COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2021-CR **Cir. Ct. No. 2011CF5885**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMAR M. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Lamar Robinson appeals an order of the circuit court denying his motion for postconviction relief without an evidentiary hearing. Robinson contends that he is entitled to a new trial on the basis of newly discovered evidence and his trial counsel's ineffectiveness. Robinson also

contends that this court should exercise its discretion under WIS. STAT. § 752.35 (2015-16)[1] and order a new trial in the interest of justice. We reject Robinson's arguments and affirm.

BACKGROUND

¶2 Robinson was charged with four counts of armed robbery, four counts of false imprisonment, and one count of burglary, all as party to a crime. The complaint alleged that on December 4, 2011, at approximately 3:00 a.m., three masked men entered the residence of S.S. One of the men pointed a gun at S.S. and demanded money, while one of the men stayed by the front door. The complaint alleged that one of the men took a jacket from her bedroom and then the men left.

¶3 Robinson pled not guilty, and the case was tried before a jury over a period of four days. Robinson's defense was that he was not present during the robbery. Central to the present appeal is the testimony of Duron Means, who agreed to testify truthfully as part of a cooperation agreement with the State.

¶4 Means testified at trial that on December 4, 2011, he, Robinson, Ricky Lobley and Lequinis Strawder,[2] and an unidentified female followed S.S. after observing S.S. at a bar because "they wanted [S.S.'s] coat." Means testified that, while following S.S.'s vehicle, the vehicle he was driving struck a median and damaged a tire. After the tire was repaired, they drove to S.S.'s house. Means

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Strawder's first name is spelled alternatively as Lequinis and Laquanis in the record.

testified that he acted as lookout on the side of S.S.'s house while the other men went inside the house. Means testified that all the men wore masks and that someone had a gun. Means testified that after the others came out of S.S.'s house, they left and eventually he, Robinson, and Lobley ended up at the house of Means' mother, where they were arrested.

¶5 The jury found Robinson guilty of three counts of false imprisonment, one count of armed robbery, and one count of burglary. Prior to sentencing, Robinson's mother submitted to the circuit court letters addressed to Judge Charles Kahn that were purportedly written by Roy Bishop and Ramone Baker, who were incarcerated at the same facility as Means. Both letters stated that Means had told them that had he lied when he testified about Robinson's involvement in the events of December 4, 2011, in order to receive a deal from the State in his own case.

¶6 Robinson filed a post-verdict, presentencing motion for a new trial,[3] wherein he sought a new trial on the basis that the letters from Bishop and Baker are newly discovered evidence. The circuit court[4] held three hearings on the issue. Baker and Bishop were called to provide testimony on the letters at the hearings. However, the court concluded that each man invoked his privilege against self-incrimination under the Fifth Amendment and refused to testify. At that time, Robinson did not take the position before the circuit court that the court made any

[3] Robinson incorrectly characterized his motion as a WIS. STAT. § 974.06 postconviction motion. However, by the terms of the statute a § 974.06 postconviction motion is one filed "[a]fter the time for appeal or postconviction remedy provided in [WIS. STAT. §] 974.02 has expired."

[4] Judge Kahn oversaw Robinson's trial and post-verdict motion for a new trial. Judge M. Joseph Donald oversaw Robinson's postconviction motion.

error in concluding that Baker and Bishop each refused to testify based on the assertion of the Fifth Amendment privilege.

¶7 The court denied Robinson's post-verdict motion. The court determined that Baker and Bishop were unavailable to testify in person and that the statements in their letters that Means falsely accused Robinson were inadmissible hearsay. On these bases, the court concluded that Robinson had failed to present any evidence to support his post-verdict motion.

¶8 Robinson was subsequently sentenced by the court. Thereafter, in May 2015, Robinson brought a postconviction motion, pursuant to WIS. STAT. §§ 974.02 and 809.30, for a new trial on two grounds. First, Robinson requested a new trial based on newly discovered evidence, in the form of the same letters by Baker and Bishop referenced above, and a sworn statement by Strawder bearing a date in October 2014, which postdated the trial. In the sworn statement, Strawder, who did not testify at Robinson's trial, averred that Strawder "along with [] Means and an individual who I can't recall … his name," had robbed S.S. and that he "agreed to [make] fake allegations against … Robinson."[5] Second, Robinson requested a new trial based on alleged ineffective assistance of his trial counsel. The circuit court denied Robinson's May 2015 postconviction motion in full without an evidentiary hearing. Robinson appeals.

¶9 Additional facts are discussed below as necessary.

[5] Robinson did not allege in his postconviction motion whether Strawder would have been available to testify on his behalf at a new trial, but it is a reasonable inference from the inclusion of the sworn statement in the motion that it was Robinson's position that Strawder would be available to testify at a new trial. In any event, as we explain in the text, Robinson does not establish the basis for considering the sworn statement to be newly discovered evidence.

DISCUSSION

¶10 Robinson contends the circuit court erred in denying his WIS. STAT. § 974.02 postconviction motion in which he sought a new trial on the basis of newly discovered evidence and ineffective assistance of trial counsel. Robinson also contends on appeal that he is entitled to a new trial in the interest of justice. We address, and reject, Robinson's contentions in turn below.

A. Postconviction Motion for New Trial

¶11 In a postconviction motion, a defendant must allege sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the defendant does so, the circuit court must hold an evidentiary hearing on the defendant's motion. ***Id.*** However, if the "motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny the motion without a hearing." ***Id.*** Whether the motion alleges sufficient facts to entitle the defendant to a hearing presents a question of law, which we review de novo. ***Id.***

¶12 Robinson's postconviction motion was denied without an evidentiary hearing. Accordingly, the issue before us is whether Robinson alleged sufficient facts in his postconviction motion that if true, would entitle Robinson to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

1. Newly Discovered Evidence

¶13 To set aside a judgment of conviction based on newly discovered evidence, "the defendant must prove, by clear and convincing evidence, that '(1)

the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. If the defendant satisfies his or her burden on all four of those elements, the circuit court must then determine whether there is a reasonable probability that a jury, looking at both the old and new evidence, would have a reasonable doubt as to the defendant's guilt. ***Id.***

¶14 As summarized above, Robinson alleged in his postconviction motion that three pieces of newly discovered evidence entitle him to a new trial: (1) the two letters from Bishop and Baker, wherein they state that Means informed them that Means falsely testified at trial about Robinson's involvement in the robbery of S.S.; and (2) a sworn statement by Strawder, wherein Strawder stated that Strawder, Means, and a third individual who he remembers only as "Means[']Cousin," robbed SS and that Strawder "agreed to [make] false allegations against … Robinson."

¶15 As noted above, the question of whether the letters from Bishop and Baker constituted newly discovered evidence and entitled Robinson to a new trial was raised by Robinson in his initial post-verdict motion for a new trial. The circuit court held hearings on this issue, and rejected Robinson's arguments and denied his motion.

¶16 Robinson has abandoned arguments he made in his postconviction motion and the only challenges that we can discern that Robinson now raises, in relation to the Bishop and Baker letters, consist of a series of completely undeveloped and unsupported suggestions or assertions. We briefly address and reject those challenges in turn below.

¶17 Robinson suggests on appeal that, in considering the Bishop and Baker letters discrediting Means, the circuit court did not understand that it was not bound by the rules of evidence in making a preliminary determination on the admissibility of evidence. Robinson provides no record support for this factual assertion, and we reject it on that basis.

¶18 Robinson suggests that the circuit court failed to understand that the letters themselves would have been admissible at a new trial pursuant to WIS. STAT. § 908.045(4), which excludes from the rule against hearsay those statements of unavailable witnesses if the statements are against the interest of the declarants. However, Robinson does not attempt to develop an argument to support any aspect of this suggestion, and we reject it on that basis.

¶19 Robinson states in his principal brief that "Bishop was present at the motion hearing on September 13, 2013 and appear[ed] prepared to testify to the contents of his letter." If Robinson intends for this sentence to stand for an argument that the circuit court erred in failing to allow Robinson to call Bishop as a witness at the September 13 hearing, the argument fails on many levels. It is sufficient for us to note that the September 13 hearing was scheduled for sentencing, evolved into a hearing about whether Robinson's attorney was going to file a motion for a new trial and whether Robinson would obtain a new attorney, and the circuit court confirmed at the hearing, without contradiction, that Bishop was, on the record and while represented by counsel, refusing to testify based on the Fifth Amendment privilege.

¶20 Having rejected the only arguments that we can discern that Robinson makes on appeal relating to the Bishop and Baker letters, we turn to Strawder's sworn statement.

¶21 In order to be entitled to an evidentiary hearing based upon Strawder's statement that he lied to police about Robinson's participation in the robbery of S.S., Robinson needed to set forth facts in his postconviction motion that, if true, establish that Robinson was not negligent in failing to obtain Strawder's statement. *See* ***id.***, 345 Wis. 2d 407, ¶¶22, 25. Conclusory allegations are not sufficient. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶22 As noted above, in his sworn statement, Strawder avers that he, Means, and an individual Strawder could recall only as Means' cousin, robbed S.S., and that Strawder "agreed to false allegations against … Robinson." In his postconviction motion, Robinson averred: "Strawder made his sworn statement in October 2014. Therefore, the evidence satisfies the first and second prongs." (Internal record citation omitted.) In Robinson's principal brief on appeal he makes the same completely conclusory statement. This is not sufficient.

¶23 A non-conclusory allegation should present "who, what, where, when, why, and how," with sufficient particularity to assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23. Robinson failed to set forth any facts in his postconviction motion showing when and how the evidence first came to his attention and showing that he was not negligent in seeking the evidence and, thus, failed to set forth specific facts sufficient to establish both the first and the second prongs of the test for an evidentiary hearing on newly discovered evidence. Accordingly, we affirm the circuit court's denial of Robinson's postconviction motion as to the letters without an evidentiary hearing, although on different grounds than the circuit court. *See* ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793

N.W.2d 920 (appellate court may affirm a circuit court's order on different grounds).[6]

2. Ineffective Assistance of Trial Counsel

¶24 To set aside a judgment of conviction for ineffective assistance of counsel, a defendant must show both that his or her counsel's performance was deficient and that the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, the defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that there is a reasonable

[6] In his principal brief, Robinson devotes substantial space to an argument regarding a Department of Corrections memorandum indicating that, after Robinson's trial, S.S. admitted to a DOC probation and parole agent that S.S. had purchased from Lobley the coat that was stolen in the crimes charged in this case, even though S.S. had testified at Robinson's trial that she did not know Lobley. Robinson did not allege in his postconviction motion and does not argue in his principal brief on appeal that this potential impeachment material is itself newly discovered evidence that warrants a new trial. Rather, he argues in his principal brief on appeal that the DOC memo tends to show that there is a reasonable probability that the jury would have acquitted him had they heard about the Bishop and Baker letters. *See* ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (if defendant satisfies his or her burden on all four newly discovered evidence factors, the circuit court must determine whether a reasonable probability exists that a jury would have a reasonable doubt as to the defendant's guilt). Because we have concluded that Robinson did not meet his burden on the four newly discovered evidence factors, we do not address whether there is a reasonable probability that a trial with the allegedly new evidence would produce a different result.

In his reply brief, Robinson argues for the first time on appeal that the DOC memo is newly discovered evidence warranting a new trial. We do not address issues or arguments raised for the first time in a reply brief. *See* ***Richman v. Security Sav. & Loan Ass'n***, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973). Moreover, even if we were to address the merits, we would reject this argument on the ground that Robinson fails to persuade us that there is a reasonable probability that a jury would have a reasonable doubt as to the defendant's guilt due if Robinson were to use this material for impeachment at a new trial. In his short reply brief argument, Robinson fails to present a coherent theory of defense in which this impeachment would have been valuable to the defense.

probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." ***Id.*** Because a defendant must show both deficient performance and prejudice, an appellate court need not consider one prong if the defendant has failed to establish the other. If the defendant fails to prove one prong, we need to address the other prong. ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878.

¶25 Robinson alleged in his postconviction motion that his trial counsel was ineffective for six reasons. For the reasons explained more fully below, we conclude that Robinson failed to allege sufficient facts in his postconviction motion that, if true, show ineffective assistance of counsel. Most of the six instances of alleged deficient performance fail to show such deficiency, as we explain below, and the remaining instances fail because Robinson failed to allege sufficient facts to show that Robinson was prejudiced by any of counsel's alleged unprofessional errors.

¶26 First, Robinson alleged in his postconviction motion that his trial counsel was deficient because counsel failed to object at trial or argue during closing arguments that an out-of-court photographic array used to identify Robinson was "unduly suggestive." Robinson alleged that the men pictured in the array "look nothing alike," and although the witness who identified Robinson from the array described Robinson to law enforcement officers as "chubby," only two of the men pictured could "be fairly characterized as 'chubby.'" Robinson alleged that he was prejudiced by counsel's failure to object to the photographic array because "identification was 'the whole case'" and there was "scarce identification evidence."

¶27 When a photographic array is challenged as impermissibly suggestive, the defendant must show that it is. ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). If the defendant does so, the burden then shifts to the State to show that despite the array's improper suggestiveness, the identification from the array was "nonetheless reliable under the 'totality of the circumstances.'" ***Id.*** Robinson's argument that only two individuals pictured in the photographic array resembled the witness's description and none of the individual's looked alike presents a question of law that we review de novo. *See* ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923.

¶28 The witness shown the array characterized Robinson as "chubby," but only because "he was bigger than everybody else." A police officer described Robinson as being approximately 5'8" or 5'9" tall, weighing approximately 165 pounds and having a "medium" build. We agree with the State that each of the men pictured in the photographic array appear to be of generally medium build, and that none appear to be notably heavier than the others, nor notably more slender. Each of the men pictured is African American, has short hair, and they appear to be around the same age. Accordingly, we conclude that Robinson failed to show that counsel engaged in deficient performance for failing to challenge the array as impermissibly suggestive when there is no basis in the record for concluding that such a challenge would have merit. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments).

¶29 Second, Robinson alleged that counsel was deficient because counsel failed to question approximately one-half of the jurors during voir dire. Robinson alleged that prejudice from this was "manifest" because counsel "sacrifice[d] the opportunity to become acquainted with the jury," to "use answers

to voir dire questions in closing arguments[,] and [to] … cater his advocacy to [the] specific factfinders." Robinson, however, did not point to any facts showing that any of the jurors were biased against him or that further questioning of the jurors would have revealed potential bias. Thus, his argument for prejudice is conclusory, at best.

¶30 Third, Robinson alleged that counsel was deficient because counsel was "complicit[] in compelling a unanimous verdict." Robinson alleged that statements made by the circuit court to the jury suggested that the jury had a firm deadline for its decisions on Robinson's guilty or innocence as to the crimes charged and that the jury's decision had to be unanimous. The specific statements identified by Robinson in his postconviction motion are taken out of context. In context, the statements are as follows:[7]

> (1) When explaining the trial procedure to the jury before opening statements, the court stated:
>
> > *There is no time limit on deliberations. As one of the lawyers mentioned yesterday, it's your responsibility to take the time necessary to consider each and every one of the questions that you are going to be asked with respect to the verdict form … So it will be your responsibility to take the time necessary to reach a verdict as to each and every one of the counts.*
>
> (2) On the morning of the third day of trial, a juror was absent, and the court explained to the jury that the trial would continue with thirteen jurors rather than fourteen. The court then stated: "I don't want to suggest that … there are excuses available for jurors now at this point [because] … you are all on the case and *we are going to continue and finish the case together*.

[7] We have emphasized the specific statements identified by Robinson in his postconviction motion.

> (3) At the end of the third day of trial, a Wednesday, the court explained to the jury that the jury could anticipate deliberations taking place two days from then. The court explained to the jury:
>
> > The *evidence is what you will rely on when you meet together and deliberate to reach your verdict…. Now, here is the key point about your deliberations. There is no time limit*. You have to take the time that's necessary to do a careful and conscientious consideration of the evidence. So that you must take some time to figure this out. It's not intended to be an easy process, so *I don't want anyone to feel that you have to be rushed to get a verdict in at a certain particular hour of the day or even that you finish on that day. If necessary, you are not going to be working over the weekend*, but if a verdict is not reached by Friday afternoon, then *we will be expecting you back on Monday … to finish the job*."

Robinson alleged that effective trial counsel would have objected to the court's statements and requested that the jury be instructed as to the "possibility of not reaching a unanimous verdict." With regard to prejudice, Robinson alleged in conclusory fashion, that his "defense was prejudiced due to the confluence of two main circumstances: (1) the jury was coerced into unanimity, and (2) given a deadline."

¶31 We conclude that the court's statements, in context, cannot be reasonably construed as "coerc[ing the jury] into unanimity" or giving the jury a "deadline" for its verdicts. The court was providing the jury with an anticipated timeline for its deliberations and the court's expectations. Although the court informed the jury that it anticipated that their deliberations would be finished by that Friday or the following Monday, the court informed the jury that it was "not going to make you deliberate past, you know, the end of the day on Monday." In doing so, the court left open the possibility that the jury might not be able to reach a unanimous verdict. Thus, counsel's performance was not deficient, as counsel

cannot be faulted for failing to make an objection that would not have been valid. ***Id.***

¶32 Fourth, Robinson alleged that trial counsel was deficient because counsel failed to request a limiting jury instruction under WIS. STAT. § 901.06 as to other acts evidence. Robinson alleges in conclusory fashion that counsel's failure to do so "prejudiced [] Robinson's defense," but fails to allege any facts showing how particular other acts evidence could have influenced the outcome and that the result of the trial would have been different but for the introduction of that evidence.

¶33 Fifth, Robinson alleged that his trial counsel was deficient in failing to move the circuit court, under WIS. STAT. § 971.12(3), to sever Robinson's prosecution from that of Robinson's co-defendant, Lobley, because at trial the prosecutor used a statement from Lobley that implicated Robinson in the crimes charged. Specifically, Robinson alleged that in explaining how he, Lobley, and Means came to be together on the morning of the robbery, Robinson had told detectives that Means and Lobley, who were together, picked him up from his house, but that at trial, Lobley testified that Lobley and Robinson arrived at Means' house together.

¶34 WISCONSIN STAT. § 971.12(3) provides: "[t]he district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant." As pointed out by the State, Robinson failed to point to any facts showing that the prosecutor intended to use a statement by Lobley implicating Robinson, or any facts showing that a statement by Lobley implicated Robinson.

¶35 During direct examination by his trial counsel, Lobley testified that between 3:45 and 4:00 a.m. on the morning of the robbery, he left his sister's house to go to Means' house, which was across the street, to smoke marijuana. Lobley testified that Robinson went with him to Means' house, although Robinson had not been at Lobley's sister's house. On cross-examination, Lobley denied that he and Means picked Robinson up from Robinson's house. The prosecutor then asked Lobley, "So if somebody said that, they are lying?" to which Lobley testified, "Yes."

¶36 Robinson's statement to detectives was not introduced into evidence and Robinson was not identified as the source of the information that Lobley and Means had picked Robinson up. Furthermore, Lobley's testimony did not implicate Robinson in any crime. At most, Lobley's testimony raised a question of credibility. Once again, it is not deficient performance for counsel to fail to make a motion that would have been unsuccessful.

¶37 Finally, Robinson alleged that his trial counsel was deficient because counsel failed to cross-examine Means as to whether Means' ability to identify Robinson was impaired because Means had taken cough syrup and codeine on the night of the robbery. Robinson alleges that the "prejudice caused to [his] defense by trial counsel's failure to attack [Means'] identification [was] great," because "eyewitness identification was 'the whole case.'" However, in the postconviction motion, Robinson failed to allege any facts, or provide any expert or other opinion tending to show that Means' use of cough syrup and codeine would have significantly affected Means' ability to observe and recall facts, including the involvement of Robinson, and thus that a challenge to Means' identification on this basis would have been successful. Once again, it is not deficient performance

for counsel to not take an action that would have had no effect. ***Toliver***, 187 Wis. 2d at 360.

B. New Trial in the Interest of Justice

¶38 This court has the power to independently consider the record to determine whether to grant a new trial in the interest of justice if we are convinced that the real controversy has not been fully tried, or that it is probable that justice has been miscarried. WIS. STAT. § 752.35; ***State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). To establish that the real controversy has not been fully tried, a defendant "must convince us that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoted source omitted). We exercise our discretionary power of reversal "only sparingly," ***State v. Prineas***, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206, and "only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶39 Robinson asserts that the real controversy was not fully tried because the jury did not have the opportunity to hear evidence impeaching Means. Robinson's arguments in this regard form the basis of his newly discovered evidence claims. We have stated that a request for a new trial in the interest of justice is not a substitute for properly pursuing an underlying claim or theory. *See, e.g.*, ***State v. Flynn***, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994) (new trial in the interest of justice not a substitute for a properly developed claim of ineffective assistance of counsel); ***State v. Hubanks***, 173 Wis. 2d 1, 29, 496 N.W.2d 96 (Ct. App. 1992) (discretionary reversal not designed to enable a

plaintiff to pursue relief under a different theory). Upon our review of the record, we conclude that Robinson has failed to show that the real controversy has not been fully tried. Accordingly, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Robinson a new trial.

CONCLUSION

¶40 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

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