the self-defense instruction, argues that the trial court erred in denying his request for a ***Machner*** hearing.[5]

¶23 In support of these arguments, Castaneda directs us to the following testimony, which he claims establishes that self-defense was an issue in the misdemeanor battery case:

> Q: Did your hands ever have contact with Luis Garcia?
>
> A: Um, I struggled with Luis Garcia, and my hands were moving everywhere. He was directly on top of me. His right hand was holding my left … and his other arm was right on top of my right arm. And I just kept moving my hands around just to get it loose from his grasp. So if I hit him, I might have. I don't really know. I was protecting myself. He was on top of me.

¶24 Castaneda directs us to his testimony that he was "protecting" himself to argue that the self-defense instruction should have been given, and that a new trial is warranted because it was not given—either because the real controversy was not fully tried, or because trial counsel was ineffective in failing to request the instruction.

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

¶25 Considering Castaneda's arguments in turn, we first conclude that the controversy was fully tried. "The power to grant a new trial in the interest of justice is to be exercised 'infrequently and judiciously,'" and should be "exercised only in 'exceptional cases.'" *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted). This is not an exceptional case. Rather, this is a case where an extremely weak case for self-defense could have been made, but was not, likely as a reasonable defense strategy.

¶26 As Castaneda himself notes, trial counsel did not request a self-defense instruction, nor did counsel object when the instruction was not given; therefore, the issue was not properly preserved for appeal and consideration of the claimed error has been waived. *See* WIS. STAT. § 805.13(3) (failure to object to proposed jury instructions constitutes a waiver of any error in the proposed instructions). *See also* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the [trial] court." Issues not preserved "generally will not be considered on appeal."). The waiver rule is not to be considered lightly; it "is not merely a technicality or a rule of convenience;" rather, "it is an essential principle of the orderly administration of justice." ***Id.***, ¶11.

¶27 Nevertheless, Castaneda urges this court to exercise our discretionary power of reversal under WIS. STAT. § 752.35 to grant him a new trial in the interests of justice. This court has the "discretionary power to reverse judgments where unobjected-to error results in either the real controversy not having been fully tried or for any reason justice is miscarried under … [WIS. STAT. § 752.35]." *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). Under the first category of cases, when the real controversy has not been

fully tried, we need not decide that the outcome would be different on retrial before exercising our discretionary power. *See* ***id.*** at 19.

¶28 "[S]ituations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶29 Contrary to what Castaneda argues, omitting the self-defense jury instruction did not prevent the real controversy from being fully tried. Castaneda does not argue that the jury was "not given the opportunity to hear important testimony that bore on an important issue of the case," nor does he argue that "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *See* ***id.*** We must therefore reject his claim.

¶30 Nor has Castaneda shown that the failure to give the self-defense instruction was plain error. We review errors otherwise waived by a party's failure to object for "plain error." *See* ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "Plain error is error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***Id.*** (citation and internal quotation marks omitted). The error must be both "'obvious and substantial,'" *see* ***id.*** (citation omitted), or "grave," *see* ***Virgil v. State***, 84 Wis. 2d 166, 191, 267 N.W.2d 852 (1978) (citation and internal footnotes omitted), and the rule is "reserved for cases where there is the likelihood

that the [error] ... has denied a defendant a basic constitutional right," *see* ***State v. Sonnenberg***, 117 Wis. 2d 159, 178, 344 N.W.2d 95 (1984). We must use the plain error doctrine sparingly. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶21.

¶31 As noted, while Castaneda testified that he was "protecting" himself, he was also unsure about whether he actually hit Garcia:

> Q: Did your hands ever have contact with Luis Garcia?
>
> A: Um, I struggled with Luis Garcia, and my hands were moving everywhere. He was directly on top of me. His right hand was holding my left … and his other arm was right on top of my right arm. And I just kept moving my hands around just to get it loose from his grasp. So if I hit him, I might have. I don't really know. I was protecting myself. He was on top of me.

Furthermore, in closing arguments, trial counsel argued that Castaneda was not guilty of battery because he lacked the requisite intent:

> Mr. Castaneda told you that he was flailing to get away from Mr. Garcia. *If Mr. Garcia was in any way struck by Mr. Castaneda, it was not intentional, and it has to be intentional for it to be a battery.* It wasn't intentional, and so you return a verdict of not guilty.

(Emphasis added.)

¶32 Given Castaneda's trial strategy of arguing that he lacked the intent to strike Garcia, and given Castaneda's testimony that he was unsure about whether he struck Garcia, we are satisfied that the omission of that instruction was not "so fundamental that a new trial or other relief must be granted even though" the omission of the instruction "was not objected to" at trial. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶21 (citation and internal quotation marks omitted).

¶33 In sum, because the omission of the self-defense instruction did not prevent the real controversy from being tried, and was not plain error, we conclude that reversal under WIS. STAT. § 752.35 is not warranted. *See, e.g.*, ***Avery***, 345 Wis. 2d 407, ¶38.

¶34 We also conclude the trial court did not err in denying Castaneda's motion for an evidentiary hearing on trial counsel's alleged ineffectiveness in failing to request the self-defense instruction. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). In ***State v. Allen***, 2004 WI 106, ¶¶12-24, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing. Relying on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the ***Allen*** court repeated the well-established rule:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Id., 274 Wis. 2d 568, ¶9 (emphasis added; internal citations omitted).

¶35 To succeed on this claim, Castaneda must allege a *prima facie* claim of ineffective assistance of counsel, showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance,

Castaneda must show facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***Strickland***, 466 U.S. at 694. The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶36 Castaneda does not allege that trial counsel's reasonable decision not to request the self-defense instruction was deficient, nor that it would have affected the trial's outcome. He simply refers us to his postconviction motion, which itself presents only conclusory arguments. The postconviction motion refers to Castaneda's testimony, noted above, that he was "protecting" himself, and states that "the failure to move the court to include the [self-defense] instruction was deficient and it prejudiced Mr. Castaneda." Castaneda's argument is underdeveloped, and we will not consider it. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 ("we may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record").

By the Court.—Judgment and order reversed in part; affirmed in part and cause remanded with directions.

Not recommended for publication in the official reports.