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DISTRICT I

November 19, 2024

To:

Hon. David A. Feiss
Reserve Judge

Nicholas DeSantis
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Mark S. Rosen
Electronic Notice

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

2023AP823-CR State of Wisconsin v. Denny Mike Thongchamleunsouk
(L.C. # 2020CF2467)

Before White, C.J., Donald, P.J., and Colón, 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).

Denny Mike Thongchamleunsouk appeals a judgment of conviction entered after a jury found him guilty of three felonies. He also appeals an order, entered without a hearing, denying his motion for postconviction relief. He claims that the circuit court erred when it limited his impeachment of a State's witness by permitting the witness to acknowledge only two of five criminal convictions. He also claims that his trial counsel was ineffective for failing to object to the State's closing argument on the ground that the prosecutor vouched for the credibility of witnesses and referred to facts not in evidence. Based upon a review of the briefs and record, we

conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).[1] We summarily affirm.

The State alleged in a criminal complaint that on July 5, 2020, D.E.B. was driving a car with his two-year-old child in the back seat. He stopped at an intersection in the 2000 block of North 27th Street, and a gold vehicle drove up and stopped on D.E.B.'s passenger side. D.E.B. reported that the driver of the gold vehicle "mean mugged"[2] D.E.B., then raised a semi-automatic handgun and shot into D.E.B.'s vehicle. A bullet pierced D.E.B.'s right leg and scrotum. D.E.B. accelerated to escape the gunman and heard three or four more gun shots behind him as he fled. D.E.B. subsequently viewed a photo array and selected Thongchamleunsouk as the gunman. Circuit court records revealed that Thongchamleunsouk had a prior felony conviction. The State charged him with first-degree reckless injury and second-degree recklessly endangering safety, both by use of a dangerous weapon, and possession of a firearm while a felon. The matters proceeded to a jury trial.

Outside the presence of the jury, the parties agreed that D.E.B. had five criminal convictions but disputed whether those convictions could be used to impeach him. The circuit court determined that D.E.B. would be required to admit two convictions, representing a 2002 felony conviction for bribing a witness and a 2006 felony conviction for possessing a firearm while

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] "Mean-mugging" is a slang term for "the act of glowering at someone with an intimidating, irritated, or judgmental facial expression." *Mean-mugging*, Dictionary.com, https://dictionary.com/e/slang/mean-mugging (last visited Nov. 11, 2024).

a felon. The circuit court determined D.E.B. should not acknowledge three additional misdemeanor convictions.

D.E.B. took the stand and testified that he had two criminal convictions. He then described the events leading up to the shooting, the shooting itself, and his subsequent hospitalization to treat his wounds. He further testified that on the day after the shooting, while he was in the hospital, he viewed a photo array and identified Thongchamleunsouk as the gunman. D.E.B. also identified Thongchamleunsouk in the courtroom and said that he was the motorist who fired a gun into D.E.B.'s car.

Law enforcement officers testified that on July 5, 2020, they responded to a report of a shooting and found D.E.B. bleeding from a gunshot wound. Officers also testified about D.E.B.'s descriptions of both the alleged gunman and the car that the gunman was driving when the shooting occurred. An officer described examining surveillance video recorded by pole cameras and a business's security system and using that footage to identify a Chrysler as the car that D.E.B. described as the gunman's vehicle. The officers further explained the technology used to decipher the Chrysler's license plate number from the surveillance footage. Additional testimony detailed the steps that the police took to identify Thongchamleunsouk as the registered owner of the suspect vehicle, explained the process of assembling a photo array for D.E.B. to review, and described how D.E.B. selected Thongchamleunsouk's photograph from the array. Finally, a detective testified that Thongchamleunsouk spoke to police after receiving ***Miranda***[3] warnings and admitted

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966) (holding that before officers question a person in custody, they must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one).

owning the car and the license plate identified in the surveillance footage. The jury found Thongchamleunsouk guilty as charged.

Thongchamleunsouk filed a motion for postconviction relief, alleging that his trial counsel was ineffective for failing to object to the following portions of the assistant district attorney's closing argument:

> You know, I look at this investigation by the officers and I think they did a great job. It's completely by the book. Sometimes as an ADA, I see investigations and I say to myself, oh, I wish they would have done it a little differently. Not here. This is a clean investigation. It's open and shut. I can't think of a single thing that I would have asked them to do differently.... I think that they all did a great job here.
>
> ....
>
> The police did a great job investigating here. They used technology. They did it quickly.

Thongchamleunsouk contended that the foregoing remarks constituted improper vouching for the officers' credibility. He also contended that the prosecutor's characterization of the investigation as "by the book" improperly introduced facts not in evidence because "there had not been any evidence of any 'book.'" Thongchamleunsouk argued that his trial counsel was ineffective for failing to object on these grounds. The circuit court denied the motion without a hearing. Thongchamleunsouk appeals.

We begin with Thongchamleunsouk's challenge to the circuit court's evidentiary ruling that required D.E.B. to admit only two of his five criminal convictions. Pursuant to WIS. STAT. § 906.09(1)-(2), a criminal conviction is admissible for the purpose of attacking the credibility of a witness, but evidence of a conviction may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The factors that a circuit court may

consider when deciding whether to admit or exclude evidence of prior convictions include: "(a) The lapse of time since the conviction. (b) The rehabilitation or pardon of the person convicted. (c) The gravity of the crime. (d) The involvement of dishonesty or false statement in the crime. (e) The frequency of the convictions. (f) Any other relevant factors." Sec. 906.09(2).

Whether to admit or exclude evidence of a prior conviction for impeachment purposes rests in the circuit court's discretion. ***State v. Gary M.B.***, 2004 WI 33, ¶19, 270 Wis. 2d 62, 676 N.W.2d 475. "[A] court properly exercises its discretion when it correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion." ***Id.*** (citation omitted). If a circuit court properly exercises its discretion, we will uphold the ruling even if another judge might have exercised discretion differently. ***Id.***

Here, the circuit court ruled that for impeachment purposes, D.E.B. must admit two criminal convictions, representing his 2010 conviction for possessing a firearm while a felon and his 2002 conviction for bribing a witness. Over Thongchamleunsouk's objection, the circuit court excluded evidence of three misdemeanor convictions: a 2000 conviction for obstructing an officer; a 2002 conviction for disorderly conduct; and a 2006 conviction for obstructing or resisting an officer. The circuit court determined that the three excluded offenses were remote in time and did not bear sufficiently on D.E.B.'s honesty to outweigh the age of the convictions. Thus, the circuit court considered proper factors under WIS. STAT. § 906.09(2), did not consider any improper factors, and used a rational process to reach a reasonable conclusion. The circuit court's decision was not the one advocated by Thongchamleunsouk, but that does not demonstrate an erroneous exercise of discretion. *See* ***Gary M.B.***, 270 Wis. 2d 62, ¶19. Accordingly, his challenge fails.

Thongchamleunsouk also claims that his trial counsel was ineffective. To prove ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. Counsel does not perform deficiently by failing to pursue a meritless claim. ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16. To demonstrate prejudice, "[t]he defendant must show that 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." ***Strickland***, 466 U.S. at 694. Whether counsel's performance was deficient and whether any deficiency was prejudicial are both questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

Although a defendant alleging ineffective assistance of counsel must seek to preserve counsel's testimony in a postconviction hearing, ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), the defendant is not automatically entitled to such a hearing, ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶¶14, 23, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a defendant's motion alleges such facts is a question of law that we review *de novo*. ***Id.***, ¶9. If a defendant's postconviction motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court, in its discretion, may deny relief without a

hearing. ***Id.***, ¶¶9, 34. We review the circuit court's discretionary decision under our customary deferential standard. ***Id.***, ¶9.

Thongchamleunsouk contends here that his trial counsel was ineffective for failing to object to the State's closing argument on the ground that the prosecutor vouched for the credibility of the investigating officers. Therefore, to satisfy the deficient performance prong of the ***Strickland*** analysis, Thongchamleunsouk must show that the State's closing argument was objectionable. *See* ***Sanders***, 381 Wis. 2d 522, ¶29. We agree with the circuit court that he did not make such a showing.

Counsel is normally "allowed latitude in closing argument and it is within the [circuit] court's discretion to determine the propriety of counsel's statements and arguments to the jury." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The "prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). However, the prosecutor may not seek to "usurp the role of the jury as arbiter of witness credibility" by vouching for the credibility of witnesses. ***State v. Cameron***, 2016 WI App 54, ¶¶17, 22, 370 Wis. 2d 661, 885 N.W.2d 611.

In this case, the prosecutor did not improperly vouch for the credibility of the investigating officers. Rather, the remarks at issue reflected the prosecutor's views regarding the quality of the investigative work in this case. "Commentary on the quality of an investigation ... is a proper ground for argument because the rigor of an investigation is reflected by the evidence and therefore is a proper subject for the jury to consider." ***United States v. Patterson***, 872 F.3d 426, 437 (7th Cir. 2017); *see also* ***State v. Draize***, 88 Wis. 2d 445, 455, 276 N.W.2d 784 (1979) (holding that a

prosecutor appropriately commented in closing argument that a police officer had choices to make in deciding how to proceed and "I think made the proper decision"). Moreover, Thongchamleunsouk questioned the quality of the investigation at the outset of the trial, telling the jury in his opening statement that, according to police, the surveillance videos "show this guy's car, they show this guy's license plate and [they] go in the house and arrest him. There's a lot of problems with that.... Our position is going to be that this is completely and totally unreliable." These remarks invited a response. *See* ***State v. Moeck***, 2005 WI 57, ¶74, 280 Wis. 2d 277, 695 N.W.2d 783 (holding that the defendant's arguments can "open[] the door' to a measured response by the prosecuting attorney"). In sum, the prosecutor's closing comments about the quality of the investigation were appropriate here. No objection was warranted.

We also reject as meritless any argument that the phrase "by the book" referred to facts that were not in evidence. The phrase "by the book" is a familiar idiom, used colloquially to mean "according to the correct or established form; in the usual manner[.]" *See Book*, Dictionary.com, https://dictionary.com/browse/book (last visited Nov. 11, 2024) (defining "by the book" under the subheading "idioms and phrases"). We therefore do not agree with Thongchamleunsouk that, by using the phrase, the prosecutor evoked an actual book that was not offered as evidence in the case. Rejecting a similar claim that a metaphorical statement should be taken literally, the Seventh Circuit described a defendant's challenge to a closing argument as "frivolous" and explained: "There simply is no standard attorney lexicon that is mandated for every sentence uttered at closing argument. Instead, the proper inquiry remains what meaning did the jury glean from the prosecutor's comments." ***United States v. Manos***, 848 F.2d 1427, 1437 (7th Cir. 1988) (discussing a challenge to the prosecutor's assertion that jurors could "bet" on certain facts). In the instant case, the circuit court found that no reasonable interpretation of the prosecutor's remarks could

have led the jury to conclude that the prosecutor "was referencing an actual 'book' not in evidence." We see no basis to disturb that assessment. *See* ***Neuser***, 191 Wis. 2d at 136. Accordingly, trial counsel did not perform deficiently by forgoing an objection.

Moreover, Thongchamleunsouk does not demonstrate any prejudice from the arguments at issue. The circuit court thoroughly instructed the jury in accordance with Wisconsin's pattern jury instructions regarding the use and assessment of counsel's arguments. The circuit court told the jury: "Remarks of the lawyers are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." *See* WIS JI—CRIMINAL 157. The circuit court further instructed: "Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence[.]" *See* WIS JI—CRIMINAL 160. Additionally, the circuit court instructed: "Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict." *See* WIS JI—CRIMINAL 100.

We presume that jurors follow jury instructions. ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. In light of the clear and unequivocal instructions that the jurors received, the closing remarks at issue here, even if somehow objectionable, did not prejudice Thongchamleunsouk. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals