

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2014

Diane M. Fremgen
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. 2013AP1744-CR

Cir. Ct. No. 2007CF2248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH HAMMER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph Hammer, *pro se*, appeals from an order denying his motion for sentence modification. We affirm.

BACKGROUND

¶2 In May 2007, Hammer was charged two with counts of attempted first-degree intentional homicide while armed. The criminal complaint alleged that Hammer had an argument with his neighbors, left the area, and then returned with a gun. The two neighbors told police that they were in front of their house and ran to the house when Hammer started shooting. The victims said Hammer fired between four and six shots at them.

¶3 A jury convicted Hammer, but the trial court ordered a new trial based on a discovery violation by the State.¹ We affirmed the trial court's order. *See State v. Hammer*, No. 2010AP3019-CR, unpublished slip op. (WI App Nov. 22, 2011).

¶4 After the case was remanded, Hammer and the State entered a plea agreement, pursuant to which Hammer entered guilty pleas to the reduced charges of two counts of first-degree recklessly endangering safety by use of a dangerous weapon, contrary to WIS. STAT. §§ 941.30(1) and 939.63(1)(b) (2007-08).² The State agreed to recommend “substantial prison time” and the defense was free to argue.

¹ The Honorable William Sosnay presided over the jury trial, admitted the challenged evidence, and entered the judgment of conviction. The Honorable Glenn H. Yamahiro entered the order granting Hammer's postconviction motion for a new trial. The Honorable Dennis R. Cimpl accepted Hammer's pleas and sentenced him. The Honorable Michael D. Guolee denied the sentence modification motion that is at issue in this appeal.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶5 The trial court accepted Hammer’s pleas and found him guilty. He was sentenced to seven years of initial confinement and five years of extended supervision on each count, to be served consecutively. He was also given 1734 days of sentence credit.

¶6 Hammer filed a notice of intent to pursue postconviction relief. According to a December 13, 2012 letter from the State Public Defender that was filed with the trial court, Hammer was denied representation from the State Public Defender because he had not established that he was financially eligible for an appointed lawyer. Hammer did not appeal his convictions on his own or with retained counsel.

¶7 On June 28, 2013, Hammer filed the motion for sentence modification that is at issue in this appeal. The motion identified numerous issues, including allegations that: his sentence was unduly harsh; he should have been released on bail prior to sentencing; his trial attorneys colluded with the State; the trial court relied on inconclusive evidence at sentencing concerning the bullet trajectories and whether there were children near the shooting; and his trial attorneys should have raised a question concerning Hammer’s mental health. The motion also explicitly stated that Hammer was not “directly [c]hallenging his conviction[s]” and wanted instead to have his two consecutive sentences modified to run concurrent with one another.

¶8 The trial court denied the motion in a written order, finding that Hammer’s challenge to the severity of his sentence was untimely and that Hammer had not established a “new factor” that would entitle him to sentence modification. The trial court said that even if it considered Hammer’s claims under WIS. STAT. § 974.06, he was not entitled to relief. This appeal follows.

DISCUSSION

¶9 Hammer continues to seek sentence modification. He again states that he is not “directly challenging his conviction at this point.” (Capitalization omitted.)

¶10 At the outset, we note that Hammer’s appellate brief looks significantly different than the motion he filed in the trial court, and he makes numerous arguments that were not presented to the trial court. For instance, Hammer’s appellate brief contains a lengthy analysis of the “Criminal Justice Standards on Mental Health,” which were not even mentioned in his motion. This court will not consider arguments made for the first time on appeal. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

¶11 We also note that Hammer included in his appendix affidavits from two of his sisters and his niece that were not part of his original motion. By order dated October 4, 2013, this court denied Hammer’s motion to supplement the appellate record with those affidavits. We will not consider documents that are outside the appellate record. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

¶12 In addition, we observe that Hammer has not briefed several of the issues that he raised in his motion for sentence modification; those are deemed abandoned. *See Reiman Assoc., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (Issues that are not briefed on appeal are deemed abandoned.).

¶13 Finally, both the motion and Hammer’s appellate brief are difficult to understand. To the extent we do not address a particular argument, it is denied

because it is it is undeveloped or inadequately briefed. *See League of Women Voters v. Madison Cmty. Found.*, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we do not decide undeveloped arguments); *Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments).

¶14 With those standards in mind, we turn to Hammer's arguments, which can be broken down into two main arguments: (1) he was sentenced based on inaccurate information; and (2) his trial attorneys provided ineffective assistance by not having his mental health evaluated.

¶15 We begin with Hammer's allegation that the trial court relied on inaccurate information at sentencing. Hammer states: "The court abused [its] discre[tion] when it assumed much and many circumstances of this case." (Capitalization omitted.) Hammer's appellate brief does not adequately explain what assumptions he is challenging, and we could choose to affirm solely on that basis. *See id.* Even if we assume that Hammer is referring to allegations he made in his motion for sentence modification concerning the State's statements at sentencing, we affirm because Hammer has not shown that the trial court relied on the challenged information.

¶16 Specifically, in its sentencing argument, the State provided its view of the bullet trajectory evidence and suggested that Hammer shot toward the two victims. The State also asserted that there were children near the shooting. Hammer's motion for sentence modification disputed the State's assertions. In its written order denying Hammer's motion, the trial court found that the sentencing judge had not relied on those facts at sentencing. Based on our review of the sentencing transcript, we agree.

¶17 First, with respect to the bullet trajectory issue, trial counsel argued that the State’s theory of where Hammer was standing and where the bullets were fired was “only one plausible scenario amongst many.” When it pronounced sentence, the trial court said that where Hammer was standing, how close the bullets came to the victims, and whether the bullets went to a particular side of a pillar “makes no difference” because “[t]he fact is he fired every bullet in the gun” and the bullets came “close to that porch where there were two people.” Next, with respect to the State’s allegation that there were children near the shooting, the trial court acknowledged that it did not know exactly where the children were playing, and later noted that “there may or may not have been little children playing” near where the shots were fired. These statements indicate, contrary to Hammer’s allegations, that when the trial court imposed sentence, it did not rely on the disputed facts concerning the bullet trajectories or the location of any children. Hammer is not entitled to relief.

¶18 The second set of issues Hammer raises concerns his mental health. He asserts that he suffers from several mental illnesses and, for the first time on appeal, he provides a detailed description of his alleged symptoms. Hammer argues that his trial attorneys provided ineffective assistance by not investigating his mental health. In a related argument, Hammer contends that his attorneys colluded with the State.

¶19 In response, the State argues that Hammer “makes no showing that he actually suffers from any mental conditions other than those already known at

sentencing,”³ and, therefore, Hammer has not shown “that counsel’s failure to request such an exam was prejudicial.” See *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (deficient performance and prejudice must be shown to establish ineffective assistance of counsel, and the court need not address both prongs when one is not established). This argument is consistent with the trial court’s conclusion that Hammer had not shown a “factual basis for the claim and nothing from an expert to substantiate why [Hammer’s attorneys] were ineffective.”

¶20 We agree with the State and the trial court that Hammer has not shown that he suffers from a mental illness or that there is additional information about his mental condition that should have been presented at sentencing. He has simply alleged that he suffers from numerous mental illnesses; he has not provided any documentation to support those allegations.

¶21 Finally, Hammer baldly asserts that his trial attorneys “entered into collusion with the State.” The trial court found that Hammer’s “conclusory allegations about [his attorneys] ... are completed unsubstantiated and without any basis in fact.” We agree that Hammer’s brief assertions in his motion, which lacked any detailed allegations or explanation, did not provide a basis for relief. Even on appeal, Hammer simply asserts that there was collusion and does not develop an argument on that issue. He has not shown that he is entitled to relief.

¶22 For the foregoing reasons, we affirm the trial court’s order denying Hammer’s motion for sentence modification.

³ The State notes that at sentencing, the trial court “fully considered that Hammer: (1) suffered from alcohol dependency, and was, by all accounts, drunk at the time of the offenses; (2) had a difficult childhood, which included the loss of both his father and mother by age 14; and (3) had a learning disability.”

By the Court.—Order affirmed.

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

