COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP853-CR **Cir. Ct. No. 2008CF4212**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEOMETRY L. MILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Geometry L. Milton, *pro se*, appeals from a judgment, entered after a jury trial, convicting him of first-degree reckless

homicide as a party to a crime. *See* WIS. STAT. §§ 940.02(1), 939.05 (2007-08).[1] He also appeals from an order that denied, in part, his motion for postconviction relief. Milton maintains that his trial counsel was ineffective in a host of ways, that the State charged him with a crime that either does not exist or is unconstitutional, and that the circuit court erred by failing to suppress evidence found when police searched his home. We affirm.

BACKGROUND

¶2 The State filed a criminal complaint alleging that Milton and a co-defendant were parties to the crime of first-degree reckless homicide in the death of Timothy Cotton. The complaint reflects that Cotton was shot and killed on August 7, 2008, near his sister's home on the 2900 block of North 11th Street in Milwaukee, Wisconsin. According to the complaint, Cotton's sister, Kimberly Mayfield, told police that she saw several black males shouting at Cotton as he left her home. Her son, James Mayfield, told police that he saw Milton hitting Cotton with a handgun just before Milton ran towards an area from which Mayfield then heard the sound of shots fired.[2] Cedric Jones told an investigating officer that he heard an argument outside of his home on North 11th Street and then observed Cotton arguing with Milton and other young people from the neighborhood. Soon thereafter, Jones told police, he heard six gunshots and saw the victim fall into a car. Roy Allen told police that he was at the scene when Cotton was killed. Allen

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

[2] Throughout the remainder of this opinion, we refer to Kimberly Mayfield as "Ms. Mayfield," and we refer to James Mayfield as "Mayfield."

said that he saw Milton arguing with Cotton, and then saw Milton running and shooting a gun in Cotton's direction.

¶3 Before arresting Milton in this case, police searched the home that he shared with his mother and sister and seized physical evidence from a bedroom that had been secured with a padlock. Additionally, police showed several witnesses a photographic array that included Milton. Mayfield and Jones identified Milton from the array as a person at the scene of the attack on Cotton. Another witness to the homicide, Robert Howard—who lived with the Mayfields—also viewed the array but was unable to identify anyone in it.

¶4 After the State filed the criminal complaint, police arrested Milton and placed him in a lineup. During this procedure, Mayfield and Howard both identified Milton as someone who assaulted Cotton. Following a preliminary examination, the State filed an information charging Milton with one count of first-degree reckless homicide as a party to a crime. Milton demanded a jury trial.

¶5 Milton moved to suppress Allen's statements to police and the physical evidence found in Milton's home. The State agreed not to use Allen's statements at trial. The circuit court denied the motion to suppress physical evidence. The matter proceeded to jury trial, and the jury found Milton guilty as charged.

¶6 Milton, who was represented by counsel at trial, sought postconviction relief *pro se* on multiple grounds. The circuit court relieved him of

the obligation to pay a $250 DNA surcharge imposed at sentencing and otherwise affirmed. He appeals.[3]

DISCUSSION

¶7 Milton asks us to review many issues. We address the issues that are adequately briefed, although not necessarily in the order that he presents them.[4]

I. Ineffective assistance of trial counsel.

¶8 The majority of the issues Milton presents involve allegations that his trial counsel afforded him constitutionally ineffective assistance. The two-prong test for claims of ineffective assistance of counsel requires a convicted defendant to prove both deficient performance by counsel and prejudice to the defense as a consequence. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a reviewing court

[3] The State filed a respondent's brief that includes an argument challenging the circuit court order vacating Milton's obligation to pay a DNA surcharge. The State's challenge is rejected. A respondent must cross-appeal to seek modification of the circuit court order or judgment underlying the appeal. *See* ***State v. Huff***, 123 Wis. 2d 397, 408, 367 N.W.2d 226 (Ct. App. 1985); *see also* WIS. STAT. § 974.05(1)(b), WIS. STAT. RULE 809.10(2)(b). Because the State did not cross-appeal, we cannot hear the State's challenge to the postconviction order. *See* ***Huff***, 123 Wis. 2d at 407-08.

[4] The ten numbered issues that Milton lists in the "issues presented" section of his opening brief do not fully correspond to the seven numbered issues that Milton lists in the brief's table of contents. Further, the headings in Milton's table of contents do not precisely describe his discussion of each claim. In this opinion, we consider the issues that Milton has developed with sufficient specificity as to permit us to identify them to a reasonable degree of certainty. Where appropriate, we have disregarded the label that Milton attached to his argument heading and addressed the substance of his contentions. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). To the extent that we have not discussed an issue suggested in Milton's submissions, we have concluded that the issue was not briefed at all or was too inadequately developed to earn mention. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not discuss issues that are inadequately briefed).

need not address the other. ***Id.*** at 697. Whether counsel's performance was deficient and whether any deficiency prejudiced the defendant are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶9 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Nonetheless, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This also presents a question of law for our independent review. ***Id.*** If, however, the motion does not raise sufficient material facts, or if the allegations are merely conclusory, the circuit court has the discretion to deny a request for an evidentiary hearing. ***Id.*** Additionally, "'an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts.'" ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). We

review a circuit court's discretionary decisions with deference. ***Allen***, 274 Wis. 2d 568, ¶9.

A. Allen's statements

¶10 Milton asserts that his trial counsel was ineffective for failing to pursue a motion to suppress Allen's statements. The record reflects that Milton's trial counsel filed such a motion but a hearing was not necessary to obtain relief because the State agreed on the record not to use Allen's statements at trial. Trial counsel did not perform deficiently by foregoing a superfluous suppression hearing. Further, Milton suffered no prejudice because the State in fact did not use Allen's statements at trial. Accordingly, Milton fails to show that his trial counsel was ineffective. *See* ***Strickland***, 466 U.S. at 687.

B. Sufficiency of the complaint

¶11 Milton argues that his trial counsel should have moved to dismiss the complaint on the ground that it includes allegedly false statements by Allen. In support, Milton cites ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). To secure a hearing pursuant to ***Franks*** and ***Mann***, the defendant must show both that the complaint contained false statements and that, if those statements are removed, "probable cause on the face of the complaint is lacking." ***Mann***, 123 Wis. 2d at 393. Because the complaint in this case is sufficient to support the charges against Milton even if Allen's statements are excised, trial counsel had no obligation to seek dismissal pursuant to ***Franks*** and ***Mann***. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (failure to bring a meritless motion is not deficient performance).

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

¶13 As discussed at the outset of this opinion, the criminal complaint in this case named Milton as the defendant and alleged that he committed first-degree reckless homicide as a party to the crime. *See* WIS. STAT. §§ 940.02(1), 939.05 (2007-08). The complaint identified Cotton as the victim and described statements by eye witnesses Mayfield and Jones, who implicated Milton in Cotton's death. Although the complaint also included Allen's incriminating statements, they were not essential to show that someone killed Cotton and that Milton was probably culpable. Accordingly, Milton cannot demonstrate that his trial counsel performed deficiently by foregoing a motion to dismiss the complaint pursuant to ***Franks*** and ***Mann***. *See* ***Wheat***, 256 Wis. 2d 270, ¶23.

C. Photographic identification

¶14 Milton offers three loosely related allegations that his trial counsel was ineffective in handling issues related to photographic evidence. We reject the claims.

¶15 Milton alleges that his trial counsel was ineffective by not moving to suppress evidence that witnesses identified Milton from a photographic array. He asserts that the array was impermissibly suggestive because he was the only person pictured wearing a black T-shirt, while each of the other men pictured in the array wore a white T-shirt.

¶16 The pictures in a photographic array "need not be identical." ***Powell v. State***, 86 Wis. 2d 51, 67, 271 N.W.2d 610 (1978). To the contrary, isolated differences in the appearance of a defendant and others in an array or lineup do not make the identification procedure impermissibly suggestive. *See* ***State v. Benton***, 2001 WI App 81, ¶10, 243 Wis. 2d 54, 625 N.W.2d 923 (noting that differences in height and weight do not render a line-up impermissibly suggestive). Accordingly, trial counsel did not perform deficiently here by foregoing a meritless challenge to the photographic array based on the participants' clothing. *See* ***Wheat***, 256 Wis. 2d 270, ¶23.

¶17 Milton also offers the theory that Mayfield misidentified a photograph of Devon M. Hughes as a picture of Milton. He suggests that trial counsel should have relied on this alleged error to pursue suppression of Mayfield's testimony identifying Milton as a suspect. Because the claim of misidentification is flatly refuted by the record, trial counsel was not ineffective for failing to pursue the issue. *See* ***id.***

¶18 Detective Erik Gulbrandson testified at trial that Mayfield named Milton as a suspect in Cotton's homicide and then identified Milton from a photo array. Gulbrandson next described the identification process. He said that he showed Mayfield six photographs, displaying them one at a time after

randomizing their order by shuffling them. Gulbrandson testified that Mayfield correctly identified the third photograph he saw as a picture of Milton.

¶19 The photographs used in the array are in the record as a trial exhibit that shows the six pictures on one page grouped in two rows of three. Noting that Hughes's picture appears as the third one in the top row of this exhibit, Milton contends that Mayfield erroneously identified Hughes as Milton. The contention is meritless. The record contains no evidence that Mayfield viewed the photographs as a group display. Milton therefore fails to demonstrate that the order in which the photographs appear in the trial exhibit is relevant to Mayfield's identification of Milton. The record thus conclusively shows that trial counsel did not perform deficiently by foregoing a suppression motion on this basis, and the circuit court correctly rejected the claim without a hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶50.

¶20 Milton next complains that police showed Allen a photograph of Milton wearing a white t-shirt, then later used a photograph of Milton wearing a black t-shirt in the photo arrays viewed by other witnesses. The legal error alleged is not clear, but Milton appears to believe that police must either use the same photograph of a suspect throughout a criminal investigation or disclose a reason for using different photographs. Milton suggests that his trial counsel was ineffective by not making such a claim and by not seeking disclosure of the photograph that Allen allegedly saw.

¶21 We will not puzzle over the precise theory underlying Milton's complaint, nor will we construct a legal theory for him. *See* ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998) (appellate court "cannot serve as both advocate and judge"). Assuming the record supports

Milton's allegation that the police showed Allen a photograph different from the one included in the array viewed by the other witnesses, Milton neither explains why this procedure is wrong nor demonstrates that his trial counsel's failure to pursue this issue prejudiced him.[5]

D. Lineup Identification

¶22 A suspect has the right to counsel at a lineup conducted after formal charges are filed. *See* ***Jones v. State***, 63 Wis. 2d 97, 104-05, 216 N.W.2d 224 (1974). Because Milton lacked representation at the lineup in this case, he contends that his trial attorney was ineffective for failing to seek suppression of the evidence that Mayfield and Howard identified Milton during the lineup. Relatedly, Milton claims that his trial attorney was ineffective for not challenging the in-court identifications made by Mayfield and Howard on the ground that the lineup impermissibly tainted those in-court identifications. We agree with the State that Milton's postconviction motion did not adequately support his claims.

¶23 Milton alleged in his postconviction motion that he lacked representation at the lineup, but the mere absence of a lawyer at a lineup does not alone demonstrate a defect in the proceedings because a defendant may waive the right to have representation at a lineup. *See* ***Laster v. State***, 60 Wis. 2d 525, 535-36, 211 N.W.2d 13 (1973). A lawyer has no obligation to raise a waived

[5] An appellant has the burden to direct the court's attention to portions of the record that support a claim. *See* ***Anic v. Board of Review***, 2008 WI App 71, ¶2 n.1, 311 Wis. 2d 701, 751 N.W.2d 870. Milton, however, does not identify anything in the record supporting his contention that police used more than one photograph of him while investigating Cotton's homicide. Nevertheless, we assume without deciding that something in the record supports the allegation that police showed Allen a photograph of Milton that was different from the photograph that the police showed to other witnesses.

issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996). Therefore, to show that the trial lawyer was ineffective here, Milton had the burden to show that he did not waive his right to counsel at the lineup.[6] *See* ***Johnson***, 153 Wis. 2d at 127 (defendant has burden to show that counsel's performance was deficient).

¶24 Milton did not make the necessary showing. Rather, as the circuit court observed when addressing this issue in postconviction proceedings, "it is unknown if the defendant was asked if he would like counsel at the line-up." Because Milton's postconviction motion does not include allegations that refute waiver, he failed to show that his trial attorney performed deficiently by foregoing a suppression motion on the ground that he lacked representation during the lineup.[7] *See* ***id.*** We need discuss this issue no further. ***Strickland***, 466 U.S. at 697.

¶25 For the sake of completeness, however, we have considered, as did the circuit court, whether Milton shows prejudice from counsel's alleged

[6] When the issue presented is whether a defendant was denied the right to counsel, the State "must overcome the presumption against waiver of counsel." ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992). Here, however, the issue before this court is not whether Milton was denied the right to counsel but whether trial counsel was ineffective by failing to challenge the lineup.

[7] Milton asserts that the State conceded in its postconviction memorandum that he did not waive his right to counsel at the lineup. He is mistaken. In postconviction proceedings, the State conceded that: 1. at the time of the line up, "the complaint had been signed and filed[; 2.] []the defendant was entitled to an attorney at the subsequent line up[;and 3.] an attorney was not given." The State also conceded that trial counsel did not object to the lineup procedure. The State did not concede, however, that law enforcement neglected to advise Milton of his right to counsel, or that Milton did not waive counsel. The State's positions in this court and the circuit court are not inconsistent.

deficiency in foregoing a challenge to the identifications made by Mayfield and Howard. Milton fails to make such showing.

¶26 A witness's in-court identification is not automatically suppressed when a witness's out-of-court identification is unlawfully obtained. *See* ***State v. McMorris***, 213 Wis. 2d 156, 167, 570 N.W.2d 384 (1997). Therefore, when a convicted person claims that trial counsel was ineffective for failing to seek suppression of a witness's improper out-of-court identification, the claimant cannot prove prejudice from the deficiency unless the claimant shows that the witness's in-court identification was also wrongly admitted. *See* ***State v. Roberson***, 2006 WI 80, ¶30, 292 Wis. 2d 280, 717 N.W.2d 111. Absent such a showing, the defendant does not demonstrate a reasonable probability of a different outcome at trial. ***Id.*** The burden rests with the defendant to show inadmissibility of both the out-of-court and the later in-court identifications. ***Id.***, ¶35.

¶27 "The admissibility of an in-court identification depends upon whether that identification evidence has been tainted by illegal activity." ***Id.***, ¶32. That is, an admissible in-court identification must rest on the witness's independent recollection of encounters with the suspect, untainted by any illegality. *See* ***id.***, ¶34.

¶28 Turning first to Mayfield's identification, the record here shows that Mayfield knew Milton from the neighborhood where both men lived, and Mayfield named Milton as a suspect several weeks before Mayfield viewed the lineup. Mayfield plainly based his in-court identification on a source other than the lineup. Milton was thus not prejudiced by his trial counsel's performance in failing to seeking suppression of Mayfield's out-of-court identification:

Mayfield's in-court identification would have been admitted regardless of the outcome of the suppression motion.

¶29 Whether Howard's in-court identification would have survived a motion to suppress is somewhat less clear cut. A reviewing court should consider seven factors to determine whether an in-court identification is sufficiently removed from a primary taint. ***Id.***, ¶35 n.14. Those factors are:

> (1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed concerning the conduct of the lineup.

Id. (citation omitted). Here, Howard did not identify Milton in the photo array. This factor weighs in favor of a conclusion that the in-court identification was improper. Balanced against this factor, however, are many countervailing considerations. Howard testified that he was "on the porch watching the whole time the shooting took place." The record indicates that he had ample opportunity to observe the incident from this vantage point. He did not incorrectly identify as a suspect any "filler" or "known innocent" included in the array or line-up, and Milton points to no discrepancies in Howard's identification. Additionally, it is relevant that Howard identified Milton in court before any testimony about Howard's out-of-court identifications. ***Id.***, ¶36. The weight of these factors favors admission of the in-court identification.

¶30 Nonetheless, we, as did the circuit court, assume without deciding that Howard's in-court identification testimony was influenced by the line-up and

should not have been admitted on these facts. We turn to the circuit court's conclusion that any error in admitting Howard's identification was harmless in light of the other evidence presented at trial.[8] An error in admitting evidence is harmless when no reasonable probability exists that the outcome of the proceeding would have been different if the evidence had been suppressed. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 370, 588 N.W.2d 606 (1999). Whether an error is harmless is a question of law that we review *de novo*. *See* ***State v. Beamon***, 2011 WI App 131, ¶7, 336 Wis. 2d 438, 804 N.W.2d 706. We weigh the error against the totality of the evidence supporting the verdict. ***Id.***

¶31 The jury heard testimony from Mayfield that he knew Milton as a person "from around the neighborhood." Mayfield then identified Milton as one of the people he saw with a bandana and a gun attacking Cotton on the night of the homicide.

¶32 Jones testified that he was in his home on North 11th Street on the night of the homicide when he witnessed an argument that erupted into a shooting. He next observed a man who had a black bandana "with white in it," and Jones testified that he heard the man with the bandana say to another man: "I can't believe I shot this nigger." Although Jones did not identify Milton as involved in the crime, and although Jones denied giving statements to police that implicated Milton, Jones also admitted that testifying at trial caused him "concern" for his safety. The jury then heard testimony from Detective Mark Peterson, who

[8] Milton asserts that prejudice is presumed upon a showing that he was denied counsel at the lineup. To the contrary, the issue is subject to a harmless error analysis. *See* ***United States v. Wade***, 388 U.S. 218, 219-20, 242 (1967).

described Jones's prior statements, including Jones's disclosure that Milton was part of the group that confronted Cotton just before he was shot.

¶33 Physical evidence also tied Milton to the homicide. Detective Charles Mueller described finding a .45 caliber bullet casing outside Milton's home several blocks from where Cotton was shot, and Officer Daniel Thompson testified that he found a .45 caliber bullet casing at the scene of the shooting. A firearm and tool mark examiner employed by the Wisconsin State Crime Laboratory offered expert testimony that the two .45 caliber bullet casings were fired from the same gun. Mueller also testified that he searched Milton's home and found a black and white bandana on the floor in Milton's bedroom.

¶34 We agree with the circuit court that no reasonable probability exists that the outcome of the trial would have been any different if Howard's testimony identifying Milton had been suppressed, given the compelling evidence that remains to implicate him in Cotton's homicide. Accordingly, Milton suffered no prejudice from his counsel's failure to seek suppression of the identification evidence. We must therefore reject the claim that his trial counsel was constitutionally ineffective in this regard. *See* ***Strickland***, 466 U.S. at 694.

E. Cross-Examination of Mayfield

¶35 Milton asserts that his trial counsel did not adequately cross-examine Mayfield to show his "significant family relation[ship]" with a second suspect in the case. Milton alleges that Mayfield fathered a child with the sister of the second suspect, and Milton believes that Mayfield therefore had a motive to accuse Milton falsely. Milton, however, does not point to anything in the record that substantiates his assertions that Mayfield fathered a child or that any child he fathered tied him to a second suspect in the case. We will not sift the record for

facts to support a party's argument. ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127.

¶36 Moreover, we are satisfied that Milton shows no reasonable probability that the outcome of the trial would have been any different if his trial counsel had cross-examined Mayfield about his alleged relationship with a second suspect. "[T]estimony offered to show bias must be 'relevant' on that point." *See* ***State v. Williamson,*** 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978), *abrogated on other grounds by* ***Manson v. State,*** 101 Wis. 2d 413, 304 N.W.2d 729 (1981). Here, however, Milton fails to demonstrate that Mayfield's alleged tie to a second suspect gave Mayfield any reason to lie about Milton. Milton's speculative and conclusory assertions about Mayfield's bias and motive to testify falsely are simply inadequate to show that trial counsel was constitutionally ineffective for omitting any evidence of the alleged relationship that might exist. *See* ***Allen***, 274 Wis. 2d 568, ¶15 (postconviction motion requires more than conclusory assertions).

¶37 Further, as the State accurately points out, Milton's trial counsel cross-examined Mayfield at length about his inconsistent statements, highlighting differences between his statements to police, his testimony at the preliminary examination, and his testimony at trial. In light of this cross-examination, additional efforts to discredit Mayfield would not have affected the outcome of the trial. *See* ***State v. Sarinske***, 91 Wis. 2d 14, 43, 280 N.W.2d 725 (1979) (where trial revealed witnesses' inconsistences, "further proof would not be decisive in impeaching [the witnesses'] credibility").

F. Form of the verdict

¶38 Milton next complains because the jury received, and the foreperson ultimately signed, a verdict form that permitted the jury to find him "guilty of first degree reckless homicide, as charged in the information," but that omitted the clause "as a party to a crime." Milton contends that his trial counsel was ineffective by failing to object to the form of the verdict because, in Milton's view, he was deprived of a unanimous jury verdict on the question of whether he committed reckless homicide or whether he instead aided and abetted in the commission of that crime. *See* WIS. STAT. § 939.05(2)(a)-(b) (person is party to a crime if, *inter alia*, the person directly commits the crime or intentionally aids and abets the commission of it). Milton is wrong.

¶39 First, the rule is well-settled that a verdict form need not include the words "as party to a crime" where, as here, the jury has been instructed on party-to-a-crime liability. *See* ***Harrison v. State***, 78 Wis. 2d 189, 210, 254 N.W.2d 220 (1977). "It is entirely correct, in accordance with the rationale of [WIS. STAT.] sec. 939.05, that the verdict of the jury refer only to the substantive offense, even when a party to a crime instruction has been given and when the jury has made the finding of guilt on an alternate basis of vicarious liability." ***Harrison***, 78 Wis. 2d at 210.

¶40 Second, the rule is equally well-settled that when, as here, a jury is instructed about the meaning of the phrase "party to a crime," the jury may find the defendant guilty of either directly committing the crime or of aiding and abetting in the commission of the crime and "it [i]s not necessary that [the jury] be agreed as to the theory of participation." *See* ***Holland v. State***, 91 Wis. 2d 134, 144, 280 N.W.2d 288 (1979). Indeed, "[t]o require unanimity as to the manner of

participation would be to frustrate the justice system, promote endless jury deliberations, encourage hung juries, and precipitate retrials in an effort to find agreement on a nonessential issue." ***Id.*** Accordingly, Milton fails to show that his trial counsel was ineffective by not objecting to the form of the verdict in this case.[9]

II. Lawfulness of the charge.

¶41 WISCONSIN STAT. § 939.05(2)(b) provides that a person who intentionally aids and abets another in the commission of a crime may be charged as a party to that crime. Milton believes, however, that a person cannot intentionally aid and abet a reckless act and that party-to-a-crime liability is thus inapplicable to the crime of first-degree reckless homicide. Consequently, he argues that he was charged with, and convicted of, a crime that either does not exist or is unconstitutional. He fails to offer a legal citation that supports his position. We do not consider arguments unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Moreover, a person need not aid and abet another to be a party to a crime. Pursuant to § 939.05(2)(a), a person who directly commits a crime may be charged and convicted as a party to the offense.

[9] In postconviction proceedings, the circuit court assumed without deciding that the verdict form should have included the words "as a party to a crime," but concluded that any error was harmless. We may affirm a correct decision on grounds different from those relied on by the circuit court. *See* ***State v. Amrine***, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990).

III. Denial of motion to suppress evidence seized from Milton's home.[10]

¶42 Milton asserts that the evidence against him was insufficient to support the guilty verdict because, he says, the evidence included items that police officers unlawfully seized from his bedroom during a search of his home.[11] We construe the argument as a claim that the circuit court erroneously denied his suppression motion.[12] We reject the claim.

¶43 At the suppression hearing, Detective Kent Corbett testified that Milton's mother, Shonda Milton, gave law enforcement consent to search her home, and Corbett identified the signed statement reflecting Ms. Milton's consent.[13] Corbett further testified that one of the bedrooms in the home was secured by a combination padlock. According to Corbett, Ms. Milton said that the padlocked bedroom was Milton's. She explained that Milton normally slept at the residence but did not pay any rent. Ms. Milton told the officers that she did not know the combination for the padlock on the bedroom door but her daughter, G.M., knew the combination. G.M. was present, and Ms. Milton instructed G.M. to unlock the door. G.M. complied.

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[10] We accept Milton's concession that he is not pursuing any challenge to the admission at trial of the bullet casing found on the sidewalk outside of his home.

[11] Milton also asserts without discussion that the evidence against him was insufficient because it included statements from Allen that should have been suppressed. Allen's statements were not presented at trial, so the contention is patently frivolous and warrants no discussion.

[12] The State suggests that Milton's argument is that his trial counsel was ineffective for losing the suppression motion. Upon examination of Milton's briefs, we conclude that Milton does not make such an argument.

[13] We refer to Shonda Milton as "Ms. Milton" throughout the remainder of this opinion.

¶44 A second officer, Mueller, similarly testified that Ms. Milton allowed the officers to search her home and that "a girl," G.M., was present during the search. Mueller confirmed that G.M. obeyed when directed to unlock the padlock on a bedroom door.

¶45 Ms. Milton also testified. She admitted that she voluntarily signed a document permitting police to search her home. She denied, however, that she gave permission to open the padlocked door or that she instructed her daughter to open the lock. Ms. Milton testified that the lock belonged to G.M. and that the officers threatened "to take [G.M.] to children's court" unless G.M. opened the bedroom door.[14]

¶46 Milton asked the circuit court to conclude that his mother did not consent to search the locked bedroom, or, if she did, the consent was invalid. The circuit court was not persuaded, and neither are we.

¶47 Consent to search is a well-delineated exception to the requirement that law enforcement conduct searches pursuant to a warrant. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385. The consent exception is satisfied when consent is given in fact and the consent given is voluntary. *See* ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430. The State has the burden to prove, by clear and convincing evidence, that the police obtained consent to search "in the 'absence of actual coercive, improper police practices.'" ***State v. Phillips***, 218 Wis. 2d 180, 203, 577 N.W.2d 794 (1998) (citation omitted).

[14] Corbett's police report, which Milton submitted with his postconviction motion, reflects that G.M. was sixteen years old at the time of the search.

¶48 Whether consent was given voluntarily is a question of constitutional fact. *See* ***id.*** at 195. We review such questions using a two-step analysis: we uphold the circuit court's findings of historical fact unless they are contrary to the great weight and clear preponderance of the evidence, and we independently apply constitutional principles to the circuit court's factual findings. ***Id.***

¶49 The circuit court found that Ms. Milton gave consent to search the whole of her home, including the padlocked bedroom. This is a finding of historical fact. *See* ***id.*** at 196-97. The circuit court determined that the officers credibly described the events that took place during the search, and the circuit court believed the officers' testimony that Ms. Milton assisted in the search of the bedroom by instructing her daughter to unlock the door. Credibility of the witnesses and the weight of the testimony are decisions that rest with the circuit court. ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736. Accordingly, we will not disturb the circuit court's finding that the police obtained consent for the search of the entire home.

¶50 In his appellate brief, Milton asserts that the police coerced Ms. Milton to obtain her consent to search the locked bedroom, but the circuit court expressly rejected Ms. Milton's testimony that the officers threatened her, finding that police used neither threats nor force to secure consent to search any room in the home. In light of the record and the circuit court's credibility determinations, we agree with the circuit court's conclusion that Ms. Milton freely and voluntarily gave consent to search her entire home.

¶51 Milton next argues that his mother could not give valid consent to the search of the room used as his bedroom. We disagree. "[C]onsent to search may be 'obtained from a third party who possessed common authority over or

other sufficient relationship to the premises or effects sought to be inspected.'" ***State v. Tomlinson***, 2002 WI 91, ¶23, 254 Wis. 2d 502, 648 N.W.2d 367 (citation omitted). Moreover, "even if a third party lacks the actual authority to consent to a search, police may rely upon the third party's apparent common authority, if such reliance is reasonable." ***Id.***, ¶ 25.

¶52 Milton contends, in effect, that his mother did not have apparent authority to consent to a search of the bedroom because she did not know the combination to the padlock on the door, and she thereby demonstrated lack of "common authority" over the area. We reject this argument, because Ms. Milton's minor daughter, G.M., could unlock the door.

¶53 The police could reasonably rely on the principle that, "[i]n general, a parent's interest in the property will be superior to that of the child." ***Id.***, ¶30. The police therefore reasonably believed that Ms. Milton had authority over a room in her home that she could, and did, direct her minor daughter to unlock. *Cf.* ***State v. Teynor***, 141 Wis. 2d 187, 200, 414 N.W.2d 76 (Ct. App. 1987) ("The lawful authority of a parent over a minor child includes the authority to direct the child's activities.").

¶54 Because Ms. Milton had apparent authority, at the very least, to consent to a police search of a room in her home accessible to her minor daughter, the police could reasonably rely on that apparent authority. Therefore, the evidence found during the search was admissible at trial.

CONCLUSION

¶55 Milton offers no argument warranting any relief. Accordingly, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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