COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP3147 **Cir. Ct. No. 2001CF1768**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORNELL D. REYNOLDS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Cornell D. Reynolds, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2009-10)[1] motion for postconviction

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

relief. Reynolds argues that his postconviction counsel performed deficiently by not alleging trial counsel ineffectiveness on several bases and that the trial court erred for the same reasons. We reject his arguments and affirm the order.

BACKGROUND

¶2 In January 2002, a jury found Reynolds guilty of three felonies related to a carjacking: operating without consent while armed with a weapon and causing death; operating without consent while armed with a weapon and causing great bodily harm; and possessing a firearm as a felon. *See* WIS. STAT. §§ 941.29(2) and 943.23(1g), (1m) & (1r) (2001-02). *See* ***State v. Reynolds***, Nos. 2007AP719-CR and 2007AP1335-CR, unpublished slip op., ¶1 (WI App May 21, 2009). Postconviction counsel filed a postconviction motion that was denied without a hearing, but "this court reversed and remanded for a postconviction hearing, holding that Reynolds'[s] motion contained sufficient facts to warrant a hearing on his claim." *See* ***id.***, ¶3.

¶3 After both trial counsel and Reynolds testified at the hearing, the trial court denied the postconviction motion. On appeal, Reynolds argued that trial counsel provided ineffective assistance "by failing to: (1) adequately cross-examine three of the four eyewitnesses to the shootings; (2) investigate and present an alibi defense; and (3) present Reynolds'[s] only remaining viable defense, given the failure to adequately cross-examine or to pursue the alibi defense." ***Id.*** We rejected those arguments and affirmed. *See* ***id.***, ¶¶5-9.

¶4 Reynolds, acting *pro se*, subsequently filed the WIS. STAT. § 974.06 motion that is at issue in this appeal. He argued that his postconviction counsel provided ineffective assistance by not alleging trial counsel ineffectiveness with respect to jury instructions and sentencing, and he argued that the trial court erred

for related reasons. The circuit court denied the motion in a written order. This appeal follows.

LEGAL STANDARDS

¶5 The circuit court denied Reynolds's WIS. STAT. § 974.06 motion without a hearing. Whether a § 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective assistance of postconviction counsel claim is a question of law that appellate courts review *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. ***Balliette*** explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. However, 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 grant or denial of the motion is a matter of discretion entrusted to the circuit court.

Id. (citations omitted). On appeal, we consider *de novo* whether a postconviction "motion on its face alleges sufficient material facts that, if true, would entitle the defendant" to an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶6 Where, as here, a defendant alleges that his *postconviction* counsel provided constitutionally deficient representation by failing to allege that the defendant's *trial* counsel performed deficiently, the defendant must first establish that the trial counsel's representation was constitutionally deficient. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not consider both prongs "if

the defendant makes an insufficient showing on one." ***Id.*** at 697. On appeal, the circuit court's findings of fact with respect to ineffective assistance of counsel will not be disturbed unless shown to be clearly erroneous, but whether there was ineffective assistance of counsel is a question of law that this court reviews *de novo*. *See* ***Balliette***, 336 Wis. 2d 358, ¶19.

¶7 Finally, a WIS. STAT. § 974.06 motion filed after a direct appeal may be procedurally barred absent a showing of a sufficient reason why the claims were not raised in a previous motion or on direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756; ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim on direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996).

DISCUSSION

¶8 Reynolds argues that postconviction counsel performed deficiently by not alleging that trial counsel performed deficiently by failing to object to certain jury instructions and failing to object to the sentence on grounds that it exceeded the statutory maximum. He also argues that the trial court erred when it gave certain jury instructions and imposed a sentence that exceeded the statutory maximum, but he does not explain how he can directly challenge the trial court's actions in light of the ***Escalona-Naranjo*** procedural bar. Therefore, we reject without further discussion his arguments concerning alleged trial court errors and we will consider his arguments only in the context of ineffective assistance of postconviction counsel, as that can be a sufficient reason to overcome the ***Escalona-Naranjo*** procedural bar. *See* ***Rothering***, 205 Wis. 2d at 683.

¶9 We begin, however, with the State's assertion that Reynolds's motion failed to overcome the procedural bar of ***Escalona-Naranjo*** because Reynolds "provided only conclusory allegations that postconviction counsel was ineffective and, thus, failed to provide the [circuit] court with a sufficient reason for failing to raise his ineffective assistance of counsel claims in his first postconviction motion and direct appeal." The State asserts that not only were Reynolds's assertions conclusory, he offered no argument at all concerning whether the issues that he claims his postconviction counsel should have raised were clearly stronger than those postconviction counsel pursued.[2] *See* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) ("'[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'") (citation omitted); *see also* ***Balliette***, 336 Wis. 2d 358, ¶¶68-69 (motion should assert that the issues postconviction counsel "failed to raise are obvious and very strong, and that the failure to raise them cannot be explained or justified").

¶10 We agree with the State that Reynolds's motion was inadequate because it did not assert, much less demonstrate, that the issues raised in the motion were clearly stronger than those that postconviction counsel chose to pursue with a postconviction motion, ***Machner***[3] hearing, and direct appeal. For that reason, Reynolds failed to overcome ***Escalona-Naranjo***'s procedural bar and his motion was properly denied.

[2] Reynolds did not respond to this argument in his reply brief. Unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

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

¶11 Reynolds's motion also fails because the issues he raises lack merit, which was the basis upon which the circuit court denied Reynolds's motion. We will briefly address the merits of Reynolds's arguments.

I. Jury instruction concerning "threat of use of a dangerous weapon."

¶12 Reynolds argues that his trial counsel should have objected to the jury instruction, prepared by the State, which was based on the pattern jury instruction in effect at the time of trial, WIS JI—CRIMINAL 1463 (taking a vehicle by use or threat of force) (April 2001).[4] He explains that although the information, which was read to the jury, alleged that Reynolds violated WIS. STAT. § 943.23(1g) (2001-02)[5] by "use of" a dangerous weapon, the jury was instructed that the element that must be satisfied is that Reynolds "took the vehicle *by the threat of use* of a dangerous weapon." (Emphasis added.) Reynolds contends that

[4] WISCONSIN JI—CRIMINAL 1463 (April 2001) was amended in April 2003 in response to 2001 Wis. Act 109 (eff. Feb. 1, 2003), but the April 2001 version was in effect at the time of Reynolds's offense and trial.

[5] WISCONSIN STAT. § 943.23 (2001-02), as it appeared prior to 2001 Wis. Act 109 (eff. Feb. 1, 2003), provided in relevant part:

> **(1g)** Whoever, while possessing a dangerous weapon and by the use of, or the threat of the use of, force or the weapon against another, intentionally takes any vehicle without the consent of the owner is guilty of a Class B felony.
>
> **(1m)** Whoever violates sub. (1g) and causes great bodily harm to another is guilty of a Class B felony and shall be sentenced to not less than 10 years of imprisonment, unless the sentencing court otherwise provides. If the court places the person on probation or imposes a sentence less than the 10−year presumptive minimum sentence, it shall place its reasons for doing so on the record.
>
> **(1r)** Whoever violates sub. (1g) and causes the death of another is guilty of a Class A felony.

as a result, "the trial court failed to instruct on the essential element of 'use of a dangerous weapon,'" and, therefore, "the jury did not convict Reynolds beyond a reasonable doubt of the 'crime charged.'"

¶13 We are not convinced that Reynolds was prejudiced by trial counsel's failure to object to the jury instruction. While an objection from trial counsel may have led the trial court to either amend the information or instruct the jury that it must be satisfied that Reynolds "took the vehicle by use of a dangerous weapon," the jury instructions as read were legally sufficient to support a conviction for violating WIS. STAT. § 943.23(1g) (2001-02). As the State explains:

> It is apparent from the record that the jury did not convict Reynolds of a crime not charged. By its plain meaning, [WIS. STAT.] 943.23(1g) sets forth a single offense that can be committed either by using a dangerous weapon or by threatening such use….
>
> The general rule is that, where a statute sets forth a number of separate acts disjunctively, a guilty verdict will stand if the evidence is sufficient to prove any one of the acts charged. ***State v. Baldwin***, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981). Here, the statute sets forth in the disjunctive the acts of using a dangerous weapon and threatening to use a dangerous weapon.

(Bolding added.)

¶14 The jury was instructed that it should find Reynolds guilty of violating WIS. STAT. § 943.23(1g) if it found that the State proved that Reynolds threatened to use a dangerous weapon (one of four elements). The information, by referencing § 943.23(1g), put Reynolds on notice that he was being charged with using or threatening to use a dangerous weapon. As the State notes:

> [A]n [i]nformation is not required to charge a crime in the language of the statute. ***Manson v. State***, 101 Wis. 2d 413, 432, 304 N.W.2d 729 (1981) (citing ***Huebner v. State***, 33 Wis. 2d 505, 514, 147 N.W.2d 646 (1967)). When an [i]nformation contains a citation to the statutory section alleged to have been violated, that reference necessarily carries with it all of the elements of the offense charged under that section. *See* ***State v. Nye***, 100 Wis. 2d 398, 406, 302 N.W.2d 83 (Ct. App. 1981), summarily affirmed, 105 Wis. 2d 63, 312 N.W.2d 826 (1981) (citations omitted).

(Bolding added.) Further, Reynolds cannot demonstrate that his defense was hindered by the fact that the jury was instructed to determine if he violated the statute by threatening to use a dangerous weapon. As Reynolds has acknowledged, the issue at trial was identification, not whether the carjacker *threatened to use* a dangerous weapon as opposed to *used* a dangerous weapon. There was more than sufficient evidence to support the jury's finding that the element was established.

¶15 We are unconvinced that trial counsel's failure to object to the jury instruction prejudiced Reynolds. Because Reynolds has not shown that his trial counsel provided ineffective assistance, it follows that his postconviction counsel was not ineffective for failing to allege trial counsel ineffectiveness on this issue. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

II. Jury instruction concerning findings on the cause of injury and death.

¶16 As noted, the trial court instructed the jury using WIS JI—CRIMINAL 1463 (April 2001). The jury was instructed to find Reynolds guilty if four elements were established. The jury was then asked to answer an additional question with respect to each victim. With respect to the victim who died, the jury was instructed:

> Therefore, if you find the defendant guilty of the offense in Count 1, you must answer the following question:
>
> Did the defendant cause the death of Jamille Julien?
>
> Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant's taking of the vehicle was a substantial factor in producing the death of Jamille Julien.

Similarly, with respect to the victim who was injured, the jury was instructed:

> Therefore, if you find the defendant guilty of the offense in Count [2], you must answer the following question:
>
> Did the defendant cause great bodily harm to Chevis Maxwell?
>
> Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant's taking of the vehicle was a substantial factor in producing great bodily harm to Chevis Maxwell.

¶17 Reynolds argues that his trial counsel should have objected to these instructions because:

> instructing the jury that if it found the four elements of [WIS. STAT. §] 943.23(1g) [(2001-02)] it should find the defendant guilty of Counts 1 and 2 created a conclusive mandatory presumption that Reynolds was also guilty of causing death and great bodily harm of Jamille Jul[]ien and Chevis Maxwell.

¶18 We are not convinced that the instructions were erroneous. The jury instructions that were given tracked WIS JI—CRIMINAL 1463 (April 2001). In a footnote in the Comment section, the jury instruction committee explained the reasoning for this approach:

> Subsection (1m) of § 943.23 provides for a presumptive minimum sentence if a person "violates sub. (1g) and causes great bodily harm to another." Subsection (1r) provides that the offense is a Class A felony if the person

> "violates sub. (1g) and causes the death of another." These issues may be most efficiently handled by submitting the additional fact to the jury in the form of a special question as reflected in the instruction.

See WIS JI—CRIMINAL 1463 at 3 n.7 (April 2001). We agree with the State that the instruction was neither erroneous nor misleading. Therefore, trial counsel did not perform deficiently by failing to object to the instruction, and postconviction counsel did not perform deficiently by failing to allege trial counsel ineffectiveness on this issue. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶19 On appeal, Reynolds for the first time also asserts that the instruction was erroneous because it did not define the term "substantial factor." This court will not consider issues raised for the first time on appeal. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495.

III. Trial counsel's failure to object to the sentence.

¶20 Reynolds argues that his trial counsel performed deficiently by not objecting to his sentence for Counts 1 and 2 on grounds that he was sentenced in excess of the maximum. Reynolds reasons that because of errors in the jury instructions, he was not properly convicted and, therefore, the sentence was improper. Because we have rejected Reynolds's jury instruction claims, it follows that we must reject his claims that his trial counsel performed deficiently for not objecting to the sentence on those grounds and that his postconviction counsel erred by not alleging trial counsel ineffectiveness with respect to the sentence. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

By the Court.—Order affirmed.

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