**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 5, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**No. 97-0770**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ERIC JOHNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Eric Johnson appeals from an order denying his § 974.06, STATS., motion, following his conviction for two counts of first-degree intentional homicide. Johnson claims the trial court erred in summarily denying his motion, which alleged that his postconviction counsel and his trial counsel

provided ineffective assistance. Because the trial court did not err in denying his motion without a hearing, we affirm.

## I. BACKGROUND

Johnson was convicted of two counts of first-degree intentional homicide. The victims, George Cole and Torrence Jackson, both seated in the front seat of a car, were shot in the head with a shotgun by a person sitting in the back seat behind the driver. Johnson admitted that he was sitting in the back seat behind the driver. His defense theory, however, asserted that a fourth person known as "Earl" was also in the back seat and was the person who actually committed the crimes.

Johnson's direct appeal did not assert that his trial counsel was ineffective. He claims that his postconviction counsel was ineffective for failing to assert that his trial counsel was ineffective. Specifically, he claims his trial counsel was ineffective for: (1) failing to move to sequester the witnesses; (2) failing to call witness Ppharoah Washington, who would have testified that he saw four people in the car several hours before the shooting; and (3) failing to call witness Sergeant Dennis Forjan, who could have provided testimony that an eyewitness originally gave a physical description of the suspect that did not match Johnson.

The trial court denied the motion without holding a hearing. Johnson appeals from that order.

## II. DISCUSSION

*A. Standard of Review.*

Johnson claims that the trial court erred when it denied his motion without conducting an evidentiary hearing. He claims that the cumulative errors of his trial counsel constituted ineffective assistance. We reject his claims.

Our standard of review of the trial court's decision to deny Johnson's motion without a hearing is as follows. If Johnson alleges facts in his motion, which, if true, would entitle him to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996) (citing ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633-34 (1972)). If, however, Johnson fails to allege sufficient facts to raise a question of fact, or makes only conclusory allegations, or if the record conclusively demonstrates that Johnson is not entitled to relief, the trial court may, in its discretion, deny the motion without holding a hearing. *See* ***Bentley***, 201 Wis.2d at 309-10, 458 N.W.2d at 53 (citing ***Nelson***, 54 Wis.2d at 497-98, 195 N.W.2d at 633-34). Further, "[w]hether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Bentley***, 201 Wis.2d at 310, 458 N.W.2d at 53.

Because Johnson's claim arises in the context of an ineffective assistance claim, we also set forth those standards. In order to establish that he did not receive effective assistance of counsel, Johnson must prove two things: (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." ***Strickland***, 466 U.S. at 687. Even if Johnson 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, Johnson 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).

In assessing Johnson's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

*B. Sequestration Motion.*

Johnson claims trial counsel was ineffective for failing to have the witnesses sequestered at trial. His postconviction motion alleges that trial counsel "failed to move to exclude and sequester the witnesses at the defendant's motion to suppress identification and also at trial" and that:

> Where identification is a key issue in a trial there can be no strategic reason for failing to sequester the witnesses. Where witnesses are permitted to listen to trial testimony prior to being called themselves there is a strong temptation to conform their testimony. Admittedly, though, the

> prejudice which occurs as a consequence of proceeding in this matter is difficult to quantify.

Johnson's motion fails to allege sufficient facts which, if true, would entitle him to relief because he fails to assert what prejudice resulted from counsel's failure to move for sequestration of witnesses. At no time does he allege facts that identification witnesses were present in the courtroom for other witnesses' testimony or that these witnesses actually conformed their identification testimony as a result of hearing another witness testify. In fact, the record demonstrates that witnesses were ordered sequestered.[1] Accordingly, we reject this claim.

*C. Failure to Call Witnesses.*

Johnson next claims trial counsel was ineffective for failing to call two witnesses: (1) Washington, who would have testified that four men were in the car, which would have supported Johnson's claim that a man named "Earl" was actually the shooter; and (2) Sergeant Forjan, who would have testified that an eyewitness's description of the subject did not match Johnson. Again, we conclude that Johnson failed to assert specific facts to prove prejudice.

Washington would have testified that at some unspecified time on September 1, 1992, the date of the homicides, he saw Johnson enter a car matching the description of the car where the shooting occurred and that Johnson was the fourth man to enter the car. In addition to the two men in the front, there

[1] Admittedly, the trial court's announcement on the record that any witnesses should leave the courtroom came after the State's first witness testified. Nonetheless, this does not alter our analysis because Johnson failed to allege that any witnesses were present in the courtroom while the State's first witness testified, nor does he allege that such witnesses altered their testimony as a result of what they heard.

was a third man of "heavy build" seated on the passenger side of the back seat. Washington would also have stated that he did not see Johnson in possession of a gun at that time. With this testimony in mind, we conclude that even if Washington had testified, his testimony would not have altered the outcome and, therefore, Johnson has not proven prejudice.

Washington's testimony may seemingly corroborate the defense theory that a fourth man named "Earl" was in the car, and support Johnson's claim that Earl actually committed the shootings. However, the other evidence in the case negates the effect of Washington's testimony.

Johnson testified that he entered the car around 7:30 - 8:00 a.m. and that he was seated behind the driver. The shooting did not occur until 11:00 a.m. The physical evidence, which consisted of blood and brain matter from the shotgun blast spewing onto the passenger side of the back seat, showed that another man could not have been in the back seat of the car with Johnson at the time of the shootings. Further, the medical examiner's testimony with regard to the shotgun wounds demonstrated that the shooter was sitting behind the driver, where Johnson admitted he was sitting when the shootings occurred.

Accordingly, we conclude that the failure to call Washington as a witness did not prejudice Johnson's defense.

Johnson also argues that his trial counsel's failure to call Sergeant Forjan was ineffective assistance. He asserts that Forjan would have testified that an identification witness, James Moore, gave Forjan a description of the suspect which did not entirely match Johnson. Specifically, Moore stated that the shooter weighed 200 pounds when, in fact, Johnson weighed only 165 pounds. Johnson,

however, fails to allege in his motion how the absence of this witness prejudiced his case. Therefore, we reject this claim.

Although Forjan was not called to testify, the information regarding the inaccurate weight description was introduced into evidence through another witness, Detective Ronald Castillo. Accordingly, this physical description discrepancy was presented to the jury and Forjan's testimony would simply have been cumulative. Failure to call Forjan, therefore, was not ineffective assistance.

*D. Ineffectiveness of Postconviction Counsel.*

Our determination that trial counsel did not provide ineffective assistance leads to the logical conclusion that postconviction counsel was not ineffective for failing to assert that trial counsel was ineffective. Accordingly, this claim is also rejected.

*By the Court.*—Order affirmed.

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