COURT OF APPEALS
DECISION
DATED AND FILED

April 08, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2393

Cir. Ct. Nos. 2002JV1619A
2002JV1619B

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN THE INTEREST OF MACK S.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MACK S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DAVID L. BOROWSKI and FRANCIS T. WASIELEWSKI, Judges. *Affirmed.*

¶1 KESSLER, J.[1] Mack S., with the assistance of his father,[2] appeals from dispositional orders after finding him delinquent based on misdemeanor battery in violation of WIS. STAT. § 940.19(1) (2001-02) and felony battery to an individual over the age of sixty-two, as a party to a crime, in violation of WIS. STAT. § 940.19(6)(a) and § 939.05 (2001-02), which incidents occurred when Mack S. was thirteen years old.[3] Mack S. also appeals the denial of his post-disposition motion and *pro se* motion for reconsideration. On appeal, Mack S. presents the following issues. First, that WIS. STAT. § 938.23(1m)(a)'s (2001-02 eff. May 25, 2002) requirement that no child under the age of fifteen, while held in a secure detention facility, can waive his or her right to counsel and "have the resulting self incriminating custodial statement used against him [or her] at trial," means that Mack S.'s statements should have been suppressed. Second, the trial court violated Mack S.'s Sixth and Fourteenth Amendment rights when it forced Mack S. to be represented by an attorney "he did not voluntarily accept" and who "frustrated a fair presentation of the case" to the extent that counsel's assistance was ineffective. Third, it was a breach of prosecutorial discretion to not refer the battery case to the city attorney's office for prosecution and that this decision was retaliation against Mack S. and his father for filing a federal lawsuit against the district attorney's office. Fourth, the WIS. STAT. § 940.19(6)(a) rebuttable presumption of conduct creating a substantial risk of great bodily harm for victims

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Mack S.'s father describes himself as a paralegal.

[3] Mack S.'s right to file a post-disposition motion was extended in May 2006, when it became apparent that a series of events after the delinquency finding but unrelated to this proceeding had inadvertently deprived Mack S. of his original right to file a post-disposition motion.

sixty-two years old or older is unconstitutional because it violates the Fifth and Fourth Amendments to the United States Constitution. Fifth, a *pro se* defendant has a Sixth and Fourteenth Amendment "right to all reasonable tools necessary to prepare and present his defense" and that WIS. STAT. § 757.30 "permits a pro bono paralegal to practice law."

¶2 We conclude that the trial court: (1) correctly determined that WIS. STAT. § 938.23(1m)(a) does not apply because Mack S. was not interrogated in a secure detention facility after a delinquency petition had been filed; (2) did not erroneously exercise its discretion in denying trial counsel's request to withdraw; (3) correctly determined that Mack S.'s counsel did not provide ineffective assistance; and (4) correctly determined that Mack S. had failed to rebut WIS. STAT. § 940.19(6)(a)'s rebuttable presumption that since his victim was over sixty-two years old, Mack S.'s battery had a substantial risk of great bodily harm. As to Mack S.'s claim that the prosecution abused its discretion in charging him with misdemeanor battery, this issue was not raised in the trial court, and the record does not establish abuse of prosecutorial discretion. Finally, WIS. STAT. § 757.30 does not allow a paralegal to practice law, regardless of whether the assistance is offered for free. We affirm on all issues.

BACKGROUND

¶3 This appeal arises out of two incidents which occurred when Mack S. was thirteen years old.[4] In the first incident, Case No. 02JV001619A,

[4] Mack S. was born on September 29, 1989. Because the first incident occurred approximately one month before he turned thirteen years old and the second occurred approximately four months later, we refer to Mack S. as thirteen years old at the time of the incidents.

(battery-on-a-bus) Mack S. was charged on August 27, 2002, with misdemeanor battery for punching a fellow bus patron in the mouth. The second incident, Case No. 02JV001619B (battery-of-the-elderly) arose out of a December 26, 2002 incident in which Mack S., along with his fifteen-year-old brother and another youth, battered Willie Poston, a seventy-four-year-old man, which resulted in Mack S. being charged with battery to the elderly, a felony offense.[5]

¶4 Mack S. confessed to the August 27, 2002 incident. Mack S. stated that he punched a bus patron, Everett Hackett, in the mouth after Hackett had complained to the bus driver that Mack S., his brother and two other youths were harassing him. On April 30, 2003, the day of the court trial, Mack S. through his counsel, Attorney Robert Brabham, waived his right to a ***Miranda-Goodchild***[6] hearing, stating that he had been read his ***Miranda*** rights prior to giving the confession and wanted to testify regarding the confession during the trial.

¶5 Mack S. also confessed to participating in the December 26, 2002 incident after being arrested that same day. On January 24, 2003, a ***Miranda-Goodchild*** hearing was conducted. Both the detective who took the confession, Madrina DelaCruz, and Mack S. testified. After closing arguments, the trial court found that the version of events given by both witnesses were similar and credible, and that Mack S. had been informed of, and had knowingly and intelligently waived, his ***Miranda*** rights. The trial court noted that there is some indication that Mack S.'s parents were at the police station during the interrogation, and that

[5] Mack S. is not appealing a third offense which occurred and was charged prior to the two cases on appeal, Case No. 02JV001619.

[6] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

"[t]here is nothing in the record to indicate that he had made a request for his parents to be present." After conducting a thorough review of what occurred at the time of the interrogation, which included discussion of the lack of intimidation (Mack S.'s much larger size to that of Detective DelaCruz), the short time of the interrogation (less than two hours), and Mack S.'s previous contact with police (at least three prior incidents in which Mack S. was arrested and transported to a police station), the trial court applied the proper balancing test and determined that none of the actions taken by the police constituted coercion, and that, therefore, Mack S.'s statement was voluntary.

¶6 Mack S. was initially represented by Attorney Mark Rosen who was permitted to withdraw on February 21, 2003, when his trial schedule repeatedly interfered with the scheduled hearings in Mack S.'s cases. Attorney Brabham was appointed by the Public Defender's Office as successor counsel. At the next scheduled hearing date following appointment, Attorney Brabham moved to withdraw as counsel. In response to the trial court's inquiry as to the reasons for the motion to withdraw, Attorney Brabham stated that the attorney-client relationship was irretrievably broken. In answering the trial court's further questioning, and asserting that he in no way wanted to violate attorney-client privilege, Attorney Brabham told the court that Mack S. "will take absolutely no advice whatsoever. In my opinion the matter is crystal clear. He will not take advice and will say such things, as this morning, 'fuck you.' He hung up on me once. I can't communicate with him. He will not communicate." Following this statement, the following exchange took place:

> Mack S.: Judge, if I can address the Court. Mr. Brabham, he is not a good lawyer. He comes to visit and he tells me I ain't going to win my case because I don't have a defense. You will find me guilty. Then he call my

> father's phone and cussed him out telling my father that he doesn't give an "F" about his son.
>
> Brabham: That is a lie.

¶7 The trial court, considering these statements, and additional comments made by Mack S.'s father, determined that if Mack S. "has this problem with [Mr. Brabham], Mack S[.] will have an identical problem with the next counsel here." Concluding that changing counsel would only be needlessly "prolong[ing] the situation [without] ever getting down to the conclusion of this case," which by statute has "tight statutory time deadlines," the trial court denied Attorney Braham's request to withdraw. In so doing, the trial court did leave open the possibility that it would allow Mack S. to change counsel, noting:

> If Mack S[.] or if his father wants to retain counsel, private counsel, and they want to bring private counsel out here, I would entertain that request but I am not going to run through the roll of attorneys down here…. If [Mack S.] or his father were to interview other counsel, screen them, and found somebody they could work with and presented that attorney to the Court, I would look at it….

¶8 On March 20, 2003, a court trial on the felony battery-of-the-elderly was held. After the State rested, Attorney Brabham had Mack S. sworn in to testify. However, after he was on the stand, Mack S. told the trial court that he had changed his mind and that he was not going to testify. After conferring with Mack S., Attorney Brabham informed the court that Mack S. would not testify and that as he was the only witness, the defense rested. The State then gave its closing argument. When it was time for the defense's closing argument, Attorney Brabham informed the trial court that he now, for the first time, questioned Mack S.'s competency and requested that Mack S. be evaluated to determine whether he was competent to assist in his defense before concluding the trial.

After a lengthy discussion between counsel and the court, the trial court suspended the trial and ordered Mack S. to undergo a competency evaluation.

¶9 On April 7, 2003, a competency hearing was conducted. The report of the evaluation found Mack S. was competent. The parties agreed to the results of the evaluation. The trial court found Mack S. competent to stand trial. The trial court then inquired whether Mack S. wanted to give a closing argument and Attorney Brabham informed the trial court that Mack S. waived his right to do so. The trial court then found Mack S. delinquent based on felony battery-of-the-elderly.

¶10 On April 30, 2003, a court trial[7] was held on the August 27, 2002 battery complaint. After testimony by the victim (Hackett), the bus driver (George Lawson), the police detective (Stella Payne) and Mack S., and closing arguments by the parties, the trial court found Mack S. delinquent based on battery.

¶11 Mack S. was sentenced to one year of confinement in Ethan Allen secure juvenile detention facility for the delinquencies, and was required to make restitution and write letters of apology to the victims.

¶12 On May 8, 2006, new counsel for Mack S. filed a post-disposition motion on the battery-of-the-elderly case, alleging: (1) trial counsel was ineffective for not making a closing argument; (2) the trial court violated Mack S.'s right to counsel by determining guilt prior to closing argument; and (3) the trial court erroneously exercised its discretion when it denied Attorney

[7] All proceedings to this point in time were conducted by the Honorable Francis T. Wasielewski. The court trial on the August 27, 2002 battery charge, however, was conducted by the Honorable Joseph R. Wall.

Brabham's motion to withdraw as counsel. Mack S. subsequently withdrew the claim that the trial court had pre-determined his guilt. Counsel filed a supplemental brief requesting a new trial because of the trial court's failure to allow Attorney Brabham to withdraw from the battery-on-the-bus case.

¶13 On August 30, 2006, a hearing on the post-disposition motion was held before the Honorable David L. Borowski. Attorney Brabham testified.[8] On September 11, 2006, the trial court denied the post-disposition motion in its entirety. The post-disposition court specifically found that the trial court did not erroneously exercise its discretion when it did not allow Attorney Brabham to withdraw as counsel for Mack S. and that Attorney Brabham did not provide ineffective assistance of counsel because waiving the right to making a closing argument was not deficient performance.

¶14 On September 15, 2006, Mack S. filed a *pro se* motion for reconsideration of the September 11 decision. In addition, Mack S. raised the following additional claims: (1) it was prejudicial error for counsel to waive Mack S.'s right to a ***Miranda-Goodchild*** hearing in the battery-on-a-bus case; (2) it was prejudicial error for counsel to not object to impermissively suggestive in-court identifications of Mack S. by the victim and witness in the battery-on-a-bus case; (3) trial counsel failed to present the defense in the battery-of-the-elderly case that Mack S. did not intend to harm the elderly victim; and (4) trial counsel failed to object to the trial court's modification of WIS. STAT. § 940.19(6)(a) and

[8] Although the State's brief notes that this transcript is document no. 119 of the record, in the Second Supplemental Index to Original Papers Sent to the Court of Appeals of Wisconsin, document no. 119 is the Juvenile Court Record for 02JV001619B, which only identifies on its docket that the August 30, 2006 hearing occurred; no transcript is included in the record (nor mentioned on the index) sent to this court.

that § 940.19(6)(a) is unconstitutional. In his brief in support of his motion for reconsideration, Mack S. also added the claim that he was subjected to selective prosecution.

¶15 On September 28, 2006, Mack S. appealed the denial of his post-disposition motion to this court. On October 3, 2006, Mack S. filed a *pro se* motion to discharge post-disposition counsel. On January 4, 2007, we granted Mack S.'s motion to proceed *pro se* and remanded to the trial court for a hearing on Mack S.'s *pro se* motion for reconsideration. On January 8, 2007, Mack S. filed a motion to dismiss both complaints, arguing in an addendum to his motion for reconsideration that he was a victim of selective prosecution. On January 23, 2007, after conducting a hearing on Mack S.'s motion, the post-disposition court, the Honorable David L. Borowski, recused himself and the case was reassigned to the Honorable Mary E. Triggiano.

¶16 Mack S. failed to appear for the April 9, 2007 scheduled hearing on his motion for reconsideration. The State and Mack S.'s father appeared. The trial court adjourned the hearing to June 11, 2007, and ordered that Mack S. appear personally to pursue his motions. Mack S. again failed to appear for the June 11, 2007 hearing and the trial court denied his motion for reconsideration. Additional facts are provided below as necessary.

DISCUSSION

I. WISCONSIN STAT. § 938.23(1m)(a) is not applicable to Mack S.'s interrogation and subsequent confessions

¶17 WISCONSIN STAT. § 938.23(1m)(a) (2001-02, eff. May 25, 2002) states:

> **938.23 Right to counsel**
>
> ….
>
> **(1m)** RIGHT OF JUVENILES TO LEGAL REPRESENTATION. Juveniles subject to proceedings under this chapter shall be afforded legal representation as follows:
>
> (a) Any juvenile alleged to be delinquent under s. 938.12 or held in a secure detention facility shall be represented by counsel at all stages of the proceedings, but a juvenile 15 years of age or older may waive counsel if the court is satisfied that the waiver is knowingly and voluntarily made and the court accepts the waiver. If the waiver is accepted, the court may not place the juvenile in a secured correctional facility, a secured child caring institution or a secured group home, transfer supervision of the juvenile to the department for participation in the serious juvenile offender program or transfer jurisdiction over the juvenile to adult court.

¶18 The effect of this statute on Mack S. was raised prior to the delinquency finding. Mack S. argues here that this statutory provision requires all juveniles fifteen years old or younger being questioned by the police to be represented by counsel and that these juveniles cannot waive this requirement. The State provided no response to this argument in its brief.

¶19 We review questions of statutory interpretation *de novo*. ***State v. Stenklyft***, 2005 WI 71, ¶¶7, 11, 281 Wis. 2d 484, 697 N.W.2d 769. When we interpret a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, *except that technical or specially defined words are given their technical or special definitions*. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (emphasis added). We interpret statutory language in the context in which it is used, not in isolation, but as part of a whole, in relation to the language of surrounding or closely related statutes, and reasonably so as to avoid absurd or

unreasonable results. ***Id.***, ¶46. We also consider the purpose, scope and context of the statute as each is ascertainable from the text and structure of the statute itself. ***Id.***, ¶48.

¶20 We begin our analysis with the language of WIS. STAT. § 938.23(1m)(a) (2001-02, eff. May 25, 2002) which specifically states that for this statute to apply, the juvenile must either be alleged to be delinquent under WIS. STAT. § 938.12[9] or be held in a secure detention facility. Section 938.12(1) has been interpreted by the Wisconsin Supreme Court as requiring that for a juvenile court proceeding to be considered to have commenced, a delinquency petition must be filed. *See* ***State v. Aufderhaar***, 2005 WI 108, ¶28, 283 Wis. 2d 336, 700 N.W.2d 4 (juvenile court proceeding is commenced on the date the juvenile petition is filed) (citing ***D.W.B. v. State***, 158 Wis. 2d 398, 399, 462 N.W.2d 520 (1990)). Here, it is clear from the record that at the time Mack S. was detained and taken to the District 5 police precinct on August 27, 2002, and for the second incident, on December 27, 2002, a delinquency petition had not yet been filed regarding the respective incidents. Accordingly, Mack S. did not fall under this provision of § 938.23(1m)(a).

---

[9] WISCONSIN STAT. § 938.12 (2001-02) states:

> **938.12 Jurisdiction over juveniles alleged to be delinquent.** **(1)** The court has exclusive jurisdiction, except as provided in ss. 938.17, 938.18 and 938.183, over any juvenile 10 years of age or over who is alleged to be delinquent.
>
> **(2)** If a court proceeding has been commenced under this section before a juvenile is 17 years of age, but the juvenile becomes 17 years of age before admitting the facts of the petition at the plea hearing or if the juvenile denies the facts, before an adjudication, the court retains jurisdiction over the case.

¶21 Police precinct interrogation rooms are not facilities for which the Department of Corrections has supervision or inspection duties. Consequently, they are not "secure detention facilities" under WIS. STAT. § 938.23(1m)(a). *See* WIS. STAT. §§ 938.02(16)[10] and 301.36.[11] Accordingly, Mack S. does not fall under either provision of § 938.23(1m)(a).

¶22 We affirm the trial court's determination that Mack S. was able to waive his right to counsel after being advised of his ***Miranda*** rights, and that he properly waived these rights. After a ***Miranda-Goodchild*** hearing in the battery-of-the-elderly case, the trial court found that Mack S. knowingly, intelligently and voluntarily waived his ***Miranda*** rights. As addressed further in section II.B., *infra*, we also affirm the trial court's determination that trial counsel was not ineffective for waiving Mack S.'s right to a ***Miranda-Goodchild*** hearing in the battery-on-a-bus case because Mack S. acknowledged that he had been informed of, and waived, his ***Miranda*** rights and that he planned on testifying during trial about why he confessed to the police.

[10] WISCONSIN STAT. § 938.02(16) (2001-02) states: "**938.02 Definitions.** In this chapter: … **(16) '**Secure detention facility' means a locked facility approved by the [D]epartment [of Corrections] under s. 301.36 for the secure, temporary holding in custody of juveniles."

[11] WISCONSIN STAT. § 301.36 (2001-02), entitled "General supervision and inspection by [D]epartment [of Corrections]," states, in pertinent part: "**(1) General authority.** The department shall investigate and supervise all of the state prisons under s. 302.01, all secured correctional facilities, all secured child caring institutions, all secured group homes and all secure detention facilities and familiarize itself with all of the circumstances affecting their management and usefulness."

II. Attorney Brabham's representation of Mack S.

A. Trial court did not erroneously exercise its discretion when it denied Attorney Brabham's request to withdraw

¶23 Mack S. next argues that the trial court violated his Sixth and Fourteenth Amendment right to counsel by forcing him to accept Attorney Brabham, when Attorney Brabham did not want to defend him and with whom "he had a conflict so great that it resulted in a substantial to total lack of communication" and in ineffective assistance of counsel. Specifically, Mack S. argues that Attorney Brabham's motion to withdraw on June 6, 2003, and Attorney Brabham's testimony at the February 2, 2005 hearing on Mack S.'s claim that Attorney Brabham provided him ineffective assistance of counsel, demonstrates that Mack S. was not provided "the defense guaranteed him by the [United States] Constitution." We are not persuaded.

¶24 The State argues that the trial court appropriately balanced "the constitutional right to counsel against the societal interest in prompt and efficient administration of justice." The State notes that the trial court asked counsel and Mack S. about the difficulties being experienced, heard the concerns expressed by Mack S.'s father, and concluded that Mack S. "would have an identical problem with the next counsel and appointing someone else was not going to solve anything," but rather would only "prolong the situation and [n]ever getting down to the conclusion of this case. As you know, these cases all have tight statutory time deadlines." The successor trial court (Hon. David L. Borowski) decided, in ruling on the post-disposition motion, that the original trial court (Hon. Francis T. Wasielewski) considered the appropriate factors and, based on these factors, did not erroneously exercise its discretion when it denied the motion to withdraw.

¶25 Counsel's motion to withdraw is addressed to the sound discretion of the trial court. *See* ***State v. Scarbrough***, 55 Wis. 2d 181, 186, 197 N.W.2d 790 (1972); *see also* ***State v. Lomax***, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). We will not reverse a trial court's discretionary determination if the trial court examined all the facts, applied the proper legal standards and reached a reasonable determination. *See* ***State v. Dwyer***, 143 Wis. 2d 448, 457, 422 N.W.2d 121 (Ct. App. 1988), *aff'd*, 149 Wis. 2d 850, 440 N.W.2d 344 (1989). The request should not be granted unless "good cause is shown." ***State v. Johnson***, 50 Wis. 2d 280, 285 n.4, 184 N.W.2d 107 (1971).

> In evaluating whether a trial court's denial of a motion for substitution of counsel is an [erroneous exercise] of discretion, a reviewing court must consider a number of factors including: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.
>
> Further, the trial court should consider such factors as whether the defendant has changed lawyers before, and whether the requested withdrawal of a lawyer is for a legitimate reason rather than mere delay. The trial court must, however, make sufficient inquiry to ensure that a defendant is not cemented to a lawyer with whom full and fair communication is impossible; mere conclusions, unless adequately explained, will not fly.

State v. Jones, 2007 WI App 248, ¶13, ___ Wis. 2d ___, 742 N.W.2d 341 (citations omitted).

¶26 Neither the June 6, 2003 motion to withdraw nor the transcript of the February 2, 2005 hearing on that motion are in the record. Accordingly, we assume the transcript supports the trial court's findings. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶6 n.4, 256 Wis. 2d 848, 650 N.W.2d

75 (In the absence of a complete record, we will assume "that every fact essential to sustain the trial court's decision is supported by the record."). The trial court made the inquiries required by ***Jones***. ***Id.***, 742 N.W.2d 341, ¶13. The record provides facts upon which the trial court could reasonably determine that allowing Attorney Brabham to withdraw was not in the best interest of obtaining a timely resolution of the delinquency petitions against Mack S., that is, the nature of the complaint which Mack S. was asserting against Attorney Brabham would likely reoccur with whatever counsel was appointed to represent him. Additionally, the trial court told the parties that should Mack S. and his father find an attorney with whom they were comfortable who was willing to represent Mack S., the court would revisit the request. No such alternative willing attorney was identified.

¶27 In sustaining the original trial court's denial of a new trial based on denial of Attorney Brabham's motion to withdraw, the post-disposition trial court found that Attorney Brabham had competently represented Mack S. in several hearings and court trials after the request to withdraw was denied. The subsequent representation included not only arguments on behalf of Mack S., but seeking and obtaining a competency evaluation. The trial court had an opportunity to hear and see Attorney Brabham's testimony during the hearing on the post-disposition motion when Mack S. was represented by new counsel. We conclude that the trial court examined all the relevant facts, applied the proper legal standards, as outlined in ***Jones***, 742 N.W.2d 341, ¶13, and based on the facts, reached a reasonable conclusion. *See* ***Dwyer***, 143 Wis. 2d at 457. Accordingly, we affirm the trial court's exercise of discretion in denying Attorney Brabham's request to withdraw as counsel.

B. Counsel provided effective assistance to Mack S.

¶28 Mack S. next argues that trial counsel provided ineffective assistance in the battery-of-the-elderly case when he: (1) did not ask the questions Mack S. wanted asked about the victim's injury; (2) failed to object to the admission of Mack S.'s confession at trial;[12] and (3) waived the right to make a closing argument without Mack S.'s consent. Mack S. argues that trial counsel was ineffective in the battery-on-the-bus case when he: (1) waived, without Mack S.'s consent, Mack S.'s right to a ***Miranda-Goodchild*** hearing on the first day of the court trial; and (2) failed to adequately cross-examine witnesses on identification of the perpetrator and extent and type of injury to the victim.

¶29 In order to prove an ineffective assistance of counsel claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Performance is deficient if it falls outside the range of professionally competent representation. ***Pitsch***, 124 Wis. 2d at 636-37. We measure performance by the objective standard of what a reasonably prudent attorney

[12] In his brief, Mack S. inexplicably reargues the facts and law that were covered in the January 24, 2003 ***Miranda-Goodchild*** hearing. This hearing, and the trial court's decision that Mack S.'s confession was made voluntarily after he knowingly, intelligently and voluntarily waived his ***Miranda*** rights occurred before he was represented by Attorney Brabham.

would do in similar circumstances, *see* ***id.*** (citing ***Strickland***, 466 U.S. at 688), and we indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637. We review the attorney's performance with great deference and "the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. "Review of the performance prong may be abandoned '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice….'" ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (citing ***Strickland***, 466 U.S. at 697).

¶30 As to prejudice, the defendant must show that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶31 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

¶32 Mack S., his brother and another youth had gone to Poston's residence with the intent to rob Poston. After Mack S. asked to use the bathroom, Poston saw Mack S. coming out of Poston's bedroom, rather than from the bathroom, and told the three boys to leave. Mack S.'s brother then grabbed Poston's keys from a hook by the door and gave them to Mack S. A struggle

ensued between Poston and Mack S. During the struggle for the keys, Poston's television set was knocked over. Poston was able to retrieve the keys and swung them at Mack S. while Mack S. was punching him. Poston, the elderly victim, testified that Mack S., who was 190 to 195 pounds and almost six feet tall, hit him fifteen to twenty times with a closed fist. Poston testified that he swung his keys at Mack S. in self-defense. Mack S.'s confession was admitted into evidence in its entirety. There, Mack S. admitted that he hit Poston about twenty times with a closed fist, but claimed this was self-defense because Poston was holding on to him by his sweatshirt and was hitting him with the keys.

¶33 The trial court found that Poston was a frail, elderly man who had difficulty walking from the witness stand. The trial court determined that even if Mack S. was being hit with the keys, Poston's size and the fact that there were three boys in the elderly man's home negated any claim that punching Poston twenty times was self-defense. Because the evidence presented at trial was overwhelming, and the fact that the trial was to the court, waiver of closing argument was not prejudicial.

¶34 Because Mack S. specifically admitted in his confession that he had punched Poston in the face up to twenty times, the failure to ask additional questions to attempt to minimize the injuries was not prejudicial because the outcome would not likely have been different and our confidence in the fairness of the trial is not undermined.

III. Claim of prosecutorial misconduct not timely

¶35 Mack S. first claimed in his motion for reconsideration that it was "an abuse of prosecutorial discretion" for the district attorney to charge him with misdemeanor battery for the punch to the bus patron instead of referring it to the

city attorney to be handled as an ordinance violation, and that the felony battery-of-the-elderly charge should have been a misdemeanor (Mack S. alleges that he was charged at this higher level of offense because he is African-American and/or because he and his father had filed a lawsuit against the district attorney's office.). Mack S. does not mention that the bus complaint had been referred by law enforcement as a battery to a passenger on a bus, which is a felony under WIS. STAT. § 940.20(6), and it was the district attorney's discretionary decision that actually reduced the charge to misdemeanor battery.

¶36 A motion for reconsideration "assumes that the question has previously been considered. If a party has not ... presented arguments in the litigation, the court has not considered that party's arguments in the first instance." ***O'Neill v. Buchanan***, 186 Wis. 2d 229, 234, 519 N.W.2d 750 (Ct. App. 1994). Absent a showing of a ground for relief under WIS. STAT. § 806.07, the party has waived the opportunity to present his argument. *See* ***O'Neill***, 186 Wis. 2d at 235. Mack S. could have properly raised his allegation of abuse of prosecutorial discretion in a motion to dismiss the charges brought before the trial court of the delinquency petition. WIS. STAT. § 938.297. Because Mack S. did not give the trial court an opportunity to timely evaluate his allegations before trial, first raising it as a new claim in his motion for reconsideration, it is untimely. We will not consider this claim.

IV. Challenge to the constitutionality of WISCONSIN STAT. § 940.19(6)(a)

¶37 Mack S. challenges as unconstitutional the rebuttable presumption contained in WIS. STAT. § 940.19(6)(a) (2001-02)[13] because it conflicts with WIS.

[13] WISCONSIN STAT. § 940.19(6)(a) (2001-02), states:

(continued)

STAT. § 939.70 (2001-02).[14] Mack S. argues that this "mandatory rebuttable presumption" "relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the [S]tate proves the predicate facts." This he asserts is a violation of his rights under the Due Process Clause of the United States Constitution. This issue, too, was first raised in the motion for reconsideration, not in a pretrial motion to dismiss or in the post-disposition motion.

¶38 Here, Mack S. appears to be arguing that WIS. STAT. §940.19(6)(a) is unconstitutional on its face. Such a challenge is a challenge to the validity of the proceedings and must be raised before trial or it is waived. *See* WIS. STAT. § 938.297(2). It was not. Further, certain procedural steps are required by statute when a litigant challenges the constitutionality of a statute on its face. *See* WIS. STAT. § 806.04(11) ("If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall ... be served with a copy of the proceeding and be entitled to be heard."); ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, ¶96 nn.84-86, ___ Wis. 2d ___, 745 N.W.2d 1 ("Once legislation is enacted it becomes the affirmative duty of the Attorney General to defend its constitutionality.") (citing ***State v. City of Oak Creek***, 2000 WI 9, ¶23 n.14, 232 Wis. 2d 612, 605 N.W.2d 526). "[T]he court had no jurisdiction to decide the

---

> **(6)** Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:
>
> (a) If the person harmed is 62 years of age or older….

[14] WISCONSIN STAT. § 939.70 (2001-02), entitled, "Presumption of innocence and burden of proof," states: "No provision of chs. 939 to 951 shall be construed as changing the existing law with respect to presumption of innocence or burden of proof."

constitutionality of a state statute when the attorney general had not been given notice as required by WIS. STAT. § 806.04(11)." ***Helgeland***, 745 N.W.2d 1, ¶96 n.86 (citing ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶1 n.3, 270 Wis. 2d 1, 676 N.W.2d 426). Mack S. did not comply with those requirements. Hence, this issue is not properly before this court.

V. WISCONSIN STAT. § 757.30 does not permit a paralegal to practice law

¶39 WISCONSIN STAT. § 757.30, entitled "Penalty for practicing without license," states, in pertinent part:

> (1) *Every person, who without having first obtained a license to practice law as an attorney of a court of record* in this state, as provided by law, *practices law* within the meaning of sub. (2), or purports to be licensed to practice law as an attorney within the meaning of sub. (3), *shall be fined* not less than $50 nor more than $500 *or imprisoned* not more than one year in the county jail *or both*, and in addition may be punished as for a contempt.

(Emphasis added.)

¶40 Mack S. claims a right under the Sixth and Fourteenth Amendments to the United States Constitution to have his father, a paralegal, practice law by preparing his defense. While a defendant is allowed to represent himself or herself under the Sixth Amendment, the Sixth Amendment does not permit an unlicensed individual to represent that *pro se* defendant. *See* ***Faretta v. California***, 422 U.S. 806, 834 (1975) (the right to defend is personal); ***State v. Kasuboski***, 87 Wis. 2d 407, 421-22, 275 N.W.2d 101 (Ct. App. 1978) (Wisconsin recognizes no right to be represented by a person not licensed to practice law in Wisconsin.). Based on the above, we determine that Mack S. has no right to be represented by a paralegal regardless of whether the paralegal charges for services or performs them for free.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT RULE 809.23(1)(b)4.