COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1372 **Cir. Ct. No. 2011CF4817**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANYALL LORENZO SIMPSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JANET C. PROTASIEWICZ, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Danyall Lorenzo Simpson appeals a circuit court order that denied without a hearing his postconviction motion seeking a new trial pursuant to WIS. STAT. § 974.06 (2015-16).[1] In the circuit court, he alleged that his postconviction counsel was ineffective for failing to challenge the effectiveness of trial counsel and for failing to pursue a claim that the prosecutor presented false evidence. On appeal, he renews the claims presented to the circuit court and seeks a hearing on those claims. He further seeks a new trial in the interest of justice. We reject his contentions and affirm.

BACKGROUND

¶2 The State alleged in a criminal complaint that police were dispatched to a Milwaukee duplex early in the morning of October 2, 2011. The property owner, Kellie Daniel, admitted the officers into the common area of the duplex where they observed fresh blood in the hallway and on the doorknob of the apartment rented by Simpson and his mother, Billie Morgan. Police entered that apartment and heard noises coming from behind a locked door leading to the northwest bedroom. While the police tried to talk to the man inside—later determined to be Simpson—Morgan arrived. She told officers that Simpson had been involved in a physical altercation with his girlfriend, B.C., and that B.C. had been wounded. Police attempted to persuade Simpson to open the door and then attempted to force their way into the bedroom, but Simpson threatened that he "[had] something for" the officers. After approximately thirty minutes, the police Tactical Enforcement Unit joined the officers already at the scene, and Simpson emerged from the northwest bedroom. When police entered the bedroom, they

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

found B.C., who was bleeding from a severe laceration to her head. Also in the bedroom were a rifle and a shotgun with blood on the barrel.

¶3 The complaint further alleged that B.C. was admitted to the hospital later on October 2, 2011. According to medical staff, she required eleven staples to close the wound in her head. In an interview on October 3, 2011, B.C. told police that she and Simpson had argued the previous night, that he had punched her multiple times, and that he had shoved a firearm into her chest. B.C. said she retreated into a corner of the bedroom but Simpson hit her on the head with an object and she could feel that her scalp had been cut open.

¶4 Following a preliminary examination, the State filed an information alleging that Simpson committed four crimes on October 2, 2011. In Count 1, the State charged Simpson with endangering safety by use of a dangerous weapon as an act of domestic abuse. *See* WIS. STAT. §§ 941.20(1)(c) (2011-12),[2] 968.075. In Count 2, the State charged Simpson with aggravated battery by use of a dangerous weapon as an act of domestic abuse. *See* WIS. STAT. §§ 940.19(6), 939.63(1)(b), 968.075(1). In Count 3, the State charged Simpson with kidnapping by use of a dangerous weapon as an act of domestic abuse. *See* WIS. STAT. §§ 940.31(1)(b), 939.63(1)(b), 968.075(1)(a). In Count 4, the State charged Simpson with failing to comply with an officer's attempt to take a person into custody by use of a dangerous weapon. *See* WIS. STAT. §§ 946.415(1), 939.63(1)(c).

¶5 The matter proceeded to trial. Daniel testified on behalf of the State, as did the police officers involved in arresting Simpson and investigating the allegations against him. The State also called B.C. to testify, but when she took

[2] All references to the Wisconsin criminal code are to the 2011-12 version.

the stand she repeatedly asserted that she had no recollection of anything that happened on October 2, 2011. The circuit court therefore granted the State's request to present the video recording of her statements to police and the transcript of her testimony at Simpson's preliminary examination. The prior testimony included B.C.'s averments that Simpson shoved a rifle into her chest with such force that she could not breathe and that he hit her on the head multiple times with a shotgun.

¶6 The jury acquitted Simpson of kidnapping and convicted him of the remaining charges. Prior to sentencing, the circuit court dismissed the dangerous weapon penalty enhancer accompanying Count 4, concluding that the enhancer was statutorily inapplicable. The circuit court went on to impose an aggregate term of fifteen years and three months of imprisonment.

¶7 Simpson pursued a direct appeal with the assistance of appointed counsel and raised a claim that he was denied his right to a speedy trial. We affirmed. *See* ***State v. Simpson*** (***Simpson I***), No. 2013AP1146-CR, unpublished slip op. (WI App May 13, 2014). Represented by new counsel, Simpson next filed a petition in this court for a writ of *habeas corpus*. We denied the claim that his appointed appellate counsel was ineffective and explained that his remaining allegations could not be pursued in a writ petition. *See* ***State ex rel. Simpson v. Meisner*** (***Simpson II***), No. 2015AP1930-W, unpublished op. and order (WI App Oct. 16, 2015). Simpson then filed a motion in circuit court under WIS. STAT. § 974.06, alleging that he received ineffective assistance from both his trial counsel and his appointed postconviction counsel. The circuit court rejected his claims without a hearing. Simpson appeals, renewing his claims that he received ineffective representation and asserting a right to a new trial in the interest of justice. Attorney Basil M. Loeb represented Simpson in his writ petition and his

§ 974.06 motion and continues to represent him in this appeal. We discuss additional facts below as necessary.

DISCUSSION

¶8 "We need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A defendant therefore is barred from pursuing claims under WIS. STAT. § 974.06 that could have been raised in an earlier postconviction motion or direct appeal absent a sufficient reason for not raising the claims previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Postconviction counsel's ineffectiveness may, in some circumstances, constitute a sufficient reason for an additional postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A convicted defendant may not, however, merely allege that postconviction counsel was ineffective but must "make the case of" postconviction counsel's ineffectiveness. *See* ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334.

¶9 The two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), governs claims that postconviction counsel was constitutionally ineffective. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶21, 28. The defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland***, 466 U.S. at 687. A court may consider either deficiency or prejudice first, and if the defendant fails to satisfy one prong, the court need not address the other. *See* ***id.*** at 697.

¶10 To prove deficiency under ***Strickland***, a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To prove

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." ***Id.*** at 694. A reviewing court will not disturb the circuit court's "findings of what happened" unless they are clearly erroneous, *see* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990), but whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law for our *de novo* review, *see* ***id.*** at 128.

¶11 When, as here, a defendant makes claims that postconviction counsel was ineffective for failing to raise claims that the defendant believes were meritorious, the defendant cannot overcome the procedural bar imposed by WIS. STAT. § 974.06, absent a showing that the neglected claims were "clearly stronger" than those claims that postconviction counsel actually pursued. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668. Whether a procedural bar applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Further when, as here, neglected claims include challenges to trial counsel's effectiveness, the defendant must show that trial counsel was, in fact, ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Claims of trial counsel's ineffectiveness are reviewed using the two-prong ***Strickland*** analysis. *See* ***Balliette***, 336 Wis. 2d 358, ¶21.

¶12 Additionally, a defendant challenging the effectiveness of counsel must preserve counsel's testimony in a postconviction hearing. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). A defendant, however, is not automatically entitled to such a hearing. To earn a hearing on a postconviction motion, a defendant is required to allege sufficient material facts that, if true, would entitle the defendant to relief. *See* ***Balliette***, 336 Wis. 2d 358,

¶¶18, 79. If the motion does not raise such facts, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the motion without a hearing. *See* ***id.***, ¶18. The sufficiency of a postconviction motion is a question of law. ***Id.*** We examine the issues on appeal with these standards in mind.

¶13 We start our review by rejecting Simpson's contention that the State has conceded the need for a postconviction hearing. According to Simpson, the State failed in its respondent's brief to address his arguments regarding his entitlement to a hearing and therefore admitted his contentions. In fact, the State explicitly set forth the requirements a convicted person must satisfy before the person is entitled to a postconviction hearing, and the State then explained the ways that Simpson failed to satisfy those requirements. Simpson's allegation of an implicit concession is meritless.

¶14 We now turn to the first of Simpson's substantive claims. Simpson asserts that his trial counsel was ineffective for failing to seek pretrial dismissal of the penalty enhancer alleged in Count 4, and that postconviction counsel was ineffective in turn for failing to challenge trial counsel's effectiveness in this regard. The claim fails because Simpson does not show any prejudice from the alleged deficiency.

¶15 The State alleged in Count 4 that Simpson failed to comply with an officer's attempt to take him into custody, a violation of WIS. STAT. § 946.415(2). The crime includes as an essential element that the defendant intentionally "remains or becomes armed with a dangerous weapon or threatens to use a dangerous weapon regardless of whether he or she has a dangerous weapon." *See*

id.; *see also* WIS JI—CRIMINAL 1768.[3] The State further alleged that Simpson committed this crime while possessing a dangerous weapon and that he therefore faced an enhanced penalty pursuant to WIS. STAT. § 939.63(1). The jury found Simpson guilty of violating § 946.415(2) and further found that he committed the crime while possessing a dangerous weapon. The penalty enhancer was statutorily inapplicable, however, because, pursuant to § 939.63(2), the enhancer "does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged." Accordingly, the circuit court dismissed the penalty enhancer before sentencing Simpson.

¶16 Simpson now contends that his trial counsel performed deficiently by failing to challenge the penalty enhancer before trial and that the deficiency prejudiced him in the plea bargaining process because, he alleges, trial counsel's failure to seek dismissal "of the improper enhancer ... prevented Simpson from accepting the [p]rosecutor's plea agreement." According to Simpson, he "was willing to consider and accept the [p]rosecution's plea offer as long as [trial counsel] sought for dismissal of the improper enhancer, so that the plea negotiations would not include the additional four years." (Emphasis omitted.)

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[3] Before a jury may find a defendant guilty of violating WIS. STAT. § 946.415(2), the State must prove three elements. *See* WIS JI—CRIMINAL 1768. They are:

> 1. The defendant intentionally refused to comply with an officer's lawful attempt to take the defendant into custody....
> 2. The defendant intentionally retreated or remained in a building or place and, through action or threat, intentionally attempted to prevent the officer from taking the defendant into custody.
> 3. While committing elements 1. and 2., the defendant intentionally [(remained) (became) armed with a dangerous weapon] [threatened to use a dangerous weapon regardless of whether the defendant had a dangerous weapon].

Id.

¶17 We begin with the prejudice prong of the analysis. To prevail on the claim that trial counsel's alleged error deprived Simpson of the opportunity to accept a plea bargain without the enhancer alleged in Count 4, Simpson must demonstrate a reasonable probability that he would have accepted a plea bargain that did not include the penalty enhancer. *See* ***State v. Winters***, 2009 WI App 48, ¶36, 317 Wis. 2d 401, 766 N.W.2d 754. If Simpson would have rejected a plea bargain that did not include the enhancer, he was not prejudiced. *See* ***id.***

¶18 Here, there is no question that Simpson would have rejected a plea bargain without the enhancer, because he in fact did reject such a plea bargain on multiple occasions. He rejected one offer that included dismissing and reading in the entirety of Count 4; he rejected another offer that included pleading guilty to Count 4 without the penalty enhancer; and he rejected a third offer that included outright dismissal of Count 4. The record shows that the offers were unacceptable to Simpson because they exposed him to more years of imprisonment than he was willing to accept. Indeed, in the affidavit he submitted with his postconviction motion, he averred that he told his trial counsel that he would not accept a plea offer "if the D.A. is not going to reduce the charges so that the exposure time wouldn't be so high."

¶19 Thus, Simpson had multiple chances to resolve this case on terms that included dismissing the penalty enhancer charged in Count 4, but he declined each opportunity. His postconviction motion shows that he was unwilling to consider a plea bargain that exposed him to more imprisonment than he felt was warranted, even when the proposed terms included the State's promise to dismiss the enhancer. Because Simpson does not demonstrate any likelihood, let alone a reasonable likelihood, that he would have resolved this case with a plea bargain if his trial counsel had moved to dismiss the enhancer before trial, he fails as a

matter of law to show that he was prejudiced in the plea-bargaining process when his trial counsel did not make such a motion.[4] The circuit court correctly denied this claim without a hearing.

¶20 Simpson also contends that he was prejudiced by his trial counsel's failure to seek pretrial dismissal of the penalty enhancer alleged in Count 4 because the enhancer rendered "the jury verdict unconstitutional and unfair and had a very serious effect on the outcome of Simpson's trial." We have considered and rejected similar contentions in analogous circumstances. *See* ***State v. Hughes***, 2001 WI App 239, 248 Wis. 2d 133, 635 N.W.2d 661. We are no more persuaded here.

¶21 In ***Hughes***, a circuit court instructed a jury that the defendant could be convicted of either the crime charged, or an included crime, or neither crime, but not both. *See* ***id.***, ¶¶2-3; *see also* WIS. STAT. § 939.66. When the jury nonetheless returned guilty verdicts as to both crimes, the circuit court entered judgment only on the greater charge, not the lesser included offense. *See* ***Hughes***, 248 Wis. 2d 133, ¶¶1, 5. On appeal, the defendant challenged the validity of the verdict and sought a new trial. *See* ***id.***, ¶¶1, 6. We denied relief. We explained that we must conduct a common sense analysis of the jury verdict and that doing so required recognizing that a person could commit the greater offense (possessing cocaine with intent to deliver) only if the person committed the lesser offense

[4] We note Simpson's contention that, had he accepted a plea bargain on terms that did not include the Count 4 penalty enhancer, his guilty plea would have been invalid. He goes on to construct a theory about why that is so. Simpson is confused. Before he can prevail on his claim that trial counsel's performance prejudiced him in the plea bargaining process, he must show a reasonable likelihood that, but for counsel's errors, he would have accepted a plea bargain. *See* ***State v. Winters***, 2009 WI App 48, ¶36, 317 Wis. 2d 401, 766 N.W.2d 754. As we have explained, he did not make that showing. His claim therefore fails. Idle speculation about how he might have challenged a guilty plea he did not enter adds nothing to the analysis.

(possessing cocaine). *See* ***id.***, ¶9. We therefore determined that the jury's guilty verdict on the lesser-included charge was mere surplusage and did not violate any of the defendant's rights. *See* ***id.*** Accordingly, we deemed the second verdict the kind of harmless error that cannot form a basis for relief. *See* ***id.***

¶22 Here, the circuit court correctly instructed the jury that before it could convict Simpson of violating WIS. STAT. § 946.415(2), the jury was required to determine that Simpson either became armed with, remained armed with, or threatened to use, a dangerous weapon. *See* § 946.415(2)(c); *see also* WIS JI—CRIMINAL 1768. Each of the three alternatives is a way of committing the offense with a dangerous weapon. *See* ***State v. Koeppen***, 2000 WI App 121, ¶24, 237 Wis. 2d 418, 614 N.W.2d 530. The circuit court then went on to instruct the jury, in accord with the penalty enhancer set forth in WIS. STAT. § 939.63, that if the jury found Simpson guilty of violating § 946.415(2), the jury must determine whether he committed the offense while possessing a dangerous weapon. The jury made both determinations in favor of the State.

¶23 Like the defendant in ***Hughes***, Simpson fails to explain "beyond mere rhetoric," *see* ***id.***, 248 Wis. 2d 133, ¶9, how the jury's duplicative determinations violated any of his rights, "constitutional or otherwise," *see* ***id.*** Therefore, like the ***Hughes*** court, we conclude that the duplication was harmless. Moreover, the circuit court fully corrected the harmless error by dismissing the duplicative penalty enhancer. Because Simpson was not prejudiced by his trial counsel's failure to prevent harmless duplication, his postconviction counsel had no duty to file a motion alleging that trial counsel was ineffective in this regard. *See* ***Rothering***, 205 Wis. 2d at 678 (no attorney is ineffective by foregoing meritless motions). The circuit court correctly denied this claim without a hearing.

¶24 Simpson next argues that his trial counsel was ineffective for failing to object to a portion of the State's rebuttal closing argument and that postconviction counsel was ineffective in turn by failing to raise the issue. Specifically, he says the State made arguments unsupported by the testimony when the prosecutor: (1) posed a rhetorical question about why Morgan did not identify an alternative culprit as the person who battered B.C.; and (2) claimed Morgan got blood on her pants while cleaning up her home in an effort to "save" Simpson.

¶25 We consider challenges to a closing argument in the context of the trial rather than in isolation. *See* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115. Accordingly, we begin our review of this issue by summarizing the portions of the trial relevant to Simpson's contentions.

¶26 Daniel testified on direct examination that on October 2, 2011, she was in her first-floor apartment when she heard Simpson and Morgan arguing in the upper flat. Daniel subsequently heard screaming, the chaotic sounds of moving furniture, and a third person crying. Eventually, Daniel heard something that sounded like a group of people running down the stairs, and then she saw Morgan's car driving away from the home. Soon thereafter, she received a text message from Morgan that said "call 9-1-1." On cross-examination, Daniel acknowledged that one or more of the people who ran down the stairs might have accompanied Morgan when she drove away from the home.

¶27 Officer Martinez Moore testified that he was one of the officers who responded to Daniel's 9-1-1 call. He told the jury that Morgan arrived at the duplex while he and other officers were at the scene, and he described the statements she made to police as they were trying to persuade Simpson to come

out of the bedroom. Specifically, Morgan told officers that Simpson had had a physical altercation with B.C., that the blood at the scene came from a head wound B.C. had sustained, and that Simpson was possibly armed with a long gun.

¶28 A second officer, Howard Joplin, described speaking to Morgan after the incident ended. When Joplin described Morgan's statement that she had "cleaned up" some items in her home, the circuit court sustained Simpson's hearsay objection and directed the jury that the statement was not evidence and should not be considered.

¶29 During closing argument, Simpson suggested that a third-party perpetrator might have injured B.C. He emphasized Daniel's testimony about hearing a "group of people" run down the stairs, and he posited that one of those people might have committed the battery and then left the home with Morgan before the police arrived.[5] In rebuttal, the State made the argument that Simpson now complains was improper:

> What's interesting is you heard a number of statements that were attributed to Billie Morgan. If it was someone else [who battered B.C.], why didn't Billie Morgan, the defendant's own mother, point that person out? Because there was nobody else. You know what Billie Morgan did instead? She started cleaning. That's how she got the blood on her pants. That was her effort to save her son.

Simpson believes his trial counsel should have objected to numerous components of the foregoing argument.

[5] Simpson's trial counsel argued: "I'm not the one that's saying a group of people ran down the stairs. [] Daniel said it. There's a group of people. She's leaving that house? Who's getting in the car with [Morgan] and leaving? Someone else was there. How did we know that all that blood in that house didn't get connected to someone else? A boyfriend, a lover, a mother, a cousin? I have no idea."

¶30 Simpson first contends his trial counsel should have objected to the prosecutor's rhetorical question of why Morgan did not name a third-party perpetrator, because, he says, that portion of the rebuttal argument constituted the prosecutor's improper effort to "try his case upon unsworn statements ... instead of evidence." We disagree. The prosecutor's remark constituted appropriate commentary on Simpson's defense strategy. *See* ***State v. Patino***, 177 Wis. 2d 348, 382, 502 N.W.2d 601 (Ct. App. 1993). Simpson implied in his closing argument that the culprit who attacked B.C. might have fled the home with Morgan. The trial, however, did not include any evidence of statements from Morgan supporting the inference Simpson wanted the jury to draw. The State was entitled to point out that gap in the theory of defense. *See* ***id.***; *see also* ***State v. Wolff***, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992) (recognizing the rule that, if a defendant's arguments invite a reply, the prosecutor may give a measured response). Trial counsel did not perform deficiently by failing to object to the State's permissible comment. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶31 Simpson also argues that trial counsel should have objected when the prosecutor said Morgan "clean[ed] ... to save her son" and "that's how she got the blood on her pants." He emphasizes that when Joplin began describing Morgan's statement that she "cleaned up" some items at the scene, the circuit court struck the officer's testimony as hearsay. Therefore, Simpson says, there was no evidence that Morgan cleaned up to "save" him and, relatedly, no evidence that her cleaning was the reason she had blood on her pants.

¶32 Simpson shows no prejudice from these alleged errors because we assume that a jury follows limiting and cautionary instructions. *See* ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399. Here, the circuit court instructed the jury to disregard the stricken hearsay testimony regarding

Morgan's cleaning. The circuit court also instructed the jury that the arguments of counsel are not evidence and that the jury must decide the case solely on the basis of the evidence at trial. Instructions such as these are presumed to erase any possible prejudice "unless the record supports the conclusion that the jury disregarded the [circuit] court's admonition." *See* ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. Nothing here supports an inference that the jury disregarded the instructions it received or that the prosecution's closing argument overpowered the jury's ability to assess the evidence fairly. Indeed, the jury acquitted Simpson of the most serious charge he faced.[6] We conclude that the jury instructions ensured that Simpson was not prejudiced by the State's comments regarding Morgan's cleaning.

¶33 Simpson also faults his trial counsel for failing to object to the portion of the State's rebuttal argument referencing the blood on Morgan's pants. He asserts an objection was required because no evidence was presented showing that Morgan had blood on her pants. To support this assertion, he says that Moore, who testified he saw blood on Morgan's pants, acknowledged that no DNA testing was conducted on the pants.

¶34 Simpson's contention in this regard strays perilously close to the line that separates a feeble argument from a frivolous one. For reasons too obvious to merit discussion, a party is not required to substantiate every description of an item with scientific testimony confirming the item's composition. Here, a witness gave evidence that Morgan had blood on her pants. "A 'prosecutor may comment

[6] The kidnapping charge that the jury rejected was a Class C felony. *See* WIS. STAT. § 940.31(1)(b). The jury convicted Simpson of a Class H felony, a Class I felony, and a Class A misdemeanor, which all carry significantly lesser penalties than the kidnapping charge. *See* WIS. STAT. §§ 939.50(3)(c), (h) & (i); 939.51(3)(a).

on the evidence … [and] argue from it to a conclusion.'" ***State v. Hurley***, 2015 WI 35, ¶95, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted). Simpson was of course free to dispute the weight of the evidence, but nothing prevented the State from giving a closing argument based on trial testimony.

¶35 In sum, Simpson fails to demonstrate that his trial counsel was ineffective in response to the State's rebuttal argument. Accordingly, his postconviction counsel did not perform deficiently by failing to pursue such a claim in a postconviction motion. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. The circuit court properly denied his claims in this regard without a hearing.

¶36 Simpson next contends that his trial counsel erred by not objecting when the State offered a rifle and a shotgun as evidence. According to Simpson, an objection was necessary because the State moved for admission of the items "without laying any foundation." He is wrong.

¶37 "'The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' A perfect chain of custody is not required." ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (citation omitted).

¶38 In this case, Moore authenticated the firearms. To do so, he first told the jury that he arrested Simpson after Simpson emerged from the northwest bedroom of his home. Moore said that when he returned to the bedroom after taking Simpson into custody, he saw a rifle and a shotgun on the bed. Moore then identified the rifle and the shotgun in the courtroom as the same firearms he observed on the bed. Moore's testimony that he recognized the guns constituted the necessary foundation for their admission. *See* ***State v. Sarinske***, 91 Wis. 2d

14, 44, 280 N.W.2d 725 (1979). Accordingly, Simpson's trial counsel had no basis to complain that the evidence lacked foundation.

¶39 Simpson nonetheless asserts that "the prosecutor did indicate that B.C. was the only person that could authenticate both firearms." The eleven-page section of a pretrial transcript that Simpson points to in support of this proposition shows only that the prosecutor wanted B.C. to identify the guns, not that she was the only person capable of authenticating them. When the prosecutor selected another witness to authenticate the firearms, Simpson had no legally cognizable basis for an objection. "'[T]he prosecution is entitled to prove its case by evidence of its own choice.'" ***State v. Connor***, 2009 WI App 143, ¶27, 321 Wis. 2d 449, 775 N.W.2d 105 (citation omitted).

¶40 Simpson next suggests that his trial counsel was ineffective for failing to seek exclusion of the firearms on the ground that their probative value was outweighed by the danger of unfair prejudice.[7] *See* WIS. STAT. §§ 904.01, 904.03. The claim is wholly baseless.

¶41 "The probative value of evidence 'is a function of its relevance under WIS. STAT. § 904.01.'" ***Marinez***, 331 Wis. 2d 568, ¶41 (citation omitted). Evidence is relevant if it has any tendency to make a consequential fact more or less probable. *See* ***State v. Richardson***, 210 Wis. 2d 694, 705, 563 N.W.2d 899 (1997).

[7] Simpson's actual contention is that his trial counsel "should have had but failed to object pursuant to WIS. STAT. § 904.03, on the grounds that, the probative value substantially outweighed the danger of unfair prejudice." (Quoted text as in original.) Because probative value substantially greater than unfair prejudice leads to admission, not exclusion, of evidence, we construe Simpson's contention as an allegation that the danger of unfair prejudice from the firearms evidence outweighed its probative value.

¶42 Here, the trial involved allegations that Simpson committed four crimes, each of which involved a dangerous weapon. To support the allegations that Simpson endangered safety and committed aggravated battery by use of a dangerous weapon, the State presented evidence of B.C.'s allegations that Simpson attacked her with a shotgun and a rifle. In further support of the allegations involving B.C., and to prove that Simpson failed to comply with police efforts to take him into custody, the State presented evidence from Moore that when officers arrived at Simpson's home in response to a 9-1-1 call, Simpson refused to come out of the locked northwest bedroom and instead threatened that he "[had] something" for the officers. Moore said that during the stand off, he learned from Simpson's mother that Simpson was possible armed with a "long gun." The State also presented testimony from Sargent Michael Karwoski that he entered the bedroom immediately after Simpson finally emerged. Inside, Karwoski found B.C. with her hands and knees covering her face, a rifle on the floor in front of her, and a shotgun next to her. Karwoski testified that he placed both firearms on the bed.

¶43 The firearms found in the room from which Simpson emerged on October 2, 2011, plainly tended to make more probable the weapons allegations against him. Accordingly, those firearms were probative evidence.

¶44 As to whether the probative value of the firearms was outweighed by the danger of undue prejudice, the question does not turn "on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the outcome of the case by improper means.'" *See* ***Marinez***, 331 Wis. 2d 568, ¶41 (citations and one set of quotation marks omitted). Simpson fails to offer any viable theory to support a claim that admission of the firearms improperly

influenced the outcome of the case.[8] Accordingly, we reject the allegation. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶45 In sum, Simpson fails to demonstrate that his trial counsel was ineffective for not challenging the authenticity or the relevance of the firearms. His postconviction counsel therefore was not ineffective for failing to pursue those allegations. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. The circuit court properly denied this claim without a hearing.

¶46 Under the umbrella of his challenges to the authenticity and relevance of the firearms, Simpson complains that his trial counsel "never cross-examined [B.C.] about the two firearms." A convicted person who complains that trial counsel was ineffective for failing to conduct a cross-examination must demonstrate exactly what the cross-examination would have revealed and how it would have altered the outcome of the trial. *See* ***State v. Provo***, 2004 WI App 97, ¶16, 272 Wis. 2d 837, 681 N.W.2d 272. In this case, Simpson did not submit an affidavit from B.C. or any similar document showing the answers she would have given to questions that might have been asked of her on cross-examination.

¶47 Notwithstanding Simpson's failure to prove exactly what B.C. would have said if cross-examined about the firearms, Simpson implies that he was prejudiced by the loss of that testimony. His argument appears to rest on a

[8] In the reply brief, Simpson struggles to show a basis for concluding that the firearms were unfairly prejudicial evidence. He states: "had [trial counsel] objected on the grounds that the probative value of both firearms if admitted into evidence, such evidence would had been unfair prejudice due to the fact that BC testified before Officer Moore and could had authenticated both guns as being the weapons that Simpson allegedly used to assault her." We are unable to extract a cognizable legal argument from this statement. We therefore do not consider the contention any further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

contention that, had trial counsel questioned B.C. about the rifle, she would have given answers that were inconsistent with other evidence in the case, and therefore "the jury would have had serious doubt as to believing what B.C. ever said about what Simpson was alleged to have done to her." These contentions amount to nothing more than rank speculation and are therefore insufficient to show actual prejudice. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

¶48 Simpson next argues that the circuit court wrongly permitted the State to present B.C.'s preliminary examination testimony at trial because, he says, that testimony was "false when compared to her original statement to police." He contends his postconviction counsel was ineffective for failing to pursue this claim. He is wrong once again. This claim was forfeited, so postconviction counsel had no duty to pursue it.

¶49 A party must make a specific and timely objection to the admission of evidence to preserve the issue for review. *See* WIS. STAT. § 901.03(1)(a). In this case, however, when the State offered the transcript of the preliminary examination, Simpson's trial counsel responded, "I will object without argument." The rule is well-settled that "[g]eneral objections which do not indicate the grounds for inadmissibility will not suffice to preserve the objector's right to appeal." ***State v. Tutlewski***, 231 Wis. 2d 379, 384, 605 N.W.2d 561 (Ct. App. 1999). Accordingly, the objection trial counsel raised here did not preserve a challenge to admitting B.C.'s preliminary examination testimony. The claim was forfeited.

¶50 A convicted person who wishes to pursue a forfeited trial issue normally does so by alleging trial counsel's ineffectiveness in failing to raise and preserve the matter. *See* ***Erickson***, 227 Wis. 2d at 766. Here, however, Simpson

flatly denies that he is alleging the wrongful admission of evidence as an instance of ineffective assistance of trial counsel. Rather, he claims that postconviction counsel alone was ineffective for failing to raise the claim of wrongfully admitted evidence in postconviction proceedings. In fact, postconviction counsel had no obligation to pursue a forfeited claim. *See* ***Rothering***, 205 Wis. 2d at 678. Because Simpson fails to show that postconviction counsel should have raised the claim in Simpson's first appeal, Simpson supplies no reason, let alone a sufficient reason, why he is entitled to raise the claim in a second postconviction motion under WIS. STAT. § 974.06. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185-86.

¶51 As did the State, however, we elect in the interest of completeness to address Simpson's claim that the circuit court allowed allegedly false information to reach the jury. At issue is B.C.'s testimony during the preliminary examination that she saw Simpson strike her in the head with a shotgun. Simpson deems this testimony "false" because, in B.C.'s earlier, video-recorded statement to police, she said that she was struck with an "unknown object." Simpson claims that the testimony therefore should have been excluded from the trial. His claim fails. He shows nothing more than some arguable inconsistency between two of B.C.'s prior statements. Whether any of B.C.'s statements were untrue was a matter for the jury to resolve, not the prosecutor. *See* ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972) ("Testimony may be so confused, inconsistent, or contradictory as to impair credibility as to parts of the testimony without being so incredible that all of it must be rejected as a matter of law. It is the function of the jury to determine where the truth lies."). Accordingly, Simpson shows no error in putting the statements before the jury.

¶52 Simpson seeks to avoid the effect of the foregoing analysis by arguing that the jury had an insufficient opportunity to assess B.C.'s credibility. In

support, he claims the State did not play for the jury the portion of B.C.'s recorded statement to police in which she said she learned from a police officer that the object Simpson used to strike her was a shotgun. We must reject this argument. Simpson does not show that he sought to admit portions of B.C.'s statements in addition to those selected by the State. Accordingly, he cannot complain about any alleged omissions now. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996) (litigant may not base a claim of error upon erroneous exclusion of evidence absent an offer of proof in the circuit court).[9] For all of the foregoing reasons, we conclude that the circuit court properly denied without a hearing Simpson's allegations regarding "false testimony" at his trial.

¶53 Simpson next asserts that the claims he presented in his postconviction motion under WIS. STAT. § 974.06 were clearly stronger than the claim he pursued on direct appeal. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. We have concluded that each of his claims lacks merit and that at least one of those claims is so weak as to narrowly avoid censure. Our conclusions dispose of this issue.

[9] We also observe that Simpson misstates the appellate record in discussing this issue. He asserts that "the prosecutor stopped the video" before reaching the point at which B.C. claims an officer told her she was struck with a shotgun. Neither the video of B.C.'s statements to police nor a complete transcript of that video is in the appellate record, but the trial transcript reveals that, after the jury was excused, the prosecutor described his presentation of the video. Specifically, the prosecutor memorialized that he had played portions of the video reflecting both B.C.'s statement that she "got hit with an object" and her next statement immediately thereafter. The excerpts of the video transcript that Simpson submitted with his postconviction motion show that B.C.'s next statement was: "the police said check this out you got hit with the shotgun." Accordingly, the record does not support Simpson's contention that the jury lacked an opportunity to resolve the inconsistency he perceives in B.C.'s statements. Although we sometimes overlook misstatements made by unrepresented parties, we caution appellate counsel that we expect members of the bar to pay scrupulous attention to the record. *See* ***State v. Lass***, 194 Wis. 2d 591, 605, 535 N.W.2d 904 (Ct. App. 1995).

¶54 Next, Simpson claims he was prejudiced by the combined effects of the alleged errors in his case. "[W]hen a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice." ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. In this case, however, Simpson has not demonstrated any prejudice arising out of the errors he alleges. Accordingly, there is no prejudice to accumulate. "'Zero plus zero equals zero.'" ***State v. Brown***, 85 Wis. 2d 341, 353, 270 N.W.2d 87 (Ct. App. 1978) (citation omitted).

¶55 Last, Simpson contends he is entitled to a new trial in the interest of justice, both on the ground that the real controversy was not fully tried and on the ground that justice miscarried. *See* WIS. STAT. § 752.35. In support, he restates the claims presented throughout his briefs. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing." ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989). We have concluded that Simpson's claims are insufficient to earn him a postconviction hearing. We are satisfied that they do not earn him a new trial. *See* ***State v. Marks***, 2010 WI App 172, ¶¶26, 28, 330 Wis. 2d 693, 794 N.W.2d 547.

By the Court.—Order affirmed.

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