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March 30, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2199 State of Wisconsin v. Christopher Deshawn McGinnis
(L.C. # 2015CF921)

Before Dugan, Donald and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Christopher Deshawn McGinnis, *pro se*, appeals an order that denied his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06 (2019-20).[1] In that motion, he claimed that his trial counsel was ineffective in several ways and that his postconviction counsel

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

was ineffective in turn for failing to pursue his current claims in his first postconviction motion. The circuit court determined that McGinnis's claims were procedurally barred and substantively meritless. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

A jury found McGinnis guilty in 2015 of one count of first-degree intentional homicide by use of a dangerous weapon as a party to a crime, one count of first-degree recklessly endangering safety by use of a dangerous weapon as a party to a crime, and one count of possessing a firearm while a felon. He filed an unsuccessful postconviction motion and then pursued an appeal. In those proceedings, he alleged that the circuit court erroneously admitted certain hearsay evidence over his objection and that his trial counsel was ineffective for failing to object to other hearsay testimony. We rejected his claims and affirmed his convictions. *See* ***State v. McGinnis*** (***McGinnis I***), No. 2017AP2224-CR, unpublished slip op. (WI App Mar. 5, 2019).

McGinnis next filed the postconviction motion underlying this appeal. He claimed that his trial counsel was ineffective for failing to: (1) allege a violation of his constitutional right to counsel on the ground that he did not have an attorney present when police showed a witness a photographic array that included a picture of McGinnis; (2) object at trial when the prosecutor allegedly vouched for a witness; and (3) object at trial when a witness identified him in court after failing to identify him in an out-of-court procedure. He further claimed that his postconviction counsel was ineffective for failing to raise these claims in his first postconviction motion. The circuit court denied relief, and he appeals.

Pursuant to WIS. STAT. § 974.06(4), a person who wishes to pursue a second or subsequent postconviction motion must demonstrate a sufficient reason for failing to raise or adequately address the issues in the first postconviction proceeding. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel for failing to raise claims in the original postconviction motion may in some circumstances constitute the sufficient reason required for an additional motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668.

We assess claims of ineffective assistance of postconviction counsel by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Balliette***, 2011 WI 79, ¶28, 336 Wis. 2d 358, 805 N.W.2d 334. The test requires that the convicted person show both a deficiency in counsel's performance and prejudice as a result. *See* ***Strickland***, 466 U.S. at 687. To satisfy the deficiency prong, the convicted person must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. Additionally, when—as here—the convicted person claims that postconviction counsel was ineffective for failing to raise issues, proof of the deficiency prong requires the person to allege and show that the neglected issues were "clearly stronger" than the claims postconviction counsel pursued. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. To satisfy the prejudice prong, the convicted person "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. We may consider either prong of the analysis first, and if the convicted person fails to make an adequate showing as to one prong, we need not address the other. *See* ***id.*** at 697.

Here, we examine the deficiency prong first because it is dispositive. To assess whether neglected claims were clearly stronger than those that postconviction counsel pursued, a

reviewing court must "compare the issue[s] not raised in relation to the issues that were raised." ***Lee v. Davis***, 328 F.3d 896, 900 (7th Cir. 2003). The burden is on the convicted person to satisfy the "'clearly stronger'" standard. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46, 58 (citations omitted). Our case law provides a well-settled methodology for the convicted person to apply, requiring the person to explain and discuss "sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks." *See* ***id.***, ¶58 (citation and italics omitted).

In this case, although McGinnis acknowledges that he must satisfy the "clearly stronger" standard, he fails to apply it. He merely states that his current claims are stronger than the claims raised in ***McGinnis I*** without examining the specifics of the current and prior claims and without analyzing the comparative merits of the new claims in relation to the original claims. Indeed, McGinnis does not mention the specific claims that he raised in ***McGinnis I***, much less compare them to his current allegations. Accordingly, he fails to show that his postconviction counsel performed deficiently by not raising his current claims, and he therefore necessarily fails to show that he has a sufficient reason for serial litigation. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶36.

For the sake of completeness, we observe that McGinnis could not show that his current claims are clearly stronger than those he raised in ***McGinnis I***. His current claims are patently meritless, and therefore they have no comparative strength.

McGinnis first claims that he suffered a violation of his Sixth Amendment right to counsel when police showed a witness a photographic lineup that included McGinnis. According to McGinnis, the police erred by failing to involve his attorney in the identification procedure. The law is clear, however, "that the Sixth Amendment does not grant the right to

counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender." ***United States v. Ash***, 413 U.S. 300, 321 (1973). McGinnis emphasizes that the police in this case showed the witness a photographic display that was created during an earlier live lineup, but the ***Ash*** rule is applicable to such circumstances. *See* ***McMillian v. State***, 83 Wis. 2d 239, 247-48, 265 N.W.2d 553 (1978) (holding that a defendant does not have a constitutional right to counsel when a witness views the videotape of a live lineup). Accordingly, McGinnis's Sixth Amendment claim is meritless.

McGinnis next claims that his trial counsel should have objected when the prosecutor improperly "vouched" for a witness. Improper vouching occurs when a prosecutor seeks to "usurp the role of the jury as arbiter of witness credibility." *See* ***State v. Cameron***, 2016 WI App 54, ¶¶17, 22, 370 Wis. 2d 661, 885 N.W.2d 611; *see also* ***United States v. Cornett***, 232 F.3d 570, 575 (7th Cir. 2000) ("Improper vouching occurs when a prosecutor expresses [his or] her personal opinion about the truthfulness of a witness or when [the prosecutor] implies that facts not before the jury lend a witness credibility."). Here, McGinnis alleges that the prosecutor acted improperly when, immediately prior to a sidebar conference, the prosecutor restated the testimony that a witness had just given. No error is shown. A prosecutor may comment on and discuss the evidence, and may argue from it to a conclusion. *See* ***State v. Lammers***, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463. Because the prosecutor's actions were not objectionable, McGinnis's claim that his trial counsel should have objected lacks any merit.

Finally, McGinnis claims that his trial counsel should have objected when a witness identified him in court because that witness did not identify him as the suspect when shown photographic arrays in out-of-court proceedings.[2] This argument also lacks merit.

Inconsistencies in an eyewitness's testimony are material to the weight and credibility of the testimony, not to its admissibility. *See* ***State v. Streich***, 87 Wis. 2d 209, 216-17, 274 N.W.2d 635 (1979). That rule is applicable here: "a witness's prior inability to identify a defendant goes to the credibility of the in-court identification and not to its admissibility, and thus raises a proper question of fact for the jury to determine." *See* ***United States v. Briggs***, 700 F.2d 408, 413 (7th Cir. 1983). Accordingly, trial counsel had no basis for objecting to the admission of the in-court identification. McGinnnis contends that the out-of-court identification procedure rendered the in-court identification unreliable, but that contention does not provide grounds for challenging trial counsel's effectiveness. The jury is entrusted in most instances to determine the credibility of an in-court identification. *See* ***State v. Hibl***, 2006 WI 52, ¶53, 290 Wis. 2d 595, 714 N.W.2d 194 (citation omitted) (observing that "evidence with some element of untrustworthiness is customary grist for the jury mill"). Here, trial counsel ensured that the jury had the opportunity to make a credibility determination in light of information favorable to McGinnis. As the circuit court explained, "the fact that the State's witness ... could not identify the defendant in different photo arrays was raised repeatedly by trial counsel during her cross-examination of the witness and in closing argument." *See* ***State v. Ledger***, 175 Wis. 2d 116, 131, 499 N.W.2d 198 (Ct. App. 1993) (observing that "factors causing doubts as to the accuracy of the identification can be

[2] According to McGinnis, the witness "should not have been permitted to make an identification of [him] during trial. Period[.] Solely because she was not able to identify him previously in any form or fashion."

attacked by counsel on cross-examination and closing argument and go to the weight to be given the identification by the jury"). For all of the foregoing reasons, we affirm.

IT IS ORDERED that postconviction order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals