

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1635-CR

Cir. Ct. No. 2002CF3277

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE DOTEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Jose Dotel appeals a judgment convicting him on two counts of first-degree intentional homicide, party to a crime, and one count of armed robbery, party to a crime. He also appeals an order denying postconviction relief. He claims various errors in the proceeding leading to his conviction, and

error in the trial court's decision to deny postconviction relief without an evidentiary hearing. We affirm.

¶2 The State charged Dotel for his involvement in two murders committed during a robbery. After Dotel's arrest, he made inculpatory admissions during a police interrogation. He was questioned in Spanish and gave his answers in Spanish. Interrogating officers then prepared a written English language version of his statement, which Dotel signed.

¶3 Dotel moved to suppress the written statement, alleging that interrogating officers obtained it by coercion and without providing adequate *Miranda* warnings. At a hearing, an interrogating officer testified that Dotel was fully advised of his *Miranda* warnings, in Spanish, and waived them before any interrogation began. He also denied using any coercive tactics to obtain Dotel's statement. Police officers provided the only testimony at the hearing; Dotel did not testify. The trial court found that Dotel knowingly and voluntarily waived his *Miranda* rights, and knowingly and voluntarily provided his statement to police. At trial, the State used the written version of Dotel's admissions as evidence against him.

¶4 After the jury returned a guilty verdict, and the court entered the conviction, Dotel filed a postconviction motion alleging, among other things, ineffective assistance of trial counsel. The trial court denied the motion without a hearing, resulting in this appeal. On appeal Dotel contends that the trial court lost jurisdiction when Dotel was bound over for trial without a probable cause determination; the trial court erred in its suppression ruling; the jury heard insufficient evidence to find Dotel guilty; Dotel received ineffective assistance of

counsel; the trial court erred by denying his postconviction motion without a hearing; and a new trial in the interest of justice is warranted.

¶5 The trial court did not lose jurisdiction when the preliminary hearing concluded without a probable cause determination. When a preliminary hearing is waived, as occurred here, the defendant is bound over as a matter of course. *See* WIS. STAT. § 970.02(4) (2003-04).¹ A probable cause determination is not necessary. In any event, there is no authority for the proposition that a probable cause determination at bindover is a jurisdictional event.

¶6 Dotel's claim of error in the suppression ruling is conclusory and made without reference to facts in the record. For example, he now asserts that he did not understand what the written statement was before he signed it, and that it misrepresents what he told the officers. However, no such testimony appears in the transcript of the suppression hearing. Nor was there any testimony that officers used unlawful means to obtain his statement. Dotel chose not to testify at the hearing or offer any other witnesses, and the sole version of events was that of two officers present at the interrogation.

¶7 Dotel fails to demonstrate that the jury heard insufficient evidence to find him guilty of the charges. He contends that the evidence of guilt was insufficient because his written statement to police was the only evidence against him at trial, and he denies that the statement accurately reports the interrogation. It is simply not true that their statement was the only prosecution evidence. Several witnesses, including persons involved in the crime, testified to Dotel's

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

participation in the robbery and murders. And even if it were the only evidence, his allegation about its accuracy is conclusory and unsupported by facts in the record. Merely saying that the statement was a misrepresentation does not make it so for purposes of our review of the evidence.

¶8 To succeed on a claim of ineffective representation the defendant must show that counsel's performance was deficient, and that prejudice to the defendant resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A sufficient showing on both components is necessary. *Id.* at 697. A motion alleging ineffective assistance of counsel is subject to dismissal if it fails to allege sufficient material facts or presents conclusory allegations. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The same is true if the record conclusively demonstrates that the defendant is not entitled to relief. *See id.* The sufficiency of the motion is an issue we review *de novo*. *Id.* at 310.

¶9 Dotel's postconviction motion identified six alleged claims of ineffective representation by counsel's failure to: (1) challenge the absence of a probable cause determination; (2) allow Dotel to participate in jury selection; (3) investigate and obtain exculpatory videotapes from security cameras; (4) object to the prosecutor's leading questions for witness Maidemy Rivera; (5) request jury instructions on duress and coercion relating to Dotel's written confession, and on the lesser included offense of second-degree intentional homicide; (6) and object to the prosecutor's misrepresentation of testimony during closing argument. We address each claim, in turn.

¶10 As we have explained, counsel had no basis to challenge jurisdiction based on Dotel's bindover. Dotel waived a probable cause determination. Failure

to raise a meritless issue is not deficient performance. *See State v. Reynolds*, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (1996).

¶11 Dotel failed to present facts entitling him to a hearing on counsel's jury selection decisions. In his brief to this court, Dotel identifies by name various jurors and explains why, in his view, counsel should have challenged them, or consulted him on their acceptability. However, in his postconviction motion Dotel merely stated, without elaboration, that "friends of law enforcement officers and victims of a crime [were] allowed to remain on the jury panel." That is a conclusory allegation. It did not provide sufficient factual grounds to hold a hearing on the issue. Generally, we will not consider arguments presented for the first time on appeal. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1990) (*superceded by statute on other grounds*, WIS. STAT. § 895.32). Dotel provides no basis to deviate from this rule.

¶12 Dotel failed to present sufficient facts for a hearing on his claim of failure to investigate. His motion alleged that counsel should have obtained security videotapes from a casino in northern Wisconsin and hotels in Pennsylvania and New York to prove that he was not present in those places when witnesses placed him there with his accomplices. His motion failed to present any facts showing that the places in question had security tape systems, that tapes from the dates in question still existed, that the tapes would in fact contain any relevant evidence, or that the evidence would be exculpatory. Additionally, in his own trial testimony, Dotel admitted he was present in two of the locations with the accomplices. No hearing on the claim was therefore necessary.

¶13 Dotel's motion next alleged that every question the prosecutor asked witness Rivera was leading, and that counsel should have objected to the entire

line of questioning. In deciding the motion the court reviewed Rivera's testimony, and concluded that it would have overruled an objection to that line of questions. Dotel's motion failed to argue, let alone demonstrate, that counsel should have nevertheless objected to preserve the issue for appeal. The failure to raise a meritless objection does not constitute ineffective representation. *Reynolds*, 206 Wis. 2d at 369. Dotel presented no grounds to conclude that an objection would have been anything other than without merit.

¶14 Dotel's allegation that counsel should have requested a duress or coercion instruction did not entitle him to a hearing. The allegation was conclusory, made without any reference to facts in the record. Moreover, no facts to support the instruction appear to exist in the record. Although Dotel testified about the interrogation at trial, he did not testify to any coercion or duress. Nor did anyone else at trial. A hearing was therefore unnecessary: the motion failed to adequately state the claim and the record conclusively demonstrates that it is without merit.

¶15 Dotel also failed to adequately state grounds for a hearing on his claim that counsel should have requested a lesser-included offense instruction. Dotel's motion devoted one sentence to the issue, stating only that counsel was ineffective for failing to request the instruction, as offered by the court. The motion does not claim that Dotel requested the instruction, that counsel refused the request, or that counsel lacked any strategic reason for the decision. Therefore, the claim was inadequately developed, and did not warrant a hearing. Additionally, Dotel failed to demonstrate prejudice from the omission. There is no showing that the jury would have convicted on the lesser offense had the court given the instruction.

¶16 Dotel's motion did not warrant a hearing on his claim that the prosecutor unfairly and prejudicially distorted testimony in closing argument. The allegation is conclusory. Without specific references to the record to confirm the prosecutor's alleged misstatements, no hearing was necessary.

¶17 Finally, Dotel requests a new trial in the interest of justice because he did not receive a fair trial with competent counsel. His argument is conclusory. Nothing presented in the postconviction proceeding or on appeal shows an unfair trial with ineffective representation. We therefore deny his request.

By the Court.—Judgment and order affirmed.

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

