COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0843 **Cir. Ct. No. 95-CF-1243**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANOU LO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. Following a trial and a direct appeal of his convictions for attempted first-degree intentional homicide and first-degree recklessly endangering safety, Anou Lo filed a postconviction motion seeking a new trial on numerous grounds. The circuit court denied the motion in all respects without conducting an evidentiary hearing. As to each issue raised on this appeal,

we reach one of three conclusions: (1) that Lo is barred from raising the issue in a postconviction motion, (2) that he has failed to allege sufficient facts in his motion to raise a question of fact or (3) that the record conclusively demonstrates that he is not entitled to relief. Accordingly, we affirm the circuit court's order denying Lo's postconviction motion. We further conclude that a new trial in the interests of justice is not warranted.

BACKGROUND

¶2 The charges in this case arose from the July 6, 1995 shooting of K.V. in Hood Park in La Crosse, Wisconsin. Lo was arrested in connection with the shooting and was charged with attempted first-degree homicide and first-degree recklessly endangering safety, both involving use of a dangerous weapon. Although he was sixteen years old at the time of the shooting, Lo was tried in criminal court as an adult. At trial, Lo did not dispute that he was responsible for shooting K.V.

¶3 The prosecution's theory of the case was that Lo sought out and shot K.V. in retaliation for previous shootings involving rival gangs. The prosecution introduced evidence to prove (1) that K.V. was a member of a gang called the TMC, (2) that Lo was associated with the Imperial Gangsters (IG), and (3) that there was a history of violence between the TMC and the IG.[1]

¶4 Lo testified and denied that he had any gang association at the time of the shooting. He sought to convince the jury that the shooting was an act of

[1] Initially, the charges against Lo included an enhancer for gang-related activity. However, the State voluntarily dropped the enhancer just before trial.

self-defense that occurred when he saw K.V. reach for a gun after the two had an argument. It was undisputed that both Lo and K.V. were carrying handguns at the time of the shooting.

¶5 The jury found Lo guilty of attempted first-degree homicide of K.V. and first-degree reckless endangerment of bystanders who were at the park when the shooting occurred. After sentencing, Lo was appointed new postconviction counsel. This attorney filed postconviction motions arguing for a new trial on several grounds, including ineffective assistance of trial counsel. The circuit court denied these motions, and Lo appealed to this court. We affirmed the judgment and the postconviction order. Many of the rulings on that appeal were based on our disagreement with Lo's contention that evidence concerning gang-related activities and materials was irrelevant and unfairly prejudicial. We concluded that such evidence was relevant to the State's theory on motive (*i.e.*, that the shooting was gang-related retaliation) and that the gang-related evidence did not cause the jury to find Lo guilty based on improper or extraneous considerations. The Wisconsin Supreme Court denied Lo's subsequent petition for review.

¶6 Lo next initiated habeas corpus proceedings in federal court, which were deemed procedurally improper. He then returned to the La Crosse County circuit court and filed a motion for postconviction relief under WIS. STAT. § 974.06 (1999-2000).[2] The motion alleged ineffective assistance of trial counsel, postconviction counsel, and appellate counsel. Lo also sought a new trial in the interest of justice due to the cumulative effect of counsels' alleged errors, the

[2] All further references to the Wisconsin Statutes are to 1999-2000 version unless otherwise noted.

circuit court's alleged errors, and what Lo characterized as "prosecutorial misconduct." In denying all requested relief, the circuit court divided the issues raised in Lo's motion into three general categories: (1) issues raised on Lo's direct appeal that could not be re-litigated in a subsequent postconviction motion, (2) issues that were barred from review under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and (3) an allegation of ineffective assistance of appellate counsel over which the circuit court concluded that it did not have jurisdiction.

DISCUSSION

Standard of Review.

¶7 WISCONSIN STAT. § 974.06(4) bars a defendant from bringing postconviction claims, including constitutional claims, under § 974.06 if the defendant could have raised the issues in a previous postconviction motion or on direct appeal, unless the defendant has a "sufficient reason" for failing to do so. ***Escalona***, 185 Wis. 2d at 181-82, 517 N.W.2d at 162. A claim brought under § 974.06 is likewise barred if it has been finally adjudicated during a previous appeal. ***Id.*** Whether any of Lo's claims brought pursuant to § 974.06 are barred by the application of § 974.06(4) and ***Escalona*** presents a question of law which we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175, 176 (Ct. App. 1997).

¶8 Whether Lo's counsels' actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Hereford***, 224 Wis. 2d 605, 612, 592 N.W.2d 247, 250 (Ct. App. 1999). The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** Whether counsel's conduct was deficient and whether it

was prejudicial to the defendant are questions of law reviewed *de novo* by this court. ***State v. Franklin***, 2001 WI 104, ¶12, 245 Wis. 2d 582, 629 N.W.2d 289.

¶9 A two-part analysis controls our review of the circuit court's decision to deny Lo's postconviction motion without a hearing. If the motion on its face alleges facts which if proved would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50, 53 (1996). Whether the motion does so is a question of law that we review *de novo*. ***Id.*** However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to deny the postconviction motion without a hearing. ***Id.*** at 310-11, 548 N.W.2d at 53-54. When reviewing a circuit court's discretionary act, we apply the deferential erroneous exercise of discretion standard. ***Id.***

Claims Previously Addressed.

¶10 We agree with the circuit court that many of the issues raised in Lo's postconviction motion represent an attempt to relitigate issues that he raised on his direct appeal. In particular, Lo seeks review of the circuit court's decision to admit evidence of prior shootings, two gun shop robberies, a photo album, and a notebook. We squarely addressed each of these alleged evidentiary errors on Lo's direct appeal, holding that all of the challenged evidence was relevant, that it was admissible to prove the State's theory of motive/intent and that it was not unfairly prejudicial to Lo.

¶11 Lo's attempt to challenge these rulings under various "new" theories—such as arguing that introducing the evidence represented prosecutorial

misconduct—does not change the fact that we have previously addressed the issues. As we stated in ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991), "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." In addition, to the extent that any of the challenged evidence might be considered "other acts" evidence, we note that our analysis on the previous appeal reflects the standard set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998), even though we did not expressly cite that case.[3] Finally, the only reason Lo offers to avoid the bar imposed by WIS.

[3] Lo argues in his motion and on appeal that, especially because the prosecution dropped the gang-related enhancer but went forward with extensive evidence and argument about gang-related activity, the circuit court should have provided a limiting instruction and specifically advised the jury that Lo's position was that the shooting of K.V. was not gang-related. This contention has no merit. Whether the shooting did or did not involve gang-related retaliation was a central factual dispute at trial. The issue went to the heart of the prosecution's theory of motive. That the issue was in dispute needed no clarification. Moreover, we note that the circuit court gave a lengthy preliminary instruction concerning other evidence of alleged gang activity. That instruction included the following words of caution:

> The State in this case intends to present evidence regarding other incidents involving gang members of the Imperial Gangsters and members of the TMC for which the defendant is not on trial. Such evidence will be admitted solely on the issue of motive. You may not consider such evidence to conclude that the defendant has a certain character or certain character trait or to further conclude that he acted in conformity with that trait or character [trait] with respect to the offense charged in this case.
>
> ….
>
> You may consider the evidence of other incidents involving Imperial Gangsters or TMC only for the purposes that I have described to you in this instruction, assigning the evidence such weight as you determine it deserves. You may not, however, consider this evidence to determine whether the defendant is probably guilty of this offense because of prior conduct of the members of the Imperial Gangsters or the TMC.

(continued)

STAT. § 974.06 and ***Escalona*** is ineffective assistance of postconviction and/or appellate counsel. As the admissibility of the evidence was challenged on Lo's direct appeal, there is no possibility that Lo's postconviction counsel or his appellate counsel could be found ineffective for failing to put those issues before the court. Accordingly, Lo may not seek further review of these issues under § 974.06 in Wisconsin courts. *See* ***Escalona***, 185 Wis. 2d at 181-82, 517 N.W.2d at 162 ("[I]f the defendant's grounds for relief have been finally adjudicated [or] waived … in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion …. *unless* the court ascertains that a "sufficient reason" exists for … the failure … to adequately raise the issue in the original, supplemental or amended motion.").

Claims Not Raised Previously.

¶12 Lo also raises a number of issues in his WIS. STAT. § 974.06 postconviction motion and on this appeal that he did not raise on his direct appeal. In an effort to avoid ***Escalona***, Lo asserts that he was the victim of ineffective assistance of postconviction and appellate counsel. His argument is that counsel failed to properly preserve all of his appealable issues, either by failing to bring them in a postconviction motion before the circuit court or by failing to pursue them on his direct appeal.

¶13 The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just

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To the extent that the State's evidence of uncharged gang-related activity needed to be placed in context for the jury, this instruction was clearly sufficient.

result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). Wisconsin courts apply a two-pronged test to determine whether the assistance was so defective that reversal of conviction is required. ***Franklin***, 2001 WI 104 at ¶11. Under this test, a defendant must show (1) that counsel's representation was deficient, and (2) that this deficient performance resulted in prejudice to the defense. ***Strickland***, 466 U.S. at 687.

¶14 The test for deficient performance is whether counsel's representation fell below the representation that a reasonably effective attorney would provide. ***Id.*** at 688. To prove prejudice, a defendant is required to show "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. The appellant must prevail on both prongs of the ***Strickland*** test to obtain relief. *See* ***Franklin***, 2001 WI 104 at ¶13.

¶15 Lo's assertion that his postconviction counsel and appellate counsel were both ineffective presents two preliminary issues. The first issue is procedural in nature: Claims of ineffective assistance of postconviction counsel are brought by filing a motion in the circuit court under WIS. STAT. § 974.06, while claims of ineffective assistance of appellate counsel are brought by filing a petition for habeas corpus directly in the court of appeals. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540, 541 (1992); ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 680-82, 556 N.W.2d 136, 138-39 (Ct. App. 1996). Recognizing this distinction, Lo asserts in his reply brief that he will be filing a separate ***Knight*** petition to address the claim that he received ineffective

assistance of appellate counsel. To date, no such petition has been filed.[4] Nonetheless, we note that where we address the merits of particular issues raised by Lo (as opposed to applying waiver under ***Escalona***), our disposition effectively addresses claims of ineffective assistance of both postconviction and appellate counsel.

¶16 The second preliminary issue concerns the manner in which we apply ***Escalona*** when a defendant's reason for not raising an issue on direct appeal is that postconviction (or appellate counsel) was ineffective in neglecting to raise the claims. It is clear that postconviction counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue. *See* ***Smith v. Robbins***, 528 U.S. 259, 287-88 (2000) (citing the Court's previous holding ***Jones v. Barnes***, 463 U.S. 745 (1983)). Rather, it is part of the function of postconviction counsel to select from among the potential issues in order to maximize the likelihood of success on a postconviction motion. *See* ***Robbins***, 528 U.S. 287-88. However, as the Seventh Circuit pointed out in ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986), counsel's decisions in choosing among issues cannot be isolated from review. The relevant inquiry is still guided by ***Strickland***, and the question of whether postconviction counsel's decisions fell below an objective standard of reasonableness involves a review of the defendant's motion and the circuit court record to assess the relative strength of issues that counsel did

[4] A remedy is not available to one who unreasonably delays in filing a ***Knight*** petition. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 800, 565 N.W.2d 805, 808 (Ct. App. 1997). We note but do not decide the issue of whether Lo's failure to file his ***Knight*** petition so that the overlapping issues could be decided in a consolidated fashion amounts to unreasonable delay.

not raise. *See* ***Gray***, 800 F.2d at 646-47. Stated another way, the analysis involves an assessment of the merits.

¶17 Here, Lo argues in several instances that *postconviction* counsel was ineffective for failing preserve a claim of ineffective assistance of *trial* counsel. The latter claim is the substantive claim for relief, while the former claim is Lo's answer to ***Escalona***. *See, e.g.*, ***Rothering***, 205 Wis. 2d at 682, 556 N.W.2d at 139 (noting that ineffective assistance of postconviction counsel may be a "sufficient reason" for failing to bring a claim on direct appeal). We analyze these nested claims of ineffective assistance of counsel by focusing on the performance of trial counsel, and, in effect, we apply the two-pronged ***Strickland*** test.

¶18 Lo also contends that postconviction counsel failed to preserve several additional claims of error. According to Lo, postconviction counsel was constitutionally ineffective for letting these issues drop. Lo contends that they are strong claims for relief that a reasonably effective attorney would not have ignored. Again, as to these claims, it is often necessary to assess the merits at some level, in order to assess the performance of postconviction counsel.[5]

[5] The State asserts that we should affirm the circuit court's decision in its entirety. In doing so, the State relies on the argument that ***Escalona*** bars our consideration of most of Lo's claims. However, despite expressly arguing that the analysis of some of Lo's claims involves an analysis of the strength (*i.e.*, the merits) of those claims, the State has not briefed the merits of a single issue raised by Lo. This approach is inadequate and singularly unhelpful to our consideration of Lo's appeal.

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1. Jury instruction issues.

a. Lesser- included offense.

¶19 Lo contends that the circuit court erred in denying his request to instruct the jury on attempted first-degree and attempted second-degree recklessly endangering safety as a lesser-included offense to count one, attempted first-degree intentional homicide. After hearing argument from each side, the circuit court explained on the record its decision to instruct the jury on both first-degree and second-degree intentional homicide, but to deny the requested instructions on recklessly endangering safety:

> I do not believe that in this case a lesser – any more lesser included [than] second degree intentional homicide is supported by the evidence, and I'm not going to send that to the jury.

¶20 Because Lo's trial counsel requested the instructions and because the circuit court denied the instructions stating its reasoning on the record, we conclude that the issue was preserved for direct appeal regardless of whether postconviction counsel raised the issue through a postconviction motion. *See* WIS. STAT. § 974.02(2) (issues "previously raised" may be appealed by filing a notice

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Lo has explained in some detail why he believes the issues he raises entitle him to a new trial and why he believes they should have been raised by his postconviction and/or his appellate counsel. In response, the State asserts only that "Lo has woefully failed to allege sufficient facts to demonstrate either deficient performance or prejudice." This is the legal conclusion that the State would like us to reach, but the State makes no effort to explain (*e.g.*, through analysis of the record and the applicable law) why we should reach that conclusion. In a recent unpublished opinion, we addressed an identical concern and, after noting the inadequacy of the State's brief, stated, "We anticipate that counsel's future briefs will fully address relevant issues." ***State v. Quinn***, No. 00-3174, unpublished slip. op. at ¶15 n.5 (WI App July 26, 2001). We now emphatically repeat our expectation that the State will provide full briefing of relevant issues. We also caution the State that waiver rules apply to both appellants and respondents.

of appeal without a postconviction motion). Accordingly, postconviction counsel was not ineffective for failing to raise the issue before the circuit court, and we could apply ***Escalona*** to this claim. However, we choose to reach the merits because we believe the record conclusively establishes that the circuit court properly denied the requested instructions.

¶21 Whether the evidence supports the submission of a lesser-included offense is a question of law, which we review *de novo*. *See* ***State v. Kramar***, 149 Wis. 2d 767, 791, 440 N.W.2d 317, 327 (1989). An instruction on a lesser-included offense is appropriate only when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. ***State v. Glenn***, 199 Wis. 2d 575, 585, 545 N.W.2d 230, 234 (1996).[6] In deciding whether the evidence supports an instruction requested by a defendant, courts must view the evidence in a light most favorable to the defendant. ***State v. Fitzgerald***, 2000 WI App 55, ¶7, 233 Wis. 2d 584, 608 N.W.2d 391.

¶22 Lo contends that there are reasonable grounds in the evidence from which the jury could have concluded that he did not have the "intent to kill" required for conviction under WIS. STAT. §§ 940.01 or 940.05,[7] but that he did

[6] We have previously held that first-degree reckless endangerment under WIS. STAT. § 941.30(1) is a lesser-included offense of attempted first-degree intentional homicide under WIS. STAT. §§ 939.32 and 940.01. *See* ***State v. Weeks***, 165 Wis. 2d 200, 206, 477 N.W.2d 642, 644 (Ct. App. 1991).

[7] The relevant portions of the statutes relating to attempted first-degree and attempted second-degree intentional homicide, taken from the 1995-96 version of the Wisconsin Statutes, are as follows:

> **940.01 First-degree intentional homicide.**
>
> **(1)** OFFENSE. Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

(continued)

have the *mens rea* necessary for conviction under WIS. STAT. § 941.30.[8] He further argues that the supreme court's decision in ***State v. Cartagena***, 99 Wis. 2d

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> **940.05 Second-degree intentional homicide.**
>
> **(1)** Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class B felony if:
>
> [the state fails to prove or concedes that it is unable to prove that the mitigating circumstances specified in § 940.01(2) did not exist.]
>
> **939.23 Criminal intent.**
>
> **(4)** "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.
>
> **939.32 Attempt.**
>
> **(3)** An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

[8] The relevant portions of the statutes relating to recklessly endangering safety, taken from the 1995-96 version of the Wisconsin Statutes, are as follows:

> **941.30 Recklessly endangering safety.**
>
> **(1)** FIRST-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class D felony.
>
> **(2)** SECOND-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety is guilty of a Class E felony.

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657, 299 N.W.2d 872 (1981), conclusively establishes his right to an instruction on the lesser-included offense and that the circuit court's denial of that instruction requires a reversal of his conviction. We disagree.

¶23 ***Cartagena*** was decided prior to a broadening of the definition of the phrase "with intent to," as that phrase is used in WIS. STAT. §§ 940.01 and 940.05. Under the version of the statutes in effect at the time of Lo's offense, a jury could convict a defendant of attempted first-degree intentional homicide if, in addition to the other elements of the offense, it found beyond a reasonable doubt that the defendant was "aware that his or her conduct is practically certain to cause" the death of another human being. WIS. STAT. § 939.23(4) (1995-96).[9] Given the evidence presented by the prosecution and the defense and assuming that the jury rejected Lo's claim that he acted in self-defense, no reasonable jury could find that Lo was not at least aware that firing five shots at K.V. from a handgun was "practically certain" to cause K.V.'s death. Simply put, repeatedly firing a handgun at another person—which (excepting self-defense) is the view of Lo's conduct that is most favorable to him—is practically certain to cause that person's death. *See, e.g.*, ***State v. Weeks***, 165 Wis. 2d 200, 210-11, 477 N.W.2d 642, 646-47 (Ct. App. 1991) (holding that the circuit court properly refused to instruct the jury on recklessly endangering safety as a lesser-included offense to attempted

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> **939.24 Criminal recklessness.**
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> **(1)** In this section, "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

[9] The definition of "intent to kill" that the court addressed in ***Cartagena*** required a jury to find that the defendant had "the mental purpose to take the life of another human being." ***State v. Cartagena***, 99 Wis. 2d 657, 658 n.2, 299 N.W.2d 872, 874 n.2 (1981).

first-degree homicide when, during an armed robbery, one of the perpetrators turned and blindly fired a shotgun toward a door that had just closed knowing that a person was standing behind the door); *see also* ***id.*** at 212-13, 477 N.W.2d at 647 (Fine, J., concurring). The fact that K.V. did not die reduced the crime to an attempt, but it did not negate Lo's criminal intent under the applicable statutes. Accordingly, Lo was not entitled to the lesser-included offense instructions.

b. Recklessly endangering safety.

¶24 Lo next claims that the court's jury instructions on recklessly endangering safety were deficient because they did not sufficiently identify the person or persons whom he allegedly endangered and because they incorporated self-defense as one of the deciding factors. Lo contends that (1) the instructions denied him the right to a unanimous verdict because the individual jurors might have disagreed about who was endangered, and (2) the instructions allowed the jury to convict him of recklessly endangering K.V., which would present a double jeopardy problem.

¶25 First, we conclude that Lo has not alleged sufficient facts to call into question the statement in the record that he was personally consulted and personally agreed during postconviction proceedings not to pursue the issue of whether the instructions on recklessly endangering safety created a unanimity problem. Lo's trial counsel had objected to the instructions on the grounds that they failed to identify a specific person who was endangered. The circuit court overruled the objection, concluding that it was a fact question for the jury whether any bystander in the park was close enough to the shooting to be endangered. Lo's postconviction counsel raised the issue a second time by motion, but informed the court at the postconviction hearing that, upon conferring with Lo and

obtaining Lo's consent, he was withdrawing the motion. Because Lo has failed to provide any explanation of the sequence of events leading to the decision to voluntarily withdraw the motion, he has not alleged sufficient facts in his motion to raise a question of fact concerning the alleged ineffectiveness of postconviction counsel. Accordingly, ***Escalona*** clearly applies to bar Lo from raising this claim for relief under WIS. STAT. § 974.06.

¶26 Second, we see no error in the references to self-defense that appear in the final instructions on reckless endangerment. Those instructions informed the jury that if it determined that Lo was lawfully acting in self-defense, it could not convict him of recklessly endangering the safety of another in connection with the shooting. Lo's interpretation of these references is unreasonable.

¶27 Third, we see no danger that the jury convicted Lo of recklessly engendering the victim, K.V., as opposed to a separate bystander. The information, which was read to the jury during both preliminary and final instructions, expressly accused Lo of recklessly endangering the safety of "bystanders" in the park. And, under Lo's own account of the shooting, he was standing at a shouting distance (about forty feet) from K.V. when he fired the shots, and there may have been a bystander five to ten feet from K.V. Reading the instructions as a whole and considering the evidence produced at trial, we have no doubt that the jury understood that the second count did not relate to K.V. *See* ***State v. Skaff***, 152 Wis. 2d 48, 59, 447 N.W.2d 84, 89 (Ct. App. 1989) (stating that appellate courts consider the instructions given to the jury in their entirety to determine whether the jury was fully and fairly instructed).

c. Self-defense.

¶28 Lo raises but not does not develop (either in his motion or his brief) an argument that the jury instructions on imperfect self-defense were legally insufficient. We will not consider this undeveloped argument. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987) (proper appellate argument contains the contention of the party, the reasons therefore, with citation of authorities, statutes and that part of the record relied on; inadequate argument will not be considered).

2. Lo's juvenile adjudication.

¶29 Lo next challenges the circuit court's decision to allow testimony concerning Lo's juvenile adjudication for sexual assault. He claims that under WIS. STAT. § 48.35(1)(b) (1995-96), the circuit court committed plain error in allowing the prosecution to cross-examine defense witnesses about the juvenile adjudication, that his trial counsel was ineffective for failing to object under § 48.35(1)(b) and for failing to seek a curative instruction and that postconviction counsel was ineffective for failing to raise trial counsel's ineffectiveness.[10]

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[10] WISCONSIN STAT. § 48.35(1)(b) (1995-96) provides as follows:

> **48.35 Effect of judgment and disposition. (1)** …
>
> (b) The disposition of a child, and any record of evidence given in a hearing in court, shall not be admissible as evidence against the child in any case or proceeding in any other court except:
>
> 1. In sentencing proceedings after conviction of a felony or misdemeanor and then only for the purpose of a presentence study and report;

(continued)

¶30 In his earlier appeal, Lo argued that his trial counsel was ineffective for "opening the door" to cross-examination of a defense character witness on Lo's juvenile record. Lo's argument centered on trial counsel having asked Lo's foster parent whether he was aware of any episodes that would have gotten Lo into trouble. The foster parent responded that he was not aware of any such incidents. The prosecution then questioned the foster parent about a sexual assault Lo had committed while he was in that foster parent's care:

> Q: You did have one problem with him while he was in the group home approximately two months after he returned, correct? He returned in January?
>
> A: Yes.
>
> Q: And there was a problem in March, right?
>
> A: Uhm, yes.
>
> Q: He had, on multiple occasions, sexual intercourse with –
>
> [DEFENSE ATTORNEY]: Your honor, I'm going to object as to the specifics of –
>
> [PROSECUTOR]: Well, he's testified that there were no problems that he was aware of, everybody adored him. I'm entitled to inquire as to specific instances that bear on that.
>
> THE COURT: Objection overruled. You may proceed.
>
> BY [PROSECUTOR]:

> 2. In a proceeding in any court assigned to exercise jurisdiction under this chapter and ch. 938; or
>
> 3. In a court of civil or criminal jurisdiction while it is exercising the jurisdiction of a family court and is considering the custody of children.

> Q: …[O]n multiple occasions in March of 1995, Anou Lo had sexual intercourse with another 12-year-old resident, correct?
>
> A: After –after investigation it was perceived to be so.
>
> Q: And he was adjudicated for that?
>
> A: Yes, he was.
>
> Q: Is having sexual intercourse with a 12-year-old child on multiple occasions, another resident, consistent with not having any problems while he was living with you?
>
> A: What I meant by problems was as far as violence or something of really majorly disorderly conduct.

¶31 In addressing Lo's argument on his direct appeal, we noted that it was trial counsel's decision to call the foster parent as a character witness—not the specific question asked on direct examination—that had "opened the door" to cross-examination concerning the sexual assault. We then held that the decision to call the foster parent was a rational one that did not constitute deficient performance. Implicit in this analysis was consideration of the rule that when an accused places a relevant aspect of his character at issue, the prosecution may respond with inquiry as to whether the witness is aware of relevant specific instances of conduct by the defendant. *See* WIS. STAT. §§ 904.04(1)(a) and 904.05(1) (1995-96). We do not revisit those conclusions here. Lo attempted to establish that he did not have a violent or assaultive character to bolster his claim that he was not associated with a violent gang. The state responded to Lo's character witnesses with inquiry into an act of sexual assault. It was within the circuit court's discretion to permit that testimony. *See* ***King v. State***, 75 Wis. 2d 26, 41-42, 248 N.W.2d 458, 465-66 (1977).

¶32 As for Lo's claim that any express reference to his juvenile adjudication was improper under WIS. STAT. § 48.35(1)(b), we conclude that any such error was harmless and non-prejudicial. Because the jury heard questions and testimony about the sexual assault *as conduct* that was relevant under WIS. STAT. §§ 904.04(1)(a) and 904.05(1), the further references to the juvenile adjudication that resulted from that conduct do not undermine our confidence in the outcome of the trial. Under the same reasoning, we conclude that there is no reasonable possibility that the result of the proceeding would have been different but for the evidentiary error Lo alleges occurred in regard to mentioning his juvenile adjudication. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 368-69, 588 N.W.2d 606, 622-23 (1999), *modified on other grounds*, 225 Wis. 2d 121, 591 N.W.2d 604. Finally, Lo is incorrect to assert that a curative instruction was necessary to erase any association in the juror's minds between the sexual offense and Lo's character. As established above, the cross-examination concerning Lo's conduct in committing the sexual assault was offered and properly admitted for the express purpose of rebutting the testimony of Lo's character witnesses. *See* WIS. STAT. §§ 904.04(1)(a) and 904.05(1).

3. Failure to have a defense ballistics expert.

¶33 Lo contends that his postconviction counsel was ineffective because he failed to argue that trial counsel was ineffective for failing to retain and present a ballistics expert to rebut the prosecution's expert, who testified that the gun Lo used to shoot K.V. was the same gun that was used in a prior house shooting. The State then argued the inference that both shootings were part of series of related gang activity.

¶34 Where a defendant alleges that trial counsel was deficient for failing to investigate certain aspects of the case, the defendant must "allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. More than speculation about what further investigation would have revealed is necessary. ***Id.***

¶35 Here, Lo contends that his trial counsel should have presented an expert witness because it was known that the bullets examined by the prosecution's expert were fragmented and misshaped in various ways, and therefore the results of the laboratory examination were likely not reliable. However, Lo has not alleged that he has spoken with an expert who will provide testimony at a ***Machner*** hearing that would be sufficient to show prejudice under ***Strickland***, and he has not provided an affidavit from an expert in the field who has actually examined the bullets and stated a conclusion that would have rebutted the testimony of the State's witness. Accordingly, he has not alleged facts that, if believed, would entitle him to relief. Neither Lo nor this court is in a position to offer an opinion concerning the point at which the condition of bullets prevents a reliable examination. Because Lo has not presented facts sufficient to show that a defense expert could have rebutted the State's expert's testimony and because we cannot reasonably conclude that a more detailed discussion of the characteristics of the bullets would have had a material impact on the case,[11] it would be pure speculation to conclude that trial counsel was deficient for failing to solicit

[11] We note that our review of the record shows that trial counsel provided very able cross-examination of the State's expert, raising for the jury's consideration many of the points that Lo argues concerning the condition of the bullets.

additional expert testimony or advice on this subject, or that there is a reasonable probability his failure to do so affected the outcome of the case.

¶36 The only case Lo cites on this issue, ***Barnard v. Henderson***, 514 F.2d 744, 746 (5th Cir. 1975), is inapposite due to the nature of the claim raised. ***Barnard*** involved a federal habeas appeal. The trial court had denied the defendant's pretrial motion to allow inspection of the murder weapon and bullet by a ballistics expert of his own choosing. ***Id.*** The Fifth Circuit concluded that the motion was not frivolous; seventy-percent of the slug had been destroyed and there was a "possibility" that a ballistics expert would have been helpful to the defense on the issue of weapon identification. ***Id.*** The court then held that the trial court's decision to deny the motion had violated the defendant's due process rights because it denied him the means necessary to conduct his defense. ***Id.*** Here, Lo's claim is that trial counsel was ineffective for failing to present rebuttal expert testimony. Under the standard set forth in ***Strickland***, 466 U.S. at 688, 693-94, the defendant has the burden to show that the alleged deficiency fell below the representation that a reasonably effective attorney would provide and that it had more than "some conceivable effect on the outcome of the proceeding." Here, Lo's failure to pursue postconviction discovery regarding ballistics evidence and his failure to provide even a hint that an actual expert in the field would validate his speculation convince us that he could not meet his burden under ***Strickland*** even if a hearing were held on the issue.

4. Juror bias.

¶37 Lo also claims error for failing to excuse a juror who stated during *voir dire* that he was an acquaintance of an officer who testified for the prosecution. Lo's trial counsel did not seek dismissal of the juror for cause, nor

did counsel use one of his five peremptory strikes to dismiss the juror. Lo now argues that "[i]t cannot be said with certainty that [the juror] did not bring into the jury room evidence not adduced at trial." This allegation is based solely on following exchange, which took place during *voir dire*:

> [Prosecutor]: …. Investigator Byerson is an investigator with the La Crosse Police Department.
>
> [Juror]: I know him, but just an acquaintance.
>
> [Prosecutor]: Okay. Anything about that that would –
>
> [Juror]: None.

¶38 There is nothing in this exchange, elsewhere in the record, in Lo's motion or in his brief that is sufficient to raise an issue as to the juror's potential subjective or objective bias. *See* ***State v. Lindell***, 2001 WI 108, ¶¶34-40, 245 Wis. 2d 689, 629 N.W.2d 223 (setting forth standards for evaluation of claims of juror bias). The acquaintanceship with a witness is not enough to suggest that dismissal for cause was required, and Lo offers only speculation that the juror may have known about facts not in evidence. We conclude that there was no error in retaining the juror. Accordingly, we also conclude that postconviction counsel was not ineffective for failing to raise the issue in a postconviction motion and that Lo was not denied a fair trial by the inclusion of the juror on the panel that heard his case.

5. Prosecutorial misconduct.

¶39 Lo also contends that his trial was tainted by prosecutorial misconduct. Some of the allegations of "misconduct" relate to the introduction of gang-related evidence and the cross-examination of Lo's character witnesses (particularly concerning the sexual assault). These issues have been adequately

addressed either on direct appeal or as part of this decision. Several of the allegations simply have no merit. For example, there was no misconduct involved in dropping the gang-related enhancer, in eliciting testimony concerning Lo's demeanor during the investigation of the shooting, or in seeking an explanation from Lo as to why he initially denied having shot K.V., but then later changed his story to assert that he shot K.V. in self-defense. We also disagree that there is any basis for Lo's allegation that the prosecutor attempted to play on racial biases.

¶40 The remaining allegations of misconduct adequately developed for our consideration are that (1) the prosecutor vouched for the truthfulness of K.V. during closing argument; (2) the prosecutor referred to Lo as a gang member; (3) the prosecutor's remarks during opening and closing argument were inflammatory because he referred to Lo as a "gangster" and a "gangster punk;" and (4) the prosecutor misstated the time-line of events during opening and closing statements to make events appear retaliatory in nature.

¶41 Prosecutors must refrain from using methods calculated to produce a wrongful conviction. ***United States v. Young***, 470 U.S. 1, 7 (1985). Prosecutorial misconduct violates due process where it "poisons the entire atmosphere of the trial." ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376, 378 (Ct. App. 1996) (internal quotation omitted). When the misconduct is serious and the evidence of a defendant's guilt is weak, we will not hesitate to reverse the resulting conviction and order a new trial. ***Id.*** However, "[r]eversing a criminal conviction on the basis of prosecutorial conduct is a 'drastic step' that 'should be approached with caution.'" ***Id.*** (quoting ***State v. Ruiz***, 118 Wis. 2d 177, 202, 347 N.W.2d 352, 364 (1984).

¶42 Lo's trial counsel did not object to or move for a mistrial as to any of the four acts of alleged prosecutorial misconduct. Further, postconviction counsel did not choose to pursue prosecutorial misconduct as an avenue for postconviction relief. Accordingly, our review of the issue is limited. We reverse only if Lo establishes plain error. *See* ***State v. Street***, 202 Wis. 2d 533, 552, 551 N.W.2d 830, 839 (Ct. App. 1996) (noting that, in order to constitute plain error, an error must be obvious and substantial, and so fundamental that a new trial or other relief must be granted).

a. Vouching for K.V.'s truthfulness.

¶43 Lo contends that the prosecutor improperly vouched for K.V.'s truthfulness during the State's closing argument. The prosecutor said:

> I'm also going to be upfront with you in the sense that I think [K.V.] lied when he testified. I'm not going to defend that. The young man took the witness stand, and with respect to the Omni Center shooting at least retracted statements that he had made to Investigator Byerson. And he retracted those statements saying he didn't know what he was saying, he was in the hospital, didn't know what was going on. I think you heard the tape. Certainly it was my impression that in giving answers he knew what he was being asked and responded appropriately. So we're not defending [K.V.] here.
>
> [K.V.] I think was honest with Investigator Byerson when he spoke originally. You heard the taped statement. Maybe he didn't appreciate the consequences of what he was saying, that at some point later on he would be called into court and possibly used as a witness against his TMC buddy, [C.T.]. But at least when he spoke with Investigator Byerson, he was upfront and clear about what had happened about the Omni Center ….
>
> So when you look at [K.V.], I don't think you disregard what he says entirely. I think you look very, very carefully at what he said on the witness stand the other day. But I think you can be much more trusting of what he said to Investigator Byerson. What he said to Investigator

> Byerson was corroborated in many respects by other witnesses.

¶44 We conclude that the prosecutor's statements do not constitute either an explicit personal assurance of the witness's veracity or an implicit indication that information not presented to the jury supports the witness's testimony. *See, e.g.*, ***United States v. Bowie***, 892 F.2d 1494, 1498 (10th Cir. 1990). In Wisconsin courts, a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on the evidence presented. ***State v. Adams***, 221 Wis. 2d 1, 16-18, 584 N.W.2d 695, 702-03 (Ct. App. 1998). The prosecutor's comments here do not stray from the standard applied in ***Adams***.

b. Referring to Lo as a gang member.

¶45 Lo also claims error because the prosecutor referred to him as a gang member as there was no direct testimony that Lo was a member of IG. We conclude that Lo is incorrect to assume that the prosecutor was foreclosed from arguing the inference, based on circumstantial evidence, that Lo was associated with IG at the time of the shooting. The evidence produced at trial was sufficient for the jury to draw the inference that Lo was a member of, or at least associated with the IG. Our review of the transcript shows that although the prosecutor referred to Lo as a gang member and to the IG as "defendant's gang," the State's closing argument expressly apprised the jury of the fact that this was an argument based on circumstantial, rather than direct, evidence.

c. Inflammatory statements.

¶46 Lo contends that the State exceeded the bounds of proper argument by referring to him as a "gangster" and a "gangster punk."[12] While we agree with Lo that these references serve no legitimate purpose and that they might have drawn a sustainable objection, we disagree that they rise to the level of plain error. Along the continuum of cases evaluating improper comments by the prosecutor in particular fact situations, the comments at issue here are tame in comparison to the comments at issue in, for example, ***Shepard v. Lane***, 818 F.2d 615, 621-22 (7th Cir. 1987) (holding that prosecutor's comments, while grossly improper, did not deprive defendant of a fair trial). Lo cites ***United States v. Cannon***, 88 F.3d 1495, 1502-03 (8th Cir. 1996) to support his contention that the prosecutor's comments require a new trial. In ***Cannon***, however, the court was not only concerned about the references to defendants as "bad people," but also with a "thinly veiled appeal to parochial allegiances" in the prosecutor's remarks. *See* ***id.*** at 1502. In any event, we rest our decision here on our review of the prosecutor's comments in the context of Lo's entire trial.

d. Misstating the time-line of events.

¶47 The prosecutor stated in his opening statement to the jury that he would prove a sequence of four shootings. The first would be a TMC shooting, the second an IG shooting, the third a TMC shooting, and the fourth would be Lo, whom the prosecutors sought to prove was associated with the IG, shooting K.V.,

[12] Lo also contends that the prosecutor referred to Lo and his associates as "gang bangers" and "street thugs," but he provides no citations to the record for those quotations. Upon our own review of the State's opening and closing arguments, we found no such references.

a TMC. Lo contends that the prosecutor intentionally misrepresented the sequence of the second and third shootings to conform to his argument that there was repeated back-and-forth retaliation between the gangs.

¶48 Although Lo may be correct that the prosecutor confused the time-line of events, Lo has not provided citations to the record that would demonstrate that his asserted sequence was established. Our own review of the trial transcript shows only that the second and third shootings occurred on the same night, but which one occurred first was not clear. We also note that during the State's closing argument, the prosecutor stated only that the second and third shooting occurred on "[t]hat same night." This presentation conformed to the evidence produced at trial. We conclude that Lo has not shown that the failure to explicitly clarify the time-line set forth in the opening, even if erroneous, rendered his trial unfair or that it resulted in any prejudice to his defense. Taken in context of the whole trial, the specific sequence of the second and third shootings was not an important issue. In summary, we conclude that none of the alleged acts of prosecutorial misconduct reached the level of plain error or rendered the trial unfair.

Issue not Briefed on Appeal.

¶49 Lo's motion under WIS. STAT. § 974.06 raises an issue as to whether the circuit court erred by not requiring the jury to answer a "special fact question" related to the issue of self-defense. He has not pursued this issue on appeal, and we conclude that the claim has been abandoned.

Denial of Lo's Motion without an Evidentiary Hearing.

¶50 For the reasons set forth above, we conclude as to each issue raised on this appeal of Lo's postconviction motion either that Lo is barred from raising the issue under WIS. STAT. § 974.06 and ***Escalona***, that he has failed to allege sufficient facts in his motion to raise a question of fact or that the record conclusively demonstrates that Lo is not entitled to relief. Based on our examination of the record and the issues raised in Lo's motion, we conclude that the circuit court's decision to deny the motion without a hearing was correct. *See* ***Bentley***, 201 Wis. 2d at 309-11, 548 N.W.2d at 53-54.

New Trial in the Interest of Justice.

¶51 Lo also seeks a new trial "in the interests of justice" under WIS. STAT. § 752.35. *See* ***State v. Neuser***, 191 Wis. 2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995). Our power of discretionary reversal under § 752.35, however, "may be exercised only in direct appeals from judgments or orders…. When an appeal is taken from an unsuccessful collateral attack under sec. 974.06, Stats., against a judgment or order, that judgment or order is not before us." ***State v. Allen***, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426, 427 (Ct. App. 1990). Section 752.35 does not permit us to go behind an order denying a WIS. STAT. § 974.06 postconviction motion to reach the judgment of conviction. ***Id.***

¶52 A new trial would not be warranted under WIS. STAT. § 752.35 in any event. The real controversy here concerned whether or not Lo acted in self-defense, whether he intended to kill K.V., and whether he recklessly endangered the safety of a bystander in the park when he fired his gun five times. No grounds exist to conclude that the case was not fully tried. Nor are we persuaded that the fundamental reliability of the trial was impugned such that

justice miscarried or that there is a substantial probability that a new trial would produce a different result. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567, 579 (Ct. App. 1998).

CONCLUSION

¶53 As to each issue raised on this appeal, we reach one of three conclusions: (1) that Lo is barred from raising the issue in a postconviction motion, (2) that he has failed to allege sufficient facts in his motion to raise a question of fact or (3) that the record conclusively demonstrates that he is not entitled to relief. Accordingly, we affirm the circuit court's order denying Lo's postconviction motion. We further conclude that a new trial in the interests of justice is not warranted.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶54 DEININGER, J. (*concurring*). I concur in the result and the reasoning of the majority opinion but write separately to comment on the increasingly frequent appearance of the analytical complexities which this appeal presents.

¶55 WISCONSIN STAT. § 974.06(4) provides as follows:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

The supreme court, concluding in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), that "[w]e need finality in our litigation," ***id***. at 185, held that a defendant may not bring postconviction claims under § 974.06 if the defendant could have raised the claims in his or her previous postconviction motion, or on a prior direct appeal, unless the defendant presents "sufficient reason" for having failed to do so. ***Id***. at 181-82.

¶56 In an increasing number of appeals from the denial of motions brought under WIS. STAT. § 974.06, especially those brought by pro se inmates, we are seeing an assertion that the reason the newly raised claims of error were not raised in previous postconviction or appellate proceedings is that postconviction or

appellate counsel rendered ineffective assistance by failing to present the allegedly meritorious claims. In order to determine whether the new claims are properly before the court, the circuit court and/or this court must first evaluate the "sufficiency" of the proffered reason, which, as the majority's present analysis demonstrates, will often require a consideration of the merits of the underlying, newly asserted claim. And, even if we or the circuit court conclude that the claim has no merit, and thus that postconviction or appellate counsel's failure to raise the claim did not represent either deficient performance or prejudice to the defendant, the defendant has essentially obtained what § 974.06 and ***Escalona-Naranjo*** ostensibly deny: the consideration of the merits of the defendant's newly asserted claim, for which sufficient reason has not been shown for an earlier failure to raise it.

¶57 Further complicating the analysis is the fact that many of the newly raised claims, as in this case, involve an assertion that *trial* counsel was ineffective for failing to make some request or objection during trial or pre-trial proceedings, and that subsequent counsel were ineffective for failing to raise a claim of ineffective assistance of trial counsel. Thus, on a record which contains neither a trial court ruling on a now disputed issue, nor a ***Machner***[13] hearing on why trial counsel failed to raise the issue, we or the circuit court must ponder the following question: Is there merit to the now raised issue, such that trial counsel was deficient for not making a request or objection regarding it, thereby prejudicing the defendant, and thereby also rendering postconviction and/or appellate counsel's performance deficient and prejudicial for failing to assert trial counsel's

[13] ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

ineffectiveness, such that the defendant has presented a sufficient reason for the failure to raise the issue in earlier postconviction or appellate proceedings, which would permit him to now bring the issue before the court for a consideration of its merits?

¶58 I believe that the effort to peel through the layers of this onion-like inquiry often results in analyses that are needlessly complex, fraught with the potential for gaps or errors along the way, and, all in all, a frustrating undertaking for courts and respondent's counsel alike. I thus have some sympathy for the unenviable task which faces counsel for the State in attempting to respond to the issues presented in the posture of an appeal such as the present one. (See majority opinion, ¶18 n.5.) I also suggest that, when given the opportunity to do so, the supreme court should revisit the ***Escalona-Naranjo*** holding to consider whether, in light of the foregoing, a meaningful bar to "successive motions and appeals" continues to exist under WIS. STAT. § 974.06(4). ***Escalona-Naranjo***, 185 Wis. 2d at 185.