COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2009AP3053-CR **Cir. Ct. No. 2002CF5523**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, TIMOTHY M. WITKOWIAK and JEAN A. DIMOTTO, Judges. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Christopher J. Anderson, *pro se*, appeals an order of the circuit court denying his motion for postconviction relief. We affirm.[1]

PROCEDURAL POSTURE

¶2 This case is before us for a second time. In 2005, a jury found Anderson guilty of possessing more than fifteen but fewer than forty grams of cocaine with the intent to deliver. Anderson, *pro se*, filed a motion for postconviction relief arguing a myriad of issues. Among the issues raised in Anderson's first postconviction motion was his contention that the circuit court erred in not ordering the disclosure of confidential police personnel and internal affairs records. The records, Anderson argued, were relevant to his complaint that the arresting officers in his case, Bodo Gajevic and Mitchell Ward, framed Anderson for cocaine possession. While Anderson's postconviction motion was pending, but fifteen months after filing the original motion, Anderson filed a "supplemental" postconviction motion, arguing additional issues. The circuit court denied Anderson's initial motion and refused to consider the merits of Anderson's supplemental motion, deeming it untimely. Anderson appealed.

¶3 We remanded the case to the circuit court to conduct an *in camera* inspection of the police files. We stated "[i]f the [circuit] court determines that the files have exculpatory or impeachment material, those parts shall be disclosed to Anderson and he may seek a new trial." *See* ***State v. Anderson***, No. 2008AP504, unpublished slip op. ¶15 (WI App May 5, 2009) ("***Anderson I***"). We did not address Anderson's other arguments.

[1] Due to judicial rotations, this case appeared before the Honorable Mel Flanagan, the Honorable Timothy M. Witkowiak and the Honorable Jean A. DiMotto.

¶4 On remand, the circuit court conducted the required examination and determined that the records did not contain exculpatory or impeachment materials. Rather, the circuit court found the relevant information in the officers' files to be completely consistent with the testimony both officers gave at Anderson's trial. Anderson now appeals the circuit court's refusal to disclose the files, along with many of the issues raised in his first appeal, but not previously addressed by us.

BACKGROUND

¶5 Anderson was arrested by City of Milwaukee Police Officers Gajevic and Ward for possessing approximately thirty-six grams of cocaine. After his arrest, Anderson and his fiancée both filed complaints with the Internal Affairs Division of the Milwaukee Police Department, alleging that the officers planted the drugs and asked Anderson to set up drug transactions. Anderson alleged that he recorded a conversation between himself and the officers from his cell phone after his arrest, in which the officers' alleged misconduct can be heard.

¶6 Anderson's case proceeded to a jury trial. However, after the jury informed the court that it could not reach a verdict, the trial court, *sua sponte*, declared a mistrial. Anderson's counsel did not file a motion to dismiss the charges after the declaration of a mistrial.

¶7 At Anderson's second jury trial, both officers testified as to the events leading to Anderson's arrest. The officers testified that, while driving through a Milwaukee neighborhood, they noticed a black Oldsmobile pull up alongside what appeared to be an old abandoned blue Oldsmobile. Ward stated that he saw Anderson exit the black car, approach the abandoned car, and pull something off of the bumper of the abandoned car. Both officers testified that they also saw Anderson bend down and place a large baggie inside the front wheel

well of the abandoned car. Ward stated that as he exited the squad car, he noticed Anderson begin to move away and put his hand in the front left pocket of his pants. When asked what he was doing, Anderson pointed to a nearby house and stated that he was waiting for a friend, "James Dixon." Ward told the jury that he knew "James Dixon" did not live in the house that Anderson pointed to because the home actually belonged to the mother of a police informant. Gajevic testified that ultimately, he went up to the wheel well of the abandoned car and recovered a bag containing cocaine.

¶8 The officers testified that after Anderson was placed in the squad car, he admitted the cocaine was his, agreed to cooperate and told the officers that he would call his supplier to arrange a drug transfer. They further testified that Gajevic wrote a statement of Anderson's confession, but Anderson refused to sign it because he wanted the officers to let him go. The officers told the jury that when it became clear that a drug deal with Anderson's supplier was not going to happen, Anderson was taken to jail.

¶9 Anderson also testified at trial. He contended that he was framed by the officers. The jury found Anderson guilty. Anderson filed a *pro se* postconviction motion, alleging: his due process rights were violated when police personnel and internal affairs records were not disclosed to him; his due process rights were violated by the possible presence of a biased juror; prosecutorial misconduct; and multiple instances of ineffective assistance of counsel. Fifteen months later, Anderson filed a supplemental postconviction motion, alleging a violation of his protection from double jeopardy and additional instances of ineffective assistance of counsel. After a ***Machner***[2] hearing, the circuit court

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

denied Anderson's first motion and refused to consider the merits of his second, stating that the second motion was untimely. As stated, we remanded to the circuit court for an *in camera* inspection of the police records, but did not reach Anderson's other arguments. Anderson now appeals the circuit court's decision after remand not to disclose the police files, as well as the denial of his postconviction motions. We affirm.

¶10 Additional facts are provided as necessary to the discussion.

DISCUSSION

¶11 On appeal, Anderson puts forth a multitude of arguments. Among them, Anderson contends that: (1) his due process rights were violated when police personnel and internal police investigation documents concerning Anderson's allegations of improper conduct by the officers and audio recordings of internal affairs interviews with them were not disclosed to him; (2) his due process right to an impartial jury was violated on the basis of a biased juror; (3) the circuit court erred in finding his supplemental postconviction motion untimely; (4) his double jeopardy rights were violated; (5) his due process rights were violated when the State made references to the "missing tape" that allegedly contained the conversation between Anderson and the officers at the time of his arrest, amounting to prosecutorial misconduct; and (6) his trial counsel was ineffective for: (a) not moving to strike the biased juror; (b) not objecting to the State's references to the "missing tape"; and (c) not filing a motion to dismiss the charges against him after his first trial resulted in a mistrial on the basis of double jeopardy. Anderson is wrong.

I. Confidential Police Records.

¶12 Anderson argues that the circuit court erroneously found that none of the records reviewed *in camera* were exculpatory or impeachment evidence, that the circuit court erred in refusing to disclose the records, and that the circuit court erroneously found that no audio recordings of the officers' internal affairs interviews exist.

¶13 On remand, the circuit court examined the personnel records of both officers, as well as internal police documents pertaining to Anderson's allegations of improper conduct by Gajevic and Ward. We instructed the circuit court to examine the files to determine whether "they contain any exculpatory or impeachment evidence relevant to this case." ***Anderson I***, No. 2008AP504, unpublished slip op. ¶1. Specifically, we directed the circuit court to look for materials which could cast doubt on the officers' trial testimony pertaining to the circumstances of Anderson's arrest. ***Id.***, ¶13. We instructed the circuit court to disclose relevant portions of the file "if [it] determines that the files have exculpatory or impeachment material." ***Id.***, ¶15.

¶14 After conducting the *in camera* review, the circuit court determined that neither the officers' personnel files, nor the internal affairs documents, contained information that was material or exculpatory. With regard to the personnel files, the circuit court determined that there was "not one scintilla of anything in there that relates in any fashion in a helpful or a non[-]helpful way to Mr. Anderson. In other words they are devoid of anything that−relates in any way to [Anderson]." With regard to the internal affairs complaint, the circuit court noted that the internal police investigation had deferred to the criminal prosecution and had not made separate findings. The circuit court pointed out that the

investigation included statements from Anderson and the officers regarding the circumstances surrounding Anderson's arrest; however, the statements in the internal affairs records were consistent with the testimony taken at trial. Specifically, the circuit court stated:

> Now what the Court of Appeals particularly wanted looked at was these records related to all the complaints that were filed by you or your fianc[ée] and that were investigated by the Police Department.
>
> ….
>
> … I've looked through these pages and what they decided to do is that because there was a case against you at which these officers were going to testify and you were going to testify, they said let this be decided in the court case, and so we are going to recommend unfounded. I don't know why they did that. To me that was kind of a poor choice of words frankly, but that meant because there's a court case pending about—that's going to involve the officers[']actions here, it's all going to be under oath, so let the jury—let the court system decide this. That's what they did.
>
> [Y]ou (Anderson) testified about what you believe … what you think the truth was about what [the officers] did.
>
> ….
>
> I looked for it as if I had your shoes on…. [I]f anything, you probably would have been frustrated to see what's here because you maintain an entirely different set of events than they do and this file—these two I.A.D. files that I've reviewed for these officers based on your—all your complaints and those of your fianc[ée] contain nothing different. They contain your version of the truth and the officers[']version of the truth and the differences are the same in this file as was in court.
>
> ….
>
> There's nothing new under the sun here. Nothing.

¶15 "When the [circuit] court conducts an *in camera* inspection, it determines whether the records contain information that is material to the defense

of the accused." ***State v. Richard A.P.***, 223 Wis. 2d 777, 785, 589 N.W.2d 674 (Ct. App. 1998) (emphasis added). Before we can review the circuit court's determination, we must also conduct an independent review of the confidential records examined by the circuit court. ***Id.*** *See also* ***State v. Solberg***, 211 Wis. 2d 372, 383, 564 N.W.2d 775 (1997) ("If the circuit court had the authority to review the privileged records, then the court of appeals also had the authority to do so."). We may find that disclosure of confidential records is necessary "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" ***Richard A.P.***, 223 Wis. 2d at 785 (citation omitted). "We review the [circuit] court's decision regarding the withholding of information from records it has reviewed *in camera* 'under the clearly erroneous standard.'" ***State v. Darcy N.K.***, 218 Wis. 2d 640, 655, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted; emphasis added). "A circuit court properly exercises its discretion in this regard if it 'applies the relevant law to the applicable facts and reaches a reasonable conclusion.'" ***Id.*** (citation omitted).

¶16 We have reviewed the confidential records contained in the record and conclude that the circuit court did not erroneously exercise its discretion. The personnel files of the two arresting officers contain nothing of relevance to Anderson's allegations of improper conduct. The internal investigation files, as the circuit court found, contain information that is completely consistent with the testimony taken by the officers at trial. Because the information in the files is consistent with trial testimony, we cannot conclude that there is a reasonable probability that disclosure of the information to Anderson would have resulted in a

different outcome. *See* ***Richard A.P.***, 223 Wis. 2d at 785. Nothing in either file contains evidence that is either material or exculpatory.

¶17 With regard to audiotapes containing recordings of the officers' internal affairs interviews, the circuit court found that the audiotapes either never actually existed, or did not exist at the time of the hearing on the *in camera* inspection. Anderson has produced no evidence inconsistent with the circuit court's findings. Rather, the records contained written summaries of the officers' interviews. We defer to the circuit court's findings of fact unless clearly erroneous. *See* ***id.*** at 786. Both the circuit court and this court have reviewed the summaries of the officers' interviews contained in the confidential records, which, as stated, are completely consistent with the officers' trial testimony. We therefore uphold the circuit court's findings that the audiotapes are not in existence and that even if they were, they would not contain information material to Anderson's defense as the interview summaries are consistent with the officers' trial testimony.

II. Impartial Jury.

¶18 Anderson contends that his Sixth Amendment right to an impartial jury was violated because of the possibility that a biased juror sat on his jury panel. Anderson argues that the State cannot prove beyond a reasonable doubt that the biased juror did not sit on his panel because the juror was simply referred to as "juror" during *voir dire*. He further contends that the record is insufficient to afford him a meaningful appeal on the issue because the record is vague as to the juror's identity and should therefore be reconstructed. He is mistaken.

¶19 "[A] criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the

United States Constitution and Art. I, § 7 of the Wisconsin Constitution, as well as principles of due process." ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). "To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." ***Id.*** The Wisconsin Supreme Court has recognized three types of bias when examining whether a potential juror is impartial: statutory, subjective, and objective. ***State v. Lindell***, 2001 WI 108, ¶¶34-38, 245 Wis. 2d 689, 629 N.W.2d 223. At issue in this appeal is whether the potential juror in Anderson's case was subjectively biased, that is, whether the potential juror's answers to questions to *voir dire* and demeanor demonstrated prejudice or partiality. *See* ***id.***, ¶36.

¶20 During *voir dire*, one potential juror admitted that he felt Anderson was guilty based just on the fact that Anderson was charged with a crime. The colloquy between Anderson's defense counsel and the juror was as follows:

> [Defense Counsel]: There anyone here who feels that just because the defendant is here and he's charged with a crime, that he's probably guilty?
>
> [Prospective Juror]: Yeah.
>
> [Defense Counsel]: And your name, sir?[3]
>
> [Prospective Juror]: That's the way I see that, yeah.
>
> [Defense Counsel]: I'm sorry?
>
> [Prospective Juror]: That's the way I would look at it in a case like this, yes.
>
> [Defense Counsel]: You understand that the law is that … the State has the burden of proof.
>
> [Prospective Juror]: Exactly. But if he doesn't even want – If he doesn't testify for himself, personally doesn't want to come forward and speak the truth themselves (sic), that's

[3] The record is unclear as to why the juror's name was neither given nor recorded.

> like it looks like, not – you know, they want nothing to do with it, you know, trying to hide.
>
> [Defense Counsel]: Okay. Even if, for example, if [the State is] unable to prove one of the elements that [it] told you about of the crime.
>
> [Prospective Juror]: It – If he doesn't testify, yes.
>
> [Defense Counsel]: Do you think he has to testify when he's – accused?
>
> [Prospective Juror]: Yep.

¶21 At the postconviction ***Machner*** hearing, Anderson's former counsel, Mark Ditter, testified that while the biased potential juror remained unidentified on the record, it was his recollection that the juror at issue never actually sat on the jury panel. Specifically, Attorney Ditter stated:

> [My] belief is that … [the] juror was too far down in the pool to ever become a potential juror.
>
> The only way that that juror ever could have made it onto the jury is if more – other jurors had been removed for cause. And my understanding is only one juror was removed for cause….
>
> So that no one ever became concerned about that potential juror because he or she never was in a position that they could have become on the jury. If that had happened, I, of course, would have raised an issue right away.

¶22 The circuit court ordered both parties to submit proposed findings of fact. In accepting the State's proposed findings, the circuit court found that the potential juror of concern to Anderson did not actually sit on the jury panel. We will uphold the circuit court's findings of fact regarding whether a potential juror was subjectively biased unless clearly erroneous. ***Lindell***, 245 Wis. 2d 689, ¶36.

¶23 Contrary to Anderson's assertion that it was the State's burden to prove that Anderson received an impartial jury, it was actually Anderson's burden

to show that the empaneled jury in his case included an objectionable juror. *See* ***State v. Traylor***, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992). In addition to the transcript from Attorney Ditter's ***Machner*** hearing, other parts of the record also support the circuit court's finding that the potential juror of concern to Anderson did not actually sit on the jury panel. The official "Juror's Selection and Peremptory Challenges" form, and Attorney Ditter's copy of the same form, reveal the peremptory challenges exercised by each party as well as the jurors removed for cause. The documents indicate that one juror was struck for cause, while each party exercised its four peremptory challenges. Consistent with Attorney Ditter's testimony, and subsequently the circuit court's findings, the jurors numbered twenty-three through thirty were not in a position to be selected for the jury panel. Consequently, we conclude not only that the record is sufficient to provide Anderson with a meaningful appeal, but also that his right to an impartial jury was not violated.

III. Supplemental Postconviction Motion.

¶24 Anderson argues that the circuit court erroneously refused to consider his supplemental postconviction motion. Specifically, Anderson contends that the circuit court's finding of his motion as untimely ignores his *pro se* status. He also contends that so long as his original postconviction motion was pending, filing a supplemental motion was not in violation of any statutes or court-created time limitations. Anderson is mistaken.

¶25 After Anderson's jury trial, Anderson, now proceeding *pro se*, filed a motion for postconviction relief, in which he made a multitude of arguments. Prior to filing his original motion, Anderson was advised by the circuit court of the consequences of filing postconviction motions *pro se* and was informed that all

potential issues for postconviction relief must be raised in an initial postconviction motion. Anderson then filed a postconviction motion pursuant to WIS. STAT. § 809.30(2)(h) (2005-06).[4] While Anderson's motion was pending, but fifteen months after it was filed, Anderson submitted a supplemental postconviction motion. The circuit court refused to consider the merits of the supplemental motion, deeming it untimely.

¶26 Whether Anderson was barred from raising additional claims in his second postconviction motion is a question of law that we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Anderson raised a multitude of additional issues in his supplemental motion, including double jeopardy and additional allegations of trial counsel ineffectiveness. As our supreme court held in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), appellants must demonstrate a sufficient reason to raise a constitutional issue that could have been but was not raised in a previous motion for postconviction review. None of the reasons raised by Anderson constitute "sufficient reasons." Anderson's *pro se* status does not exempt him from the requirement discussed in ***Escalona***. Indeed the case makes no exception for unrepresented litigants, to do so would be contrary to ***Escalona***'s policy of "finality in … litigation." *See* ***id.*** Anderson elected to proceed *pro se* after his trial and was notified by the circuit court that all potential claims for relief must be brought forth in one motion. He has not overcome the ***Escalona*** bar.

¶27 Anderson also argues that there are no time limits to filing supplemental postconviction motions, and because his original motion was still

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

pending before the circuit court when his supplemental motion was filed, the court should have considered the merits. As discussed, Anderson raised entirely new issues in his supplemental motion. Allowing appellants to raise new issues after filing an initial postconviction motion simply by labeling the new motion "supplemental" would also run contrary to ***Escalona***'s principle of finality. *See* ***id.*** We decline to carve such an unprecedented all-encompassing exception from the clear policy of ***Escalona***.

IV. Double Jeopardy.

¶28 Anderson also contends that his protection from double jeopardy was violated when he was retried after his first trial ended in a *sua sponte* declaration of a mistrial. Anderson's double jeopardy argument is waived, however, as he did not move to dismiss the charges against him after the first trial resulted in a mistrial. *See* ***State v. Mink***, 146 Wis. 2d 1, 10, 429 N.W.2d 99 (Ct. App. 1988) (if the State moves to retry defendant after a mistrial, "the defendant must move for dismissal on double jeopardy grounds to avoid waiver"). Anderson also raises his double jeopardy argument under the umbrella of ineffective assistance of trial counsel; however, Anderson raised this issue for the first time in the supplemental motion we upheld as untimely. We will therefore not address this argument further.

V. Prosecutorial Misconduct.

¶29 Anderson contends that his due process rights were violated because the prosecutor made references to a "missing tape" in an attempt to attack his credibility, amounting to prosecutorial misconduct.[5] Because Anderson did not

[5] The "missing tape" refers to the recording of the cell phone conversation, as discussed, *supra*.

object to the prosecutor's references at trial, his argument is waived. *See* ***State v. Damon***, 140 Wis. 2d 297, 300, 409 N.W.2d 444 (Ct. App. 1987) (Failure to timely object waives an error, including a claimed error based on an alleged violation of a constitutional right.). However, Anderson also contends that his trial counsel was ineffective for failing to object to the prosecutor's references. We address this issue below.

VI. Ineffective Assistance of Counsel.

¶30 Finally, Anderson raises numerous allegations of trial counsel ineffectiveness. Specifically, Anderson contends that his trial counsel was ineffective for: (a) not moving to strike the biased juror; (b) not objecting to the State's references to the "missing tape"; and (c) not filing a motion to dismiss Anderson's second trial on the basis of double jeopardy. We disagree.

¶31 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his or her attorney that fall "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697.

¶32 An attorney is not ineffective for failing to make meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 359-60, 523 N.W.2d 113 (Ct. App. 1994). Anderson's allegations pertaining to trial counsel's failure to strike a

biased potential juror, as well as his arguments pertaining to double jeopardy, have been found meritless in this opinion. We therefore conclude that his trial counsel was not ineffective with regard to these issues.

¶33 With regard to Anderson's argument that his trial counsel was ineffective for failing to object to the prosecutor's references to the "missing tape," we conclude that if counsel's performance was deficient, Anderson has not demonstrated prejudice as a result. At trial, Anderson testified that at the time of his arrest, he recorded a conversation between the arresting officers and himself on his cell phone. This recording, Anderson stated, proved his allegations that the officers planted drugs on the abandoned car and framed him. When asked by the prosecutor whether he had the recording, Anderson responded in the negative. Anderson argues that because copies of the recording were delivered to the District Attorney's office, the prosecutor's references to the recording as either missing or nonexistent, amounts to prosecutorial misconduct. His trial counsel, he contends, was ineffective for not challenging the misconduct.

¶34 It is undisputed that two copies of the recording were delivered to the District Attorney's office. The State contends that because the prosecutor who tried Anderson's case was not the original prosecutor on the case—and not the prosecutor who received the recording—it is likely that the prosecutor was not aware that the recording existed. This is supported, the State argues, by the fact that Anderson's trial counsel in his first trial did not mention the recording, and Anderson's trial counsel in his second trial, Attorney Ditter, never had a copy of the recording. The circuit court found that any references to the missing recording amounted to harmless error on the State's part because no evidence in the record suggests that the jury's findings were influenced by the State's references to the

recording, particularly when Anderson admitted to not having the recording himself.

¶35 We agree with the circuit court that there is no evidence that the jury was influenced by the prosecutor's references. We therefore conclude that Anderson was not prejudiced by his trial counsel's failure to object to the prosecutor's references to the audio recording.

¶36 The record contains overwhelming evidence suggesting that the jury would have still found Anderson guilty beyond a reasonable doubt without references to the recording. Most notably, the testimony of Janarro Bradley, a witness to Anderson's arrest, corroborated the testimony of both officers. Bradley testified that in the minutes leading up to Anderson's arrest, he was looking out of the bedroom window of his mother's house and could see the blue abandoned Oldsmobile. Bradley stated that the vehicle belonged to his brother, Demetri. Bradley testified that he noticed a black Oldsmobile pull up near the abandoned car and then observed someone get out of the black Oldsmobile. This person, Bradley stated, then approached the abandoned car, took "something off of the front" of the car, and then "kneeled down and was reaching over by the tire, the wheel well" when the officers' police car approached. Bradley identified Anderson as the person exiting the black car and removing "something" from the abandoned car. Bradley further testified that he noticed one of the officers get out of the police car and grab Anderson, while the other removed "a bundle of something" from the abandoned car. Bradley further stated that he was familiar with Gajevic, as Demetri was a confidential informant who had previously worked with Gajevic.

¶37 Bradley's testimony corroborated the officers' version of the events leading to Anderson's arrest. Bradley's testimony also corroborated the officers' knowledge that "James Dixon" did not live in the house Anderson pointed to—Demetri and Bradley did.

¶38 In addition to Bradley's testimony, other items in the record point to the conclusion that the jury still would have found Anderson guilty beyond a reasonable doubt absent references to the recording. Namely, a written summary of a confession given by Anderson to both officers after his arrest. Although the statement summary was not signed by Anderson, it was admitted into evidence and Ward testified that Anderson acknowledged the summary was accurate.

¶39 We therefore cannot conclude that but for trial counsel's failure to object to the prosecutor's references to the audio recording, the result of Anderson's trial would have been different. An overwhelming amount of evidence supports the jury's verdict. Anderson's counsel was therefore not ineffective.

¶40 For all the foregoing reasons, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.