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

**November 6, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2010AP2861** **Cir. Ct. No. 2006CF640**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROLAND PRICE,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roland Price, *pro se*, appeals from an order denying his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06

(2009-10).[1] Some of his claims are barred for failure to offer a sufficient reason for serial litigation, others are precluded as previously litigated, and his claim of newly-discovered evidence is unsupported. We affirm.

## BACKGROUND

¶2 In 2007, a jury found Price guilty of one count of armed robbery by use of force and not guilty of two additional armed robbery charges. He appealed with the assistance of counsel, arguing that the circuit court erred by denying his motions to suppress evidence. We rejected his claims and affirmed the judgment of conviction. *See* ***State v. Price***, No. 2008AP2656-CR, unpublished slip op. (WI App Feb. 9, 2010) (***Price I***).

¶3 Price, by counsel, petitioned for supreme court review of ***Price I***, and, acting *pro se*, he petitioned this court for "interlocutory review" and for a writ of *habeas corpus*. We denied interlocutory review on the ground that the judgment at issue was final. *See* ***State ex rel. Price v. Circuit Court***, No. 2010AP730-W, unpublished slip op. at 2 (WI App July 23, 2010) (***Price II***). As to his petition for a writ of *habeas corpus*, we addressed and denied the claims that his appellate counsel was ineffective. *See* ***id.*** at 3-4. We otherwise denied his petition for a writ of *habeas corpus* on the ground that he had an alternative remedy for his remaining claims, namely, a motion for postconviction relief pursuant to WIS. STAT. § 974.06. *See* ***Price II***, No. 2010AP730-W at 5. We reminded Price, however, that to pursue his claims under § 974.06, he would first

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

be required to "substantiate and develop" them. *See* ***Price II***, No. 2010AP730-W at 5.

¶4 After the supreme court denied review of ***Price I***, Price returned to circuit court and filed the *pro se* motion for postconviction relief that underlies this appeal. The circuit court concluded that Price raised nine identifiable claims, and the circuit court rejected each one. The circuit court acknowledged that Price might also wish to raise additional claims, but it concluded that any additional claims Price hinted at in his submission were too undeveloped to address. The circuit court denied any relief, and this appeal followed.

## DISCUSSION

¶5 "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. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶6 Price suggests that he did not pursue his current claims during the direct appeal process because his postconviction counsel was ineffective by failing to raise them. Postconviction counsel's ineffectiveness may, in some circumstances, constitute a sufficient reason for serial litigation. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A defendant must do more, however, than merely assert in a conclusory fashion that postconviction counsel was ineffective. *See* ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, a convicted defendant must "make the case" of postconviction counsel's ineffectiveness. ***Id.***, ¶67.

¶7 A familiar test governs claims that counsel was constitutionally ineffective. The defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Thus, to earn the opportunity for additional postconviction litigation, Price must allege facts that, if proved, show prejudicially deficient performance by his postconviction counsel. The necessary factual allegations must appear within the four corners of his postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433 (reviewing court examines only allegations in postconviction motion and not additional allegations in defendant's briefs). Moreover, the motion must be sufficiently detailed and specific as to satisfy "the five 'w's and one 'h' test, that is, who, what, where, when, why and how." *See* ***Balliette***, 336 Wis. 2d 358, ¶59 (some punctuation deleted; citation omitted). We require a "clearly articulated justification" for serial postconviction litigation. *See* ***id.***, ¶58.

¶8 Unfortunately, Price's submissions are not clearly articulated. The circuit court observed:

> Price's [postconviction] motion is almost completely unintelligible, a mishmash of sentence fragments, non sequiturs, conclusory statements, erratic legal reasoning, indefinite references, scattered case and statutory citations and quotations untethered from any explanation of how these legal principles make a difference in []Price's case, vague suggestions about what was said at trial and in pretrial proceedings, and inscrutable punctuation. Without having to guess too much, I can decipher what appear to be nine distinct legal claims, on which I will rule in this decision.

Price's briefs on appeal similarly offer a virtually impenetrable hodgepodge of fragmented complaints, invented and garbled words, inapt references to unrelated cases, and repetitious assertions. We have carefully examined the postconviction

motion and attachments and considered the briefs and appendix that Price submitted in support of his appeal. Nothing that we can decipher in his allegations or his briefs satisfies us that he has demonstrated a sufficient reason for serial litigation.

¶9 We begin by considering Price's claim that a police officer involved in the case committed perjury. The circuit court denied Price any relief based on this claim, first observing that Price did not make clear in his postconviction motion "just what it was that [the officer] said that was false." The circuit court ultimately determined that Price referred to statements the officer made when interviewing him. The circuit court then explained that those statements "do not constitute perjury because they were not given under oath." The circuit court's analysis is correct. Statements do not constitute perjury unless they are made under oath or affirmation. *See* WIS. STAT. § 946.31. Nothing in the record suggests that any police officer made statements under oath or affirmation when interviewing Price. Accordingly, postconviction counsel was not ineffective by foregoing a claim that a police officer committed perjury while interviewing Price. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel not ineffective for failing to pursue futile arguments).

¶10 Price complains because he was not brought from jail to the courtroom for a status conference held on June 26, 2006. In his view, his inability to attend this proceeding violated his statutory right to be present for evidentiary hearings. *See* WIS. STAT. § 971.04(1)(d). Price is wrong. An evidentiary hearing is defined as "a hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented." BLACK'S LAW DICTIONARY 789 (9th ed. 2009); *see also* ***State ex rel. Epping v. City of Neillsville Common Council***, 218 Wis. 2d 516, 522, 581 N.W.2d 548 (Ct. App. 1998) (discussing the term

"evidentiary hearing" as used in § 19.85(1), governing open meetings, and stating: "an evidentiary hearing would involve the taking of testimony and the receipt of evidence"). The record reflects that at the June 26, 2006 proceeding, the circuit court set dates for future hearings. The circuit court neither heard testimony nor received evidence during the proceeding. Postconviction counsel therefore was not constitutionally ineffective by foregoing a challenge to Price's conviction based on his absence from the June 26, 2006 proceeding.[2] *See* ***Toliver***, 187 Wis. 2d at 360.

¶11 Price complains because the circuit court excused three prospective jurors from the panel. The circuit court excused two prospective jurors because they violated its order not to communicate with Price, and the circuit court excused a third prospective juror who said that his religion prevented him from participating in the trial. Price, who is African-American, asserts that the circuit court's actions excluded all African-Americans from the jury. Price does not describe any error. African-American defendants are not entitled to African-American jurors. ***State v. Gregory***, 2001 WI App 107, ¶12, 244 Wis. 2d 65, 630 N.W.2d 711. Moreover, jury selection proceedings are not unlawful merely because they have a racially disparate impact. *See* ***State v. Lamon***, 2003 WI 78, ¶34, 262 Wis. 2d 747, 664 N.W.2d 607. Rather, a litigant must prove racially discriminatory intent or purpose. ***Id.*** Here, the record reflects that the circuit court removed jurors for appropriate reasons unrelated to race. Price fails to show

[2] In his postconviction motion, Price complained that he was not brought to the courtroom on July 10, 2006, when the circuit court ruled on one of his motions to suppress evidence. Whether Price intended to complain about his absence from the courtroom on June 26, 2006, or his absence on July 10, 2006, our analysis is the same. The circuit court heard no testimony and received no evidence in his case on either date. Therefore, his absence did not violate his statutory right under WIS. STAT. § 971.04(1)(d) to attend evidentiary hearings.

how he could establish that his postconviction counsel performed deficiently by foregoing a challenge to his conviction grounded on the circuit court's actions.[3] Consequently, his complaint is insufficient to warrant further proceedings. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶59, 67.

¶12 Price alleges that his trial was unfair because the State made an improper closing argument. In his view, the State engaged in prosecutorial misconduct by drawing inferences about Price's intent from the evidence presented and by giving a personal opinion that Price committed armed robbery. The State, however, is permitted to give opinions based on the evidence and to draw '"fair and reasonable deductions and conclusions.'" *See* ***State v. Nemoir***, 62 Wis. 2d 206, 213 & n.9, 214 N.W.2d 297 (1974) (citation omitted). Moreover, a prosecutor may "state that the evidence convinces him or her and should convince the jurors." ***State v. Nielsen***, 2001 WI App 192, ¶46, 247 Wis. 2d 466, 634 N.W.2d 325. Accordingly, Price fails to show that his postconviction counsel was ineffective by foregoing a challenge to his conviction based on the State's closing argument. *See* ***Toliver***, 187 Wis. 2d at 360.

¶13 Price complains that his trial counsel was ineffective by failing to call an expert witness, Jean Barina, to testify on his behalf. According to Price, Barina would have testified at trial about "the trustworthiness of penal interest statements made by [a police officer]." The circuit court ruled during the trial,

[3] We note that Price does not demonstrate that the jurors removed for cause were African-American, although he seeks to make that showing by reference to the record. He states: "Subjectively, the Clerk strokes three potential black-males jurors. Clerk of Court stated 'I saw black men looking at black men and make nods at each others' the ADA stated I agree 'I seen same conduct' [sic]." Price misquotes the record, and the portion of the record that corresponds most closely with his restatement discloses only the gender, not the race, of the three prospective jurors that the circuit court removed for cause.

however, that Barina's proposed expert testimony was inadmissible because it "would have consisted of one witness's commentary on whether another witness is credible." The circuit court correctly held that such testimony is not admissible. "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Price therefore fails to show that his postconviction counsel performed deficiently by not challenging trial counsel's effectiveness in regard to Barina. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (claim of ineffective assistance of postconviction counsel cannot be grounded on trial counsel's failure to challenge a correct circuit court ruling).

¶14 Price complains that trial counsel did not call Price's wife as an alibi witness. The record shows, however, that Price and his trial counsel decided not to present testimony from his wife. The circuit court discussed the decision with Price, stating "strategically ... [the circuit court is] not going to read a [jury] instruction in here concerning her prior conviction; do you understand that?" Price responded, "yes sir." The circuit court then asked Price if he made his decision freely and with the advice of counsel. Price responded again, "yes sir."

¶15 A strategic decision by counsel rationally based on the facts and the law will not support a claim of ineffective assistance of trial counsel. ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Moreover, the reasonableness of trial counsel's actions and inactions may be substantially influenced by the defendant's statements and conduct. *See* ***Strickland***, 466 U.S. at 691.

¶16 Here, the record reflects that Price and his trial counsel chose not to call Price's wife as a witness in order to avoid the risk involved in disclosing her criminal history. Because the record shows that the decision was a reasonable strategic choice with which Price concurred, Price could not base a postconviction challenge on the decision. *See* ***Elm***, 201 Wis. 2d at 464; *see also* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (deliberate choice of strategy is binding on defendant). Postconviction counsel therefore was not ineffective by foregoing such a challenge.

¶17 Price complains because his trial counsel did not "sequester verdict forms" and "place them under seal." The circuit court determined that Price offered no legal basis for a claim that these omissions constituted error. On appeal, Price seeks to bolster his position with a citation to ***State v. Van Ark***, 62 Wis. 2d 155, 215 N.W.2d 41 (1974). In ***Van Ark***, the supreme court recommended that discovery material examined by the circuit court *in camera* and then masked or deleted as irrelevant should be preserved in a sealed envelope to permit appellate review. *See* ***id.*** at 163. ***Van Ark*** is wholly irrelevant to a theory that jury verdicts should be placed under seal. Thus, Price offers no legal theory under which his postconviction counsel could have challenged the actions of trial counsel in regard to the verdict forms. Accordingly, he fails to demonstrate that postconviction counsel performed deficiently by not raising the issue. *See* ***Toliver***, 187 Wis. 2d at 360.

¶18 Price claims that the police unlawfully entered and searched his home, and he contends that the evidence found there should have been suppressed as a remedy. Relatedly, he claims that while the officers were in his home they

improperly questioned his seven-year-old son until the boy produced incriminating evidence.[4] Price pursued similar claims on direct appeal, and he may not renew them here. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). In ***Price I***, we concluded that officers lawfully entered Price's home with the consent of his wife. *See* ***id.***, No. 2008AP2656-CR, ¶¶2, 20. We also upheld the circuit court's determinations that officers seized evidence in plain view after observing Price's seven-year-old son playing with that evidence. *See* ***id.***, ¶¶9-11, 25. We are satisfied that our opinion in ***Price I*** precludes Price's current efforts to raise claims that evidence in this case should have been suppressed.

¶19 Price asserts he is entitled to a new trial because he has newly-discovered evidence that unidentified informants called the police and directed officers to his home. A defendant seeking a new trial based on newly-discovered evidence must establish "'by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). If the defendant satisfies these requirements, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** (citation

[4] Price's arguments in regard to his son are difficult to interpret. Price asserts, for example: "[t]hese lengthy grueling interrogations late hours of the night he's force to endure while mother is asleep on the floor; father arrested and men color with adage are unconstitutional and foremost a equal protection violation[sic]." We believe that we have correctly construed such arguments as a complaint that police improperly questioned the child.

omitted). A convicted person may well have a sufficient reason for additional postconviction litigation upon a showing that newly-discovered evidence exists. Here, however, Price fails to explain in his postconviction motion exactly what information the unidentified callers offered to police, why the alleged new evidence is material to any issue in the case, or how the information would affect the outcome of a new trial. Accordingly, he does not demonstrate that he has newly-discovered evidence warranting further consideration in postconviction proceedings. *See* ***id.***

¶20 Price also asks us to reverse his conviction in the interest of justice. This court has the discretionary power to reverse a judgment when the real controversy was not fully tried or justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). We exercise the power, however, in only the most exceptional of cases. *See* ***id.*** at 11. Here, Price asserts that the combined effect of the errors and omissions he alleges entitle him to a new trial. We do not agree. We have rejected Price's claims as meritless. They are no stronger combined than apart, and together they earn him no relief.[5] "'Zero plus zero equals zero.'" *See* ***Allen***, 274 Wis. 2d 568, ¶35 (citation omitted).

[5] In addition to the issues that we discuss in this opinion, Price also suggests that he has grounds for relief because the criminal complaint contains a false statement, his trial counsel failed to object to the mechanics of the State's examination of certain witnesses, his trial counsel failed to call him to testify on his own behalf, and his trial counsel had a conflict of interest and did not listen to him. These claims appear to be raised for the first time on appeal. Perhaps Price attempted to raise them in his postconviction motion, but the circuit court explained that the claims it discussed were the only claims that Price identified and developed with sufficient clarity as to permit the circuit court to address the allegations "without guessing too much." Our review of Price's postconviction motion satisfies us that the circuit court addressed all of the decipherable claims that Price advanced. We therefore conclude that any other claims he may suggest in his appellate briefs were not first presented to the circuit court. We normally do not consider issues raised for the first time on appeal. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. No basis exists to make an exception in this case.

*By the Court.*—Order affirmed.

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