COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0317-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIAN K. AVERY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Brian K. Avery appeals from a judgment of conviction entered after a jury convicted him of two counts of armed robbery,

party to a crime. He also appeals from trial court orders denying his motions for postconviction relief. Avery raises numerous issues on appeal.[1] We affirm.

I. BACKGROUND

On July 10, 1994, Milwaukee police arrested Avery for two armed robberies of convenience stores on the city's near north side. Following his arrest, Avery confessed to his involvement in both armed robberies and signed a written statement detailing the facts of the crimes.

According to trial testimony, four men robbed Malone's Fine Foods at approximately 8:30 p.m. on July 7, 1994. Ahmed Hasan, Malone's owner, testified that he was working as a cashier when the armed men entered his store. Hasan stated that the robbers fired their guns at the store's video camera and stole approximately $50 and a carton of cigarettes. Neither Hasan nor his employee was able to identify Avery as a suspect. A customer, Alcherie Simmons, did identify Avery as a participant in the robbery.

Trial testimony also established that four men robbed Atari Foods at 1:45 p.m. on July 8, 1994. Eyewitnesses to the Atari robbery stated that the men entered the store, stole approximately $30 from the cash register, and shot the store owner, Mueen Hamdan. Hamdan testified that shortly after he was released from the hospital, he identified Avery as a participant in the robbery.

[1] Avery raises more than fifteen issues on appeal. His arguments, however, lacking either citation to legal authority or record references, inadequately address many of them. Consequently, we decline to address them. *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

At trial, Avery presented an alibi defense, claiming that he had been attending a junior college basketball tournament at North Division High School at the time of the Malone's robbery, and that he had been talking on the phone at his house at the time of the Atari Foods robbery. After a four-day trial, the jury convicted Avery. The trial court sentenced Avery to consecutive prison terms of ten years for the first armed robbery and twenty years for the second armed robbery. Avery then filed lengthy motions for postconviction relief. The trial court denied the motions in part and then set a date for a hearing on Avery's ineffective assistance of counsel claims. Following the ***Machner*** hearing,[2] the trial court issued a written decision denying Avery's remaining ineffective assistance of counsel claims. Additional facts pertinent to each claim will be set forth where appropriate.

II. ANALYSIS

A. Altered Transcript

Avery claims that the trial court erred in rejecting his motion for a hearing to determine whether the trial transcript was defective. We disagree.

In his brief in support of his motion to correct the transcript, Avery alleges that the transcript has been intentionally altered, and thus, is defective. He contends that portions of the April 4, 1995 morning session and portions of the April 6, 1995 afternoon session are missing, and that these alleged alterations "indicate an intentional alteration of the transcripts." Specifically, Avery asserts:

> The questionable occurrences at trial which were omitted from the transcripts were (a) the prosecutor

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

> informed the jury twice that Brian Avery had been previously arrested and convicted for armed robbery. Defense counsel objected thereto both times. The trial court remonstrated the prosecutor at side bar once, and remonstrated him again, after the jury was excused for said purpose; (b) the owner/victim of the first robbery, [Ahmed Hasan,] testified on direct examination that the robbery occurred shortly after 8:00 p.m., and defense counsel confirms this missing testimony;[3] (c) an officer testified that in order to validate a photo identification, the photo would have to be signed, that the photo in question was not signed, and that, therefore, police had no reason to arrest Brian Avery; (d) the trial court at sentencing stated to Brian Avery that if he would admit his guilt he would be given a much lighter sentence or the minimum sentence. None of these occurrences appear in the transcript.

(Footnote added; record references omitted.)

Avery explains that "[a] close look at . . . the April 6, 1995, PM, transcript indicate [sic] glaring irregularities," which he alleges show that the transcript was intentionally altered. From the structure of the transcript that precedes and follows the prosecutor's comment, Avery infers that the jury had not been excused and that the prosecutor's argument regarding Avery's 1994 arrest for armed robbery occurred in the jury's presence.[4] He also alleges that the transcript

[3] Avery has failed to provide any record reference to support this allegation. The only support for his claim is trial counsel's testimony at the ***Machner*** hearing. Trial counsel, explaining why he had stated in his closing argument that Hasan testified that the robbery occurred at about 8:00 p.m., testified that he "believed [Hasan] testified . . . that it was about eight o'clock that this robbery happened." When appellate counsel provided trial counsel with a copy of Hasan's testimony and asked him to locate where Hasan testified that the robbery occurred at 8:00 p.m., trial counsel acknowledged that he could not locate the testimony. Trial counsel then stated: "I don't see it. It's in my trial notes though. I don't know." From this testimony, we cannot conclude that trial counsel "confirmed" that the testimony was deleted.

[4] The pertinent section of the transcript provides:

> [DEFENSE COUNSEL]: I have no further questions.
>
> THE COURT: Counsel, I think we need to take a break at this point.
>
> (Thereupon, the jury was excused.)

(continued)

> [DEFENSE COUNSEL]: Judge, I completely forgot I have two more –
>
> THE COURT: Have a seat.
>
> [DEFENSE COUNSEL]: I have two more questions, just with regard to the telephone records and interviews of the documents that [the prosecutor] did.
>
> [THE PROSECUTOR]: Well, I think we need to deal with the documents outside of the presence of the jury.
>
> THE COURT: Why don't the two of you during the break resolve that? I felt the jury needed a comfort break, so we will take about a 15-minute break.
>
> You may step down, sir.
>
> Do you plan to call any rebuttal witnesses?
>
> [THE PROSECUTOR]: Yes. I will have two short rebuttal witnesses?
>
> (Thereupon, a brief recess was taken.)
>
> [THE PROSECUTOR]: Your Honor, there is one matter outside of the presence of the jury. What I would like to raise is the fact that the defendant has made some assertions in his testimony, and there is the fact that in May of 1994 the defendant was arrested for armed robbery.
>
> Ultimately, the District Attorney's office declined to prosecute this defendant on this charge….
>
> ….
>
> THE COURT: I am aware of the concerns, and so far, I haven't heard a specific request.
>
> And I don't know that you are in a position to make that, but what I have heard is you are not going to make that request in front of the jury.
>
> [THE PROSECUTOR]: That's correct.
>
> [THE COURT]: That's my concern.
>
> Before we broke, we had the issue of some documents.

Contrary to Avery's assertion, this excerpt contains no indication that the transcript has been altered.

does not reflect all of the prosecutor's comments regarding his arrest, and implies that the trial court's rejection of his postconviction motion on this issue reflects its own involvement in the alteration of the transcript. Relying on ***State v. Perry***, 136 Wis.2d 92, 401 N.W.2d 748 (1987), Avery argues that "[t]he post-conviction court's 'determination [here] was not an articulated rationale that showed the exercise of discretion to reach the conclusion that the transcript in its incomplete form was sufficient "beyond a reasonable doubt" to provide a basis for a meaningful appeal.'"

Avery's reliance on ***Perry*** is misplaced. In ***Perry***, the defendant was convicted after an eight-day jury trial in Rock County. During the morning sessions of the last two days of trial, a substitute court reporter recorded the proceedings. After the trial, the substitute court reporter moved to Manitowoc, but left the notes from Perry's trial in Rock County. When a request for transcripts was ordered, the regular court reporter sent the notes to the substitute reporter to transcribe, but the notes were lost in the mail. When the post office finally located the notes, they were incomplete. After the notes were pieced together, significant portions of the transcripts were missing. The issue before the court thus was whether the "transcript [, as compiled, was] sufficient under appropriate standards to serve its necessary purpose on appeal." ***Id.*** at 97, 401 N.W.2d at 750-51. In ***Perry***, unlike the instant case, the parties conceded that portions of the transcript had been lost. In ***Perry***, no one alleged any intentional alterations of the transcript.

In support of his allegations that the transcript had been intentionally altered, Avery submitted affidavits of Kathy and Peter Brown, Avery's mother and father, and of appellate counsel. Appellate counsel, however, was not present at the trial, and although he may have carefully scrutinized the record, his affidavit simply does not support the allegations. Further, the self-serving affidavits of

family members, without more, cannot serve as the basis for a motion to reconstruct or correct the transcript. Thus, Avery presented only speculation. Therefore, the trial court properly denied Avery's request for a hearing, declaring that the claims were "wholesale allegations unsubstantiated by any evidence and made in total disregard of the impact on the reputation of others." *See* ***State v. Bentley***, 201 Wis.2d 303, 309-11, 548 N.W.2d 50, 53 (1996) (if defendant fails to allege sufficient facts or presents only conclusory allegations, the trial court may deny the motion without a hearing).

B. Right of Confrontation

Avery also contends that he was "denied his right to confrontation of an accomplice to the robberies, DeShawn Ro[d]gers, who did not testify at trial, and whose statements implicating [Avery] in the robberies were introduced through [Detective] Blumenberg without the possibility for defense counsel to cross-examine Ro[d]gers." We do not reach this issue, however, because we conclude that the alleged error was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

At trial, the State sought to introduce evidence of why Avery was arrested for the two armed robberies. The State requested that the trial court permit it to elicit information that a co-defendant had named Avery as a participant in the Atari Foods robbery. The State explained that it wanted to use this testimony to establish that the police had a basis to arrest Avery for the Atari robbery given that Simmons, the customer at Malone's who identified Avery, only provided a basis to arrest him for the Malone's robbery.

Defense counsel objected to the State's request to present this information to the jury. The trial court, implicitly overruling the objection,

allowed the State to question the detective about the events preceding Avery's arrest as long as it did not identify the source of the information. In questioning the detective, the prosecutor asked Detective William Blumenberg whether he "receive[d] information from a person that the -- an identification that the defendant, Brian Avery, was involved in the armed robbery of both Malone's and the Atari Foods?" Detective Blumenberg responded: "Yes. A person I interviewed identified Brian Avery as being involved in both of those robberies." Blumenberg further stated that, based on that identification, he authorized Avery's arrest. Detective Blumenberg also testified that after Avery was arrested, he (Detective Blumenberg) told Avery that his (Avery's) accomplice had identified him as a participant in the robberies.

Detective Blumenberg stated that Avery then identified his accomplices, and specified that one of the individuals was known to him only by the nickname, "Dope Fiend." Blumenberg stated that he then showed Avery a picture of the person he (Detective Blumenberg) knew to be known by that name, and in referring to the picture during his testimony, Detective Blumenberg identified that person as DeShawn Rodgers.

Generally, constitutional errors are subject to a harmless-error analysis. *See* ***State v. Flynn***, 190 Wis.2d 31, 54, 527 N.W.2d 343, 352 (Ct. App. 1994). Thus, a conviction will be upheld despite a violation of the defendant's constitutional rights if the State can demonstrate beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the conviction. *See* ***id.*** at 54-56, 527 N.W.2d at 352-53; ***State v. Rewolinski***, 159 Wis.2d 1, 27, 464 N.W.2d 401, 412 (1990); ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231-32. A reasonable possibility is one that is "'sufficient to undermine confidence in the outcome' of the proceeding." ***Dyess***, 124 Wis.2d at 544-45, 370 N.W.2d at 232.

After reviewing the record, we are satisfied that no reasonable possibility exists that Detective Blumenberg's testimony regarding DeShawn Rodgers contributed to Avery's conviction. Detective Blumenberg's references to Rodgers were vague and insignificant because, obviously, the jury understood that something or somebody caused the police to arrest Avery. Moreover, Rodgers's statement was not the only evidence linking Avery to the crimes. Hamdan had identified Avery as a suspect in the Atari Foods robbery, and Avery had confessed to both robberies. Accordingly, we conclude that even if the prosecutor had not been allowed to engage in this line of inquiry with Detective Blumenberg, the result would have been the same.

C. Corroboration of Confession

Avery next argues that his "alleged confession was not sufficiently corroborated at trial to produce confidence in its truth or the outcome of the trial." His argument is without merit.

A confession must be corroborated by independent evidence in order to support a conviction; however, "[a]ll the elements of the crime do not have to be proved independently of an accused's confession." ***Holt v. State***, 17 Wis.2d 468, 480, 117 N.W.2d 626, 633 (1962). The corroborating evidence "can be far less than is necessary to establish the crime independent[ly] of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test." ***Id.***

Sufficient evidence corroborated Avery's participation in the crimes. First, the details described in Avery's confession were corroborated by the videotapes of both armed robberies. Second, his participation was corroborated by the eyewitness account of Simmons, a witness to the Malone's robbery. Simmons,

who was declared a hostile witness to the State because of her refusal to acknowledge her pretrial statements, admitted at trial that she had witnessed the robbery. The State impeached Simmons with her prior inconsistent statements, revealing that Simmons had told police that she was afraid to talk to them because she feared retaliation from the robbers. Detectives James Kraft, Ralph Spano, and William Blumenberg each testified that Simmons identified Avery as one of the robbers in the holdup of Malone's Fine Foods.

Avery's confession was also corroborated by the eyewitness-identification testimony of Mueen Hamdan, the shooting victim in the Atari robbery. After he had been released from the hospital, Hamdan picked out a photograph of Avery. He identified Avery as the tall suspect who was wearing a team jacket and who kicked his cousin, Hiba Hamdan, as she lay on the floor. Clearly, this evidence corroborated Avery's confession.

D. Ineffective Assistance of Counsel

Avery also claims that his trial counsel was ineffective. Specifically, he contends that counsel was ineffective for: (1) failing to move to suppress Simmons's testimony; (2) failing "to properly suppress [Hamdan's] alleged identification[]" of him; (3) failing to establish the time of the Malone's robbery; (4) failing to bring out evidence that Simmons and other eyewitnesses had failed to identify him on several occasions as a participant in the robberies; and (5) failing to be a zealous advocate as a result of an impermissible conflict of interest involving Ahmed Hasan, the owner of Malone's Fine Foods. We are not persuaded.

In order to establish that his counsel was ineffective, Avery must prove: (1) that his lawyer's performance was deficient; and (2) that "the deficient

performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Even if Avery can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice prong, Avery "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." ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (citation omitted).

Whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). A trial court's findings pertaining to an attorney's conduct, what happened at trial, and the basis for the challenged conduct are findings of fact and will be upheld unless clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). "The ultimate conclusion of whether an attorney's conduct constituted ineffective assistance of counsel is a question of law," which we review *de novo*. ***Flores***, 183 Wis.2d at 609, 516 N.W.2d at 369.

1. Alcherie Simmons

Avery contends that trial counsel was ineffective for not challenging the admissibility of Simmons's statements identifying and implicating him in the

Malone's Fine Foods robbery.[5] He also alleges that counsel was ineffective in cross-examining Simmons. We disagree.

First, trial counsel had no grounds to challenge Simmons's testimony. Her testimony was admitted as prior-inconsistent statements after she denied that she had ever identified Avery as a participant in the Malone's robbery. *See* §§ 906.13(2) & 908.01(4)(a)1, STATS. On appeal, appellate counsel offers no basis for their suppression.

Second, trial counsel was not deficient with respect to his cross-examination of Simmons. Defense counsel elicited testimony from Simmons in which she repeatedly denied that she had ever identified Avery as a participant in the Malone's robbery. Defense counsel also elicited testimony from Simmons that the police had accused her of being involved in the robbery.[6] Cross-examining Detective Spano, defense counsel exposed that, despite his denial that he ever believed that Simmons was an accomplice in the Malone's robbery, Detective Spano did tell Simmons that it looked as though she might be involved, thus lending credence to Simmons's testimony.

[5] Avery also claims he was denied his confrontation rights, but because Simmons's statements were prior-inconsistent statements of a testifying witness, they were admissible; Avery's confrontation rights were not denied. *See* §§ 906.13(2) & 908.01(4)(a)1, STATS.

[6] Among Avery's numerous claims of defective representation are accusations that the State withheld exculpatory evidence regarding some sort of clandestine agreement between police and Simmons not to charge her in exchange for her statements implicating Avery in the Malone's robbery. He contends counsel was ineffective for not seeking exclusion of her entire testimony based upon the State's alleged failure to disclose this supposed exculpatory evidence. Avery, however, offers nothing more than baseless accusations. We need not address them further. *See* ***Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (This court does not address arguments that are inadequately developed.).

The record clearly shows that trial counsel successfully elicited favorable testimony from Simmons and successfully brought out the alleged inconsistency in Detective Spano's testimony. Consequently, we conclude that trial counsel's strategic decisions regarding Simmons's testimony were reasonable.[7]

2. Identification by Mueen Hamdan

Next, Avery claims that he was denied effective assistance of counsel because defense counsel failed "to properly suppress [Hamdan's] alleged identification[]." This is an absurd argument; defense counsel cannot suppress identification evidence, only a court can.

Even if we were to interpret Avery's argument as a claim that counsel was ineffective in arguing his motion to suppress, we must still reject his claim because Avery offers nothing to suggest that counsel had any legal basis on which to challenge the admissibility of Hamdan's identification. Avery's challenge to Hamdan's identification goes solely to the weight and credibility of the identification, which were for the jury to decide.

3. Time of the Malone's Robbery

Avery next claims counsel was ineffective for failing to challenge Detective Fenning's testimony that the Malone's robbery occurred at 8:30 p.m.

[7] Avery also contends that trial counsel should have "moved the court . . . for a very strong curative instruction to the jury" with respect to Simmons's testimony, but fails, once again, to explain either what instruction he believes was required or how the lack of such an instruction prejudiced his defense. Accordingly, he waived this issue. *See* ***Barakat v. DHSS,*** 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

Avery contends that counsel should have examined Malone's alarm records and 911 records from the night of the robbery to establish the exact time of the robbery and to challenge the detective's testimony. He maintains that because his alibi evidence established his whereabouts until approximately 8:15 p.m., counsel's failure to challenge Detective Fenning's account constituted ineffective assistance of counsel.

Avery fairly argues that counsel should have obtained and examined the 911 records and Malone's alarm records. He also reasonably criticizes defense counsel's explanation for why he did not obtain these records. At the ***Machner*** hearing, defense counsel testified that he did not review the 911 or alarm records because he believed those records would not be helpful given that all the police records indicated that the robbery occurred at 8:30 p.m. We cannot agree with defense counsel's explanation. Given the fact that Avery's alibi was inextricably tied to the precise time of the robbery, counsel should have investigated every source of time evidence available to him. This he did not do. Nevertheless, we conclude that Avery has failed to show how he was prejudiced by this fact. Avery offers no evidence on appeal to establish that the Malone's robbery occurred at any time other than 8:30. Moreover, Avery offers no reply to the State's argument that "[it] had such proof [of time evidence] if it was forced to present it." *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted are deemed admitted). Because Avery offered no evidence to support his claim that the Malone's robbery occurred at any time other than 8:30 p.m., and because he failed to respond to the

State's argument, we conclude that Avery has not established that he was prejudiced by counsel's performance.[8]

4. Eyewitnesses' Failures to Identify Avery

Avery also complains that trial counsel was ineffective for failing to elicit testimony from eyewitnesses regarding their inability to identify him as one of the robbers. The record belies this claim. The record reveals that both defense counsel and the prosecutor questioned witnesses in detail about their identifications. Defense counsel also challenged the reliability of the two identifications that were made—those by Simmons and by Mueen Hamdan, and emphasized on several occasions that eyewitnesses were unable to positively identify Avery when they had the opportunity.

Ahmed Hasan testified that he had viewed police lineups two days after the Malone's robbery and that he had identified someone other than Avery. Hiba Hamdan, an eyewitness to the Atari robbery, testified that she had viewed two lineups, and that she had identified someone other than Avery at the first lineup. Defense counsel also challenged Mueen Hamdan's identification of Avery; counsel's pointed questions drew attention to the fact that Hamdan's exposure to photographs of Avery, which had appeared in the media prior to his identifying Avery, might have tainted his identification. As noted earlier, defense counsel successfully elicited testimony from Simmons in which she denied either

[8] In his brief to this court, Avery argues that available evidence showed that the robbery occurred closer to 8:00 p.m., but he fails to point to any record reference to support this claim. Instead, Avery points only to the alleged confusion by the victim, Ahmed Hasan, whom he claims testified that the Malone's robbery occurred shortly after 8:00 p.m. Avery concedes in the same sentence, however, that "no such testimony from Mr. Hasan appears in the transcript." All of the remaining evidence indicates that the robbery occurred at 8:30 p.m.

having picked out a photograph of Avery from the school yearbook or having identified him as a suspect.

Thus, the record clearly establishes that counsel challenged the eyewitnesses' identifications and highlighted the other witnesses' failures to identify Avery. Accordingly, we conclude that Avery has failed to establish that counsel's performance was deficient.

5. Conflict of Interest

Finally, Avery contends that his trial counsel was ineffective: (1) for failing to apprise the court of an alleged conflict of interest; and (2) for failing to be a zealous advocate as a result of this alleged conflict. Again, the record belies his claim.

The pertinent facts are not in dispute. Counsel advised the court on two separate occasions that he had a potential conflict of interest. Counsel informed the court that his father, who was also a practicing attorney, had represented the State's witness, Ahmed Hasan, in matters relating to Hasan's business. Counsel explained that while his father was recuperating from a heart attack, he (trial counsel) represented Hasan for a very brief period of time, appearing with him in one municipal court matter. Counsel told the court that he had disclosed this matter to Avery and Avery's parents, and counsel averred that he believed that his prior representation of Hasan would not impair his ability to represent Avery. The trial court then conducted a brief colloquy with Avery, accepted his waiver of any potential conflict of interest, and permitted defense counsel to continue representing Avery.

As this court recently reiterated:

> It is uncontested that a defendant may waive an actual or serious potential conflict of interest claim involving his or her attorney. The waiver must be knowing and voluntary. Our supreme court has directed that a trial court should make the following inquiry when a question of conflict of interest about an accused's counsel of choice is raised in any criminal case:
>
> > "The court should inquire of the defendants and their attorney at the arraignment as to the possibility for actual conflicts of interest. The judge should ensure that the defendants understand the potential conflicts and determine whether they want separate counsel…. [T]his determination [to allow representation] should not be made unless it is clear the defendants have made a voluntary and knowing waiver of their right to separate counsel."
>
> Once satisfied that the defendant has made a voluntary and knowing waiver of a conflict of interest, the trial court may permit counsel's representation, or in its discretion, a court may disqualify an accused's chosen counsel when there is an actual conflict or a serious potential conflict of interest.

State v. Cobb, Nos. 97-1521-CR, 97-2403-CR, slip op. at 3-4 (Wis. Ct. App. July 22, 1998, ordered published Aug. 26, 1998) (citations omitted; alterations in ***Cobb***). Clearly, the record establishes that Avery waived any potential conflict of interest.[9]

E. Officers on the Jury

Avery also claims that he was denied a fair trial because two City of Milwaukee police officers were in the jury pool. We cannot agree.

[9] Avery also argues that "the Supreme Court Rules . . . require waiver of a conflict of interest be in writing." Avery has not, however, cited any authority in support of this underdeveloped argument. *See* ***Barakat***, 191 Wis.2d at 786, 530 N.W.2d at 398 (appellate court need not consider "amorphous and insufficiently developed" arguments).

During voir dire, two prospective jurors stated that they were employed as City of Milwaukee police officers. The trial court then inquired whether either officer knew any of the individuals involved in the proceedings. Prospective jurors Duane Prinz and Henry Hampton stated that they knew Detective Blumenberg. The trial court then asked the officers whether either of them worked in Detective Blumenberg's unit or whether either had contact with him on a regular basis. Officer Hampton stated that he worked in Detective Blumenberg's unit. The trial court then asked the officers whether their employment would affect their ability to be impartial jurors. Both officers unequivocally answered, "no." Defense counsel never moved to strike either prospective juror for cause. Neither Prinz nor Hampton was selected to serve on the panel. The record does not reflect whether the State or Avery struck the officers.

Whether a juror is biased and should be dismissed for cause is a determination committed to the sound discretion of the trial court. *See* ***State v. Ramos***, 211 Wis.2d 12, 15, 564 N.W.2d 328, 330 (1997). "[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Section 805.08(1), STATS., provides, in part, that "[i]f a juror is not indifferent in the case, the juror shall be excused." "Bias may be either implied as a matter of law or actual in fact." ***State v. Louis***, 156 Wis.2d 470, 478, 457, N.W.2d 484, 487 (1990). "Even the appearance of bias should be avoided." ***Id.*** at 478, 457 N.W.2d at 488; *accord* ***State v. Ferron***, 219 Wis.2d 481, 499, 579 N.W.2d 654, 661 (1998).

Avery essentially argues that the trial court should have *sua sponte* struck the officers because it should have somehow assumed that counsel was ineffective for not having requested that they be struck for cause. We cannot agree. First, Avery cites no authority for the proposition that a trial court must *sua sponte* strike for cause any arguably objectionable juror when counsel has not done so. Second, as Avery concedes, prospective jurors Prinz and Hampton could not automatically be disqualified from serving on the panel because of their profession. *See* ***Louis***, 156 Wis.2d at 474, 457 N.W.2d at 486 ("[L]aw enforcement officials of the jurisdiction where the crime was committed should not be automatically disqualified from the petit jury as a matter of law."). Accordingly, we conclude the trial court properly relied on the parties to exercise their respective peremptory strikes.

Avery also alleges that counsel was ineffective for not having moved the court to strike the prospective jurors. His claim is without merit. The trial court adequately examined the officers with regard to their knowledge of the individuals participating in the trial and properly posed questions regarding whether their employment or relationship with Detective Blumenberg would influence their ability to be impartial. In response, the prospective jurors told the court that they could be impartial. Consequently, defense counsel could reasonably believe that if he moved for their dismissal, the court would have denied his request. Accordingly, we conclude that counsel's performance was not deficient. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994) (trial counsel not ineffective for failing or refusing to pursue feckless arguments).

F. Exhibits

Avery next claims that the trial court erred in refusing to send certain exhibits to the jury room during deliberations. Avery contends that this alleged error effectively precluded the jury from considering phone records and other exhibits during the deliberations. We disagree.

A trial court has broad discretion in deciding what exhibits to send to the jury room. *See* ***State v. Jensen***, 147 Wis.2d 240, 259, 432 N.W.2d 913, 921 (1988). In deciding whether to send an exhibit to the jury room, the trial court should consider "whether the exhibit will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibit, and whether the exhibit could be subjected to improper use by the jury." ***Id.*** at 260, 432 N.W.2d at 922.

Because trial counsel did not object to the trial court's handling of the other exhibits, the only issue properly before this court is the issue of the phone records. *See* ***State v. Davis***, 199 Wis.2d 513, 517-19, 545 N.W.2d 244, 245-46 (Ct. App. 1996) (failure to enter objection on the record waives right to review). The exhibit consisted of Ameritech phone records of Avery's mother's house. The records indicated that a phone call was made at 1:46 p.m. on July 8, 1994, from Avery's mother's house to the home of Courtney Williams, a friend of Avery. Trial counsel used this evidence to support Avery's alibi that he was home talking to Williams at the time of the Atari robbery.

When defense counsel requested that the phone records be sent into the jury room, the trial court denied the request, concluding that the multi-paged document would not assist the jury and that it unduly accentuated one fact in evidence more than all the others. We agree.

The phone records consisted of a month's list of outgoing calls, only one line of which was relevant to Avery's alibi defense. Trial testimony clearly explained what the records meant and, therefore, the jury did not need to see them. The trial court reasonably concluded that submission of the telephone records would have unduly highlighted this one fact in evidence; accordingly, we conclude that the trial court properly exercised discretion in denying the request for the telephone records.[10]

By the Court.—Judgment and orders affirmed.

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

[10] Avery also argues that the trial court erred when it failed to inform the jury that the parties had stipulated to the authenticity of the records. Avery never requested that the trial court do so, however. Accordingly, he has waived any claim of error on this ground. *See* ***State v. Davis***, 199 Wis.2d 513, 517-19, 545 N.W.2d 244, 245-46 (Ct. App. 1996).