COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP620 **Cir. Ct. No. 1993CF931789**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACK BOO WILLIAMS,

DEFENDANT-APPELLANT.

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. Jack Boo Williams, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2011–12) motion for a new trial based on newly

discovered evidence.[1] He argues that the circuit court erroneously: (1) denied his request to have a lawyer appointed to represent him at the evidentiary hearing; (2) failed to order that Williams's trial lawyer appear at the evidentiary hearing; and (3) exercised its discretion when it denied Williams's motion for a new trial.[2] We affirm.

BACKGROUND

¶2 In 1994, Williams was convicted of first-degree intentional homicide while armed with a dangerous weapon, as a party to the crime. In 1996, we affirmed his conviction on direct appeal. *See* ***State v. Williams***, No. 1995AP2318-CR, unpublished slip op. (WI App Aug. 27, 1996). That decision summarized the facts of the case:

> "The evidence at trial established, with little or no controversy, that there was a traffic dispute involving a car containing the defendant and a car containing Robert Mills, a dispute which began with an exchange of verbal insults and hand gestures and the display of a gun by the defendant. The cars separated, but at the urging of the defendant, the occupants of his car went looking for the victim's car for the purpose of pursuing the confrontation.

[1] All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

[2] We will address the main issues Williams raises in his extensive briefs, some of which are difficult to understand. To the extent we do not address particular subissues, we reject them because they are unpersuasive, undeveloped, inadequate, or raised for the first time on appeal or in his reply brief. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 140, 707 N.W.2d 285, 291 (we do not decide undeveloped arguments); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985) (we do not decide inadequately briefed arguments); ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) ("As a general rule, this court will not address issues for the first time on appeal."); ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502, 508 n.11 (Ct. App. 1995) (it is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief).

> At least one other occupant of the defendant's car was armed with a handgun. The victim's car was quickly found and followed. When the victim's car stopped, the defendant's car pulled up and the defendant pointed a handgun out the window and fired five shots at Mills as Mills was trying to get out of his car. The bullet which killed Mills entered the rear of his arm, passed th[r]ough his chest cavity, and came out the front of his chest.
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> ….
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> The primary issues at trial concerned self-defense, and the principal factual dispute concerned whether Robert Mills removed or displayed his weapon before he was shot. The State argued that he did not, although the defendant testified that he believed that Mills pulled out a gun. The defendant contended that his conduct was completely privileged or at least that imperfect self-defense mitigated the offense to second degree intentional homicide."

Id. at 2 (quoting factual summary from a trial court decision; bracketing supplied by court of appeals).

¶3 After his conviction was affirmed, Williams filed a number of postconviction motions, including one with the assistance of a lawyer, that led to additional trial court and appellate court proceedings. Williams's conviction was never reversed. In April 2011, he filed the WIS. STAT. § 974.06 motion that is the subject of this appeal.

¶4 Williams's motion asserted that he should be granted a new trial based on newly discovered evidence, combined with ineffective assistance by his trial lawyer. The newly discovered evidence claims included allegations about firearm, ballistics and toolmark evidence, as well as an affidavit from a man named Fontaine Baker who claimed he was a witness to the crime who saw the victim pull a gun and fire shots at Williams before Williams fired back. Baker's affidavit further stated that after Williams was arrested, Baker saw the mother of Williams's child and received Williams's mother's phone number from her.

Baker's affidavit states that he called Williams's mother and "told her [he] had seen everything." He asked her for Williams's lawyer's number, which she gave him. Baker's affidavit stated that he "called a couple times and only talked to the [lawyer's] assistant, who asked for [Baker's] number, but never called [Baker]." The affidavit explained that Baker was subsequently incarcerated, saw Williams at different institutions, and ultimately gave Williams the affidavit, which was dated December 23, 2008.

¶5 The circuit court concluded that only Baker's affidavit provided a potential basis for relief and denied Williams's other arguments.[3] As for the affidavit, the circuit court explained:

> The defendant claims that there is a reasonable probability that the testimony of Fontaine Baker would have produced a different result at his trial for first degree intentional homicide and that trial counsel was ineffective for failing to properly investigate the evidence. He claims that Baker's evidence would have impeached [the] State's witness['s] … credibility and would have established a motive for [that witness] to lie, as well as establishing a reasonable self defense claim. He further asserts that Baker's evidence came to him "after trial." The court finds this assertion vague to say the least. Although Baker's affidavit is dated December 23, 2008, it is unknown exactly when the defendant was provided this information. Baker affies that he first told the defendant of this information when he was lodged at Columbia Correctional Institution with him, which according to the Department of Corrections was sometime in 2005 or 2006 (or after [Williams] filed his last motion in the circuit court). Arguably, it qualifies as newly discovered evidence. The

[3] The Honorable Kevin E. Martens issued the orders partially denying Williams's motion and ultimately granting an evidentiary hearing concerning Baker's affidavit. The Honorable Richard J. Sankovitz conducted the hearing and denied the remainder of Williams's motion.

To avoid confusion, we will refer to the judge who conducted the trial as the trial court and to the judges who presided over Williams's 2011 postconviction motion as the circuit court.

> court will set a briefing schedule on this claim and ask for a State response.

(Record citation omitted.)

¶6 After reviewing the parties' briefs, the circuit court issued a written order for an evidentiary hearing, explaining:

> The State argues that Fontaine Baker's testimony would have been cumulative and that the defendant should have raised this issue in one of his prior motions. The evidence is purported to have been discovered after his prior motions had been decided, and therefore, he could not have raised this claim in an earlier motion. Further, the only testimony concerning the defendant's initial contact with the victim was from the defendant himself. Baker's testimony would arguably have supported the defendant's version of the incident. Under the circumstances, the court cannot find that the evidence would have been cumulative or not reasonably probable to alter the outcome.
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> The court will order an evidentiary hearing. It will be the defendant's burden to ensure that Fontaine Baker is present at the hearing…. The court declines to appoint counsel for the defendant because the issue is very narrow and Mr. Baker will merely describe what he saw, after which he may be asked questions.

(Footnote omitted.)

¶7 Williams moved the circuit court to reconsider its decision to deny his request for the appointment of a lawyer, citing WIS. STAT. § 974.06(3)(b).[4] He asserted that he has mental limitations and that the circuit court should refer his case to the public defender or appoint a private bar lawyer.[5] Williams also

[4] Williams did not ask the circuit court to consider the denial of other claims in his postconviction motion, such as his argument concerning ballistics evidence. Further, Williams has not pursued those arguments on appeal.

[5] This court recognized in its 1996 decision that Williams has had mental health issues (although there were allegations that he was malingering) and that at least one psychologist (continued)

contacted the public defender's office himself, and he subsequently received a letter from an assistant public defender indicating that she would consider appointing a lawyer only after reviewing the relevant motions and orders. Williams moved to postpone the hearing, but the Record does not indicate that the circuit court issued any written orders in response to Williams's two motions; the hearing date remained the same.

¶8 At the hearing, Williams told the circuit court that the public defender's office "said they want to give me Counsel, but they can't go over the Court ruling."[6] The circuit court told Williams that it would reconsider whether to appoint a lawyer "after we hear what Mr. Baker has to say." The circuit court added: "If I think it is appropriate for you to have an attorney, I will make sure the public defender is aware."

¶9 Williams also asked whether his trial lawyer would be present for the hearing.[7] The circuit court indicated that it did not believe Williams's trial lawyer would be called and recognized that Williams was arguing that his trial lawyer should have "figured out … something about Mr. Baker." The circuit

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diagnosed Williams with mild retardation. *See* ***State v. Williams***, No. 1995AP2318-CR, unpublished slip op. at 3 (WI App Aug. 27, 1996).

[6] This contradicts the information in the letter that Williams provided with his prior motion to postpone the hearing. In that letter, the lawyer reviewing the case stated: "I am sorry, but I am simply unable to exercise discretion properly without being able to review the motion itself…. If you are able to provide a copy of your motion, [the State's response,] and the orders … I will review your request for counsel. Otherwise, however, I am compelled to deny it."

[7] Williams referred to his "trial counsel" but named a lawyer who served as his postconviction lawyer. We infer, as did the circuit court, that Williams was asking whether his trial lawyer would be present to testify concerning Williams's ineffective assistance claims.

court said that the first step was "to figure out, does it make a difference that Mr. Baker didn't testify" at trial.

¶10 Baker testified at length in response to questions from the State and the circuit court. Williams was offered opportunities to ask questions but declined, indicating that the circuit court's questions "summed it up." After the hearing, both parties submitted written briefs to the circuit court. The circuit court issued a written decision finding that "Baker's story is just not credible" and denying Williams's motion, for reasons explained more fully below.

DISCUSSION

¶11 Williams argues that the circuit court erroneously: (1) denied his request to have a lawyer appointed to represent him at the evidentiary hearing; (2) failed to order that Williams's trial lawyer appear at the evidentiary hearing; and (3) exercised its discretion when it denied Williams's motion for a new trial. We consider each issue in turn.

I. Appointment of a lawyer.

¶12 As noted, prior to the hearing Williams sought the appointment of a lawyer pursuant to WIS. STAT. § 974.06(3)(b), which states that the circuit court shall refer a defendant to the public defender's office "[i]f it appears that counsel is necessary and if the defendant claims or appears to be indigent." This statute provides a mechanism for a circuit court to refer a defendant to the public defender for representation related to a § 974.06 motion, even though the defendant is not constitutionally entitled to a lawyer. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698, 713 (1998) ("Defendants do not have a

constitutional right to counsel when mounting collateral attacks upon their convictions, such as … § 974.06 postconviction motion[s].").

¶13 Williams argues that the circuit court should have referred him to the public defender because he is "mentally retarded" and that the circuit court "failed to address or take into account Williams['s] very limited intellectual abilities." He further asserts that the circuit court "failed to discharge [its] responsibility under [WIS. STAT. §] 974.06(3)(b), especially when it was made evident that the public defender would appoint counsel." He also argues that there is a constitutional right to a lawyer for § 974.06 proceedings.

¶14 In response, the State argues that "[t]he courts of this state have expressly held that there is no constitutional right to counsel on a motion for postconviction relief under [WIS. STAT.] § 974.06," and that appointment of a lawyer pursuant to § 974.06(3)(b) is discretionary. We agree. *See* ***Warren***, 219 Wis. 2d at 649, 579 N.W.2d at 713 (1998). At issue is whether the circuit court erroneously exercised its discretion when it denied Williams's request for a lawyer.

¶15 In its written order granting the hearing, the circuit court said that it would not appoint a lawyer for the hearing "because the issue is very narrow and Mr. Baker will merely describe what he saw, after which he may be asked questions." At the hearing (which was presided over by a different judge), the circuit court employed this same reasoning, indicating that it needed to hear from Baker before determining if a lawyer was needed to pursue the WIS. STAT. § 974.06 motion. In doing so, the circuit court implicitly found that it did not appear that a lawyer was necessary at that time. *See* § 974.06(3)(b).

¶16 The State argues that "Williams was not prejudiced by his lack of counsel," noting that "Williams followed the proceedings and even made several intelligent objections to the prosecutor's questions." The State adds: "[H]aving representation at the evidentiary hearing wouldn't have made Baker's story any more credible. Baker simply was not a believable witness…. There is nothing that an attorney could have ethically done to bolster Baker's credibility."

¶17 We agree that the circuit court did not erroneously exercise its discretion and that Williams was not prejudiced by the lack of a lawyer at the hearing. The circuit court determined that Williams did not need a lawyer to participate in the limited-scope hearing. It conducted a thorough hearing that fully fleshed out the narrow issues presented: what Baker claims he saw. Based on the evidence presented, the circuit court was able to make detailed findings and fully analyze the legal issues. We are unconvinced that the circuit court erroneously exercised its discretion when it determined that Williams did not need an appointed lawyer for the hearing and indicated that it would revisit the issue as needed.

¶18 Finally, we reject Williams's argument that "it was made evident that the public defender would appoint counsel." The letter from the public defender's office indicated that the reviewing lawyer would take a look at the motions and orders if Williams provided them; it did not indicate that the public defender was willing to provide a lawyer. Indeed, the lawyer stated that until she reviewed the filings and determined if the appointment of a lawyer was justified, she was "compelled to deny" Williams's request. As the State notes, "the [R]ecord does not indicate whether Williams attempted to provide further documentation" to the public defender, and there is nothing in the Record indicating that the public defender contacted Williams again.

II. Alleged denial of Williams's "right to have trial counsel present at his evidentiary hearing."

¶19 Williams argues that his WIS. STAT. § 974.06 motion asserted that his trial lawyer was ineffective and that he should have been able to elicit testimony from his trial lawyer about his alleged "failure to investigate" information related to Baker. We are not convinced. First, the circuit court's written order indicated that Baker would testify at the hearing and directed Williams "to ensure that Fontaine Baker is present at the hearing." The State reasons that based on that order, "it should have been clear to Williams that he had the burden of obtaining the presence of any witnesses he desired to appear at the evidentiary hearing." We agree. It was unreasonable for Williams to simply hope that his trial lawyer would appear. If Williams wanted his trial lawyer there, Williams needed to seek permission to have him testify and take steps to ensure his presence.

¶20 Second, when Williams asked the circuit court at the hearing whether his trial lawyer would be present, it was appropriate for the circuit court to indicate that it wanted to hear Baker's testimony before deciding if testimony from Williams's lawyer was relevant, especially where the written order had explicitly limited the scope of the hearing to Baker's testimony. We are unconvinced that the absence of Williams's trial lawyer entitles him to relief.

III. Denial of the postconviction motion.

¶21 Williams argues that the trial court erroneously exercised its discretion when it denied his postconviction motion. In doing so, he argues that the trial court applied the wrong legal standard and that there is a reasonable

probability of a different result at trial. He also argues that the trial court improperly advocated for the State by personally questioning the witness.

¶22 We begin with the legal standards applicable where a defendant seeks a new trial based on newly discovered evidence, which the State summarizes as follows:

> A criminal defendant who seeks a new trial on the basis of evidence not presented at the trial resulting in his conviction must prove by clear and convincing evidence that: (1) the evidence was discovered after the conviction, (2) the defendant was not negligent in failing to find the evidence sooner, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42; ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62. Since all four factors must be established to show that evidence qualifies as newly discovered, ***State v. Sarinske***, 91 Wis. 2d 14, 38, 280 N.W.2d 725 (1979), the defendant fails to meet the required burden of proof if he fails to prove any one of them. ***Sheehan v. State***, 65 Wis. 2d 757, 768, 223 N.W.2d 600 (1974).
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> But even a defendant who proves all four factors is not entitled to a new trial unless there is a reasonable probability that a jury, looking at the evidence presented at the trial, the new evidence the defendant could introduce, and other new evidence the state could introduce to rebut it, would find that the new evidence changes the factual picture so significantly that it would now have a reasonable doubt about the defendant's guilt. ***Plude***, 310 Wis. 2d 28, ¶¶32-33; ***Love***, 284 Wis. 2d 111, ¶¶43-44. *See* ***Wong v. Belmontes***, 130 S. Ct. 383, 386-89 (2009).

(Bolding added.) "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." ***Plude***, 2008 WI 58, ¶31, 310 Wis. 2d at 47, 750 N.W.2d at 52.

¶23 Applying those standards, the circuit court concluded that Williams was not entitled to a new trial based on newly discovered evidence for two

reasons. First, the circuit court found that even if Baker's information was newly discovered, Williams's motion failed because Baker's testimony was incredible and would not create a reasonable doubt about Williams's guilt. *See* ***id.***, 2008 WI 58, ¶32, 310 Wis. 2d at 48, 750 N.W.2d at 52. The circuit court explained:

> Mr. Baker's testimony is doubtful because he says he told Mr. Williams'[s] mother that he saw everything that happened, yet he says that she did nothing about it except give him the telephone number of Mr. Williams'[s] lawyer. She did not even tell her son about it, her son who was on trial facing life in prison. And she did nothing about it even after it must have been clear to her that her son's lawyer either hadn't received the information from Mr. Baker or had failed to check out what Mr. Baker says he saw.
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> ….
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> Mr. Baker's story is just not credible. A mother who is very concerned for a son who is facing life in prison for murder—whose mother wouldn't be?—receives good news about an eyewitness who will support her son's defense, and all she does is pass along the telephone number of her son's lawyer?[8] And doesn't put her foot down when the lawyer shows up for the trial without the eyewitness? And doesn't make a stink about it after he is convicted and sentenced to life in prison? *And doesn't even tell her son about the eyewitness*?

¶24 Citing ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), the circuit court noted that "[a] claim of newly discovered evidence may be rejected if the court finds the new evidence incredible and therefore that it is not reasonably probable that a different result would be reached if the new

[8] The circuit court's written decision notes that Williams told the circuit court "at the hearing that his mother, who died in 2007, was 'very concerned' at the time of his trial about his case and about him going to prison.'"

evidence was presented at a new trial," and it specifically found: "[N]o reasonable jury would find this account reasonable or credible."[9]

¶25 The circuit court said that the second reason that Williams's motion failed is that if Baker's testimony was accurate, then the evidence was not newly discovered. The circuit court explained: "I firmly believe that if Mr. Baker told Mr. Williams'[s] mother what he says he told her, and if, as he said, she was encouraged by his testimony, then [Williams's] mother would have told Mr. Williams. If so, then this evidence was not newly discovered, and it is Mr. Williams'[s] fault that the evidence was not put before the jury at trial." *See* ***Plude***, 2008 WI 58, ¶32, 310 Wis. 2d at 48, 750 N.W.2d at 52 (evidence is not newly discovered unless it "'was discovered after conviction'") (citation omitted).

¶26 We conclude that the trial court did not erroneously exercise its discretion when it denied Williams's motion. The circuit court evaluated Baker's testimony and found that it was incredible and would not lead to a different result at trial.[10] It was the circuit court's role to evaluate the testimony and Baker's

[9] In ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), the court considered whether a witness's recantation was newly discovered evidence. *See* ***id.***, 208 Wis. 2d at 473–474, 561 N.W.2d at 710–711. It concluded: "A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury." *See* ***id.***, 208 Wis. 2d at 475, 561 N.W.2d at 711. Applying that reasoning here, the circuit court recognized that its finding that Baker's testimony was incredible "'necessarily leads to the conclusion that the [new evidence] would not lead to a reasonable doubt in the minds of the jury.'" (Quoting ***McCallum***, 208 Wis. 2d at 475, 561 N.W.2d at 711) (bracketing supplied by circuit court).

[10] Williams appears to argue that the circuit court did not, in fact, find Baker's testimony incredible. He argues that the circuit court's reference to Baker's credibility being "doubtful" was not the same as "incredible." We are not persuaded. While the circuit court did refer to the testimony as doubtful in one part of its written decision, it also explicitly recognized that a claim based on newly discovered evidence "may be rejected if the court finds the new evidence incredible" and it explicitly found that "no reasonable jury would find this account reasonable or credible." In doing so, the circuit court implicitly found that Baker's testimony was incredible.

credibility, and we will not disturb the circuit court's findings.[11] *See* ***State v. Peppertree Resort Villas, Inc.,*** 2002 WI App 207, ¶19, 257 Wis. 2d 421, 435, 651 N.W.2d 345, 352 (when circuit court acts as fact finder, it is the ultimate arbiter of witness credibility); *see also* ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869, 873 (1989) ("Sorting out the conflicts and determining what actually occurred is uniquely the province of the [circuit] court, not the function of the appellate court.").

¶27 Finally, we briefly address Williams's argument that the circuit court asked too many questions and was effectively "acting like an advocate for the [S]tate." As the State points out, a circuit court has authority to ask a witness questions. *See* ***State v. Carprue***, 2004 WI 111, ¶31, 274 Wis. 2d 656, 671, 683 N.W.2d 31, 39 (circuit court "'may interrogate witnesses, whether called by the judge or by a party'") (quoting WIS. STAT. § 906.14(2)). At issue is whether the circuit court erroneously exercised its discretion when it did so here. *See* ***Carprue***, 2004 WI 111, ¶40, 274 Wis. 2d at 674, 683 N.W.2d at 40.

¶28 Williams raised this issue in his post-hearing brief, so the circuit court had an opportunity to address Williams's concern in its written opinion. It stated:

> In gathering the evidence during an evidentiary hearing such as the one in this case, the judge must balance two competing interests. Administering justice and pursuing the truth sometimes compete with maintaining the

[11] Because we affirm the circuit court's finding that a reasonable jury would not find Baker's testimony credible, we decline to address the circuit court's alternate basis to deny Williams's motion: that if Baker were to be believed, then it follows that Williams knew before trial that Baker was a potential witness, and the potential testimony was therefore not newly discovered. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

> appearance of impartiality. So, on the one hand, a judge is permitted to ask questions of witnesses….
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> On the other hand, however, the judge's questioning must not convey the impression that the judge is taking sides….
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> In determining whether the judge has crossed the line, one thing a court considers is the extent to which the court has usurped the role of one of the parties. If the court itself calls the witnesses, or if the court conducts the cross-examination of one party's witness to the exclusion of the other party, a defendant might be able to say that the court has usurped one party's role in the trial. But the [R]ecord [here] … does not demonstrate this kind of takeover. The court's questioning followed the prosecutor's and touched only on matters that the prosecutor did not cover. The court's questions pursued legitimate issues that flowed directly from the evidence, issues that a reasonable jury would have considered if the case had gone so far.

The circuit court also found that it had not acted partially against Williams. It explained: "Before hearing all the evidence, I had no reason to lean against Mr. Williams or otherwise make up my mind about his motion and nothing about the questioning suggests otherwise."

¶29 We accept the circuit court's assessment. We have reviewed the hearing transcripts and we agree that the circuit court did not erroneously exercise its discretion when it asked Baker questions. Moreover, we note that Williams never once raised a concern about the circuit court's questions. Indeed, Williams implied that the circuit court had asked questions that he would have asked himself, stating: "No questions. You summed it up."

¶30 For these reasons, we reject Williams's argument that the circuit court erroneously exercised its discretion when it questioned Baker and ultimately concluded that Williams was not entitled to a new trial.

By the Court.—Order affirmed.

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