COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1338-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. David Wilson appeals from a judgment of conviction entered by the trial court after a jury found him guilty of felony murder, in violation of § 940.03, STATS., and felon in possession of a firearm, in violation of § 941.29(1), STATS., as a habitual criminal, pursuant to § 939.62, STATS. Wilson also appeals from a trial court order denying his motion for postconviction

relief, and a trial court order denying his motion for reconsideration. Wilson claims that: (1) the trial court erroneously exercised its discretion when it denied Wilson's request for an adjournment or continuance of his trial, because the State's delivery of certain discovery materials on the first day of trial violated Wilson's constitutional right to due process and statutory right to pretrial discovery; (2) the trial court erred when it found that the prosecutor did not comment in closing argument on Wilson's choice not to testify; and, (3) the trial court erroneously exercised its discretion when it denied Wilson's claim of ineffective assistance of counsel without holding a ***Machner*** hearing.[1] We are not persuaded. Therefore, we affirm the trial court's judgment and orders.

I. BACKGROUND.

This case arises from a shooting which took place near North 31st Street and West Brown Street, on August 6, 1995, at approximately 1:30 a.m., and which resulted in the death of Patrick Quinn. At Wilson's trial, Lataro P. Jones (a/k/a "Pee-Wee") testified that, on August 5, 1995, he attended a wedding reception with David Wilson (a/k/a "Snake"). Testimony later established that the reception was in celebration of the marriage between Anjonette Wilson and Montonio Wilson, who is David Wilson's brother. Jones testified that, at approximately 6:00 p.m., he and David Wilson left the wedding reception and drove to the house of Shema Huff, one of their "associates." Jones testified that, at approximately 9:00 p.m., he and Wilson left Huff's house in Wilson's girlfriend Bonita Field's car, a four-door blue station wagon, which Wilson was driving. Jones testified that they drove around for a while, and at approximately 12:00

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

a.m., arrived at a party at Patricia Burks's house, located near 31st Street and West Brown Street. Jones testified that, after approximately thirty minutes, he left the party, accompanied by: Wilson; Nathaniel Bell, who is Burks's son; Jimmy Bell, who is Nathaniel Bell's cousin; and a person named Kenneth, who was Jimmy Bell's friend. Jones testified that they all left in the blue station wagon, which Wilson was driving, that Jones was in the front passenger seat, and that the three others were in the back seat.

Jones testified that Wilson drove the car to a Citgo filling station located at the intersection of 31st Street and Lisbon Avenue. Jones testified that he, Wilson, and some of the others in the back seat then exited the car. Jones testified that he then saw Patrick Quinn, and that Quinn asked Jones if he "knew where to score for him." Jones testified that he understood Quinn to be interested in buying cocaine, and that Jones told Quinn that he knew where to get cocaine for him. Jones testified that he told the others to follow him, and entered Quinn's car on the passenger side. Jones testified that he then directed Quinn to drive to a location near the corner of 31st Street and West Brown Street. Jones testified that Wilson followed Jones and Quinn to 31st Street and West Brown Street in Wilson's car, and pulled up behind Quinn's parked car. Jones testified that he exited Quinn's car, walked to Wilson's car, and told Wilson that he was going to get some crack for Quinn. Jones testified that Wilson said that he had some crack, exited the car, and walked to Quinn's car. Jones testified that when Wilson reached Quinn's car, Wilson entered and sat in the passenger seat, and that Jones then sat in the passenger seat of the station wagon. Jones also testified that Nathaniel Bell had exited the station wagon, but that Jimmy Bell and Kenneth remained in the back seat.

Jones testified that, sometime between five seconds and four minutes after Wilson entered Quinn's car, Jones heard a shot. Jones testified that he then saw Wilson exit Quinn's car and return to Wilson's car, and that Wilson told Jones to "scoot over" into the driver's seat. Jones testified that he moved into the driver's seat and that Wilson entered the car and sat in the passenger seat. Jones testified that he saw that Wilson had a gun, that he had blood on his hands and shorts, and that he said something to the effect that "he reached and he caught one in the shoulder." Jones testified that he then backed the car down the block, turned onto 31st Street and drove away. Jones testified that they then drove to a bar called Club Deja Vu, which Wilson entered, and that when Wilson returned to the car, the blood on his shorts and hands was gone, and his shorts looked "reddish wet." Jones testified that Wilson then insisted that they go to a party, and that they eventually did go to the party.

Jones testified that the next day, he saw Wilson at Huff's house. Jones testified that Wilson asked him why he was not acting like himself, and when Jones replied "because of what happened," Wilson told Jones, "Don't you crack on me." Jones testified that he interpreted the statement to mean, "Don't tell what happened." Jones testified that after learning that the police were looking for him, he came to the police station, and gave a statement to the police about his knowledge concerning the shooting.

Nathaniel Bell also testified as a witness for the State. Bell testified similarly to Jones, and corroborated much of Jones's testimony. Bell testified that, before the shooting, he exited Wilson's car and walked around the corner. Bell testified that, when he heard the gunshot, he turned around and saw Wilson exit Quinn's car and return to the station wagon. Bell testified that, after the shooting, Quinn exited his car and ran toward him, swearing, with a hole in his chest. Bell

testified that a woman ran out of a house and told him to call the police, and that his mother came out of her house and tried to give Quinn cardio pulmonary resuscitation. Bell also testified that he initially falsely told police that he had walked, instead of driven, to the gas station, and had witnessed the shooting on his way home. Bell testified that he did so because he didn't want to get involved, and stated on cross-examination that he decided to tell the truth because he had to come to court.

In addition to Jones and Nathaniel Bell, a number of other witnesses testified for the State. Charlotte Carr testified that she lived on the corner of North 31st Street and West Brown Street. Carr testified that, in the early morning hours of August 6, 1995, as she was sitting in her living room, she heard a loud popping sound. Carr testified that she looked out of her window and saw two people "tussling," and moving around in the front seat of a car. Carr also testified that she looked away, and when she looked back, she saw one person moving away from the car, and one person inside of the car. Carr testified that the person moving away from the car was a tall, slim, black male. Carr testified that she then saw a man stumble out of the car, saying that he had been shot. Carr testified that she dialed 911, went outside, and saw Quinn lying on the ground with his pockets turned inside out. At trial, Carr testified that a photograph of Quinn's car depicted the car which she had seen.

Milwaukee Police Officer Kevin Porter testified that he responded to the shooting and spoke with Quinn at the scene of the shooting. Officer Porter testified that Quinn told him that the people who were responsible for the shooting were "from the neighborhood," and that "the heavy set guy did not shoot him, it

was the skinny guy."[2] Officer Porter also testified that when he asked Quinn why he had been shot, Quinn said the words "wallet" and "money." Detective Kathleen Borkowski testified that she collected Quinn's belongings at the hospital, and that Quinn did not have any valuables on his person. Detective Michael Dubis also testified that he searched Quinn's car and did not find a wallet or any valuables.

Additionally, Burks testified that she saw Wilson and his car on August 5, 1995 at approximately 12:00 a.m. at the party held at her house. Burks also testified that, after the shooting, she ran outside and saw a blue station wagon leaving the area.

In his defense, Wilson presented a number of family members and friends as alibi witnesses. These witnesses testified not only that Wilson attended Anjonette and Montonio Wilson's wedding, but also that David Wilson had remained at the wedding reception until as late as 12:45 a.m. Montonaze Wilson, one of David Wilson's brothers, testified that at 1:00 a.m. he drove Wilson from the reception to Huff's house, arriving at approximately 1:15 a.m. Bonita Fields, David Wilson's girlfriend, testified that she talked with Wilson at Huff's house at approximately 7:00 p.m.; that she then drove home in her car and went to sleep at approximately 10:00 p.m.; that she awoke when Wilson called her at approximately 1:00 a.m.; that she left her house at approximately 1:30 a.m. and picked Wilson up at Huff's house at approximately 2:00 a.m.; that she and Wilson

[2] Although neither party's briefs appear to address the issue, the State's reply brief to Wilson's postconviction motion states that, "It was clear from Jones' physical appearance in court (i.e. he was a large, heavy set person) that he did not match the victim's dying description of his assailant."

drove to a bar called Vandomes where they allegedly had their picture taken; and that eventually Wilson spent the night at her house. Wilson did not testify.

The jury found Wilson guilty of both felony murder and felon in possession of a firearm. Wilson then filed a motion for postconviction relief, based partly upon his failure to timely receive discovery requested from the State. On the first day of his trial, the prosecution gave Wilson a stack of discovery materials, and Wilson made a motion for an adjournment or a continuance, which the trial court denied. In his postconviction motion, Wilson claimed that the trial court erred by denying his request for an adjournment or continuance because the discovery materials contained information which Wilson could have used to buttress his alibi witnesses and to attack the credibility of the State's witnesses. Wilson's motion also alleged that the prosecutor had impermissibly commented in her closing argument on Wilson's choice not to testify at trial. The trial court denied the motion. Wilson then filed a motion for reconsideration in which he made a new claim of ineffective assistance of counsel. The trial court also denied that motion. Wilson now appeals.

II. ANALYSIS.

A. Denial of Wilson's Motion for Trial Adjournment or Continuance.

Wilson claims that the trial court erroneously exercised its discretion when it denied his motion for an adjournment or continuance of his trial, because the State's delivery of certain discovery materials on the first day of trial violated Wilson's constitutional right to due process, and statutory right to pretrial discovery. We are not persuaded.

Although due process requires a prosecutor to disclose all exculpatory evidence, *see* ***State v. Nerison***, 136 Wis.2d 37, 54, 401 N.W.2d 1, 8 (1987), he or she is only constitutionally required to disclose evidence which is material to either guilt or to punishment, *see* ***State v. Ray***, 166 Wis.2d 855, 870, 481 N.W.2d 288, 294 (Ct. App. 1992). "[E]vidence is material 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." ***Id.*** (citation omitted).

In addition to the constitutional duty to disclose exculpatory, material evidence, a prosecutor also has a statutory duty to disclose certain types of non-exculpatory evidence. *See* § 971.23(1), STATS. If the State violates § 971.23(1), "The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or continuance." *See* § 971.23(7m), STATS.

A motion for an adjournment or continuance is addressed to the sound discretion of the trial court and will only be reversed upon an erroneous exercise of discretion. *See* ***State v. Anastas***, 107 Wis.2d 270, 272, 320 N.W.2d 15, 16 (Ct. App. 1982). There is no set test for determining whether the trial court erroneously exercised it discretion; rather, that determination must be based upon the particular facts and circumstances of each case. *See* ***id.*** at 273, 320 N.W.2d at 16. The supreme court has held, however, that in order to obtain an adjournment or continuance, a defendant must show both prejudice and surprise. *See* ***Kutchera v. State***, 69 Wis.2d 534, 545, 230 N.W.2d 750, 756 (1975).

Wilson claims that the trial court should have granted him an adjournment or a continuance after the State delivered the following evidence to him on the first scheduled day of his trial: (1) a police report, dated August 11, 1995, stating that Anjonette Wilson told Detective Allen Schoessow that "she last saw [David Wilson] on Saturday when she got married to his brother"; (2) a police report, dated August 16, 1995, stating that, Anjonette and Montonio Wilson told police officers that they "both ... saw David [Wilson] at their wedding on Saturday, August 12, 1995"; and (3) a police report, dated February 1, 1996, stating that Rosa Marie Reese told police officers that, after the shooting, Nathaniel Bell gave her a gun.[3] We conclude that it is not reasonably probable that the result of Wilson's trial would have been different had the State delivered this evidence to Wilson before the first scheduled day of his trial. Therefore, we conclude that Wilson's constitutional right to due process was not violated. Additionally, because Wilson was not prejudiced by the State's failure to deliver the evidence earlier, we conclude that the trial court did not erroneously exercise its discretion when it denied Wilson's motion for an adjournment or a continuance.

At trial, Wilson presented an alibi defense consisting of testimony by Wilson's family members and friends, some of whom placed Wilson at Anjonette

[3] Wilson also briefly alludes to unidentified "new statements which helped to impeach several witnesses; namely, Dale Huff, a witness for the defense, and Nathaniel Bell, a witness for the State" and states that "Other statements by Rosa Reese, Linda Marie Jones, and Linda Huff raised issues of impeachability." Wilson does not present a developed argument with respect to these unidentified statements, and, therefore, we do not address them. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995) (court of appeals need not address "amorphous and insufficiently developed" arguments).

and Montonio Wilson's wedding reception as late as 12:45 a.m.[4] In closing argument, the prosecutor, after reviewing the alibi testimony, told the jury, "The first time we hear this explanation for David Wilson's whereabouts from these people is when they come to court to testify at this criminal trial." Wilson claims that, if the statements which Anjonette and Montonio Wilson gave to police only days after the shooting had been delivered to him earlier than the first scheduled day of his trial, he would have been able to effectively counter the State's suggestion that his alibi witnesses had recently fabricated their testimony. Wilson, however, is incorrect.

Assuming that the State's delivery of Anjonette Wilson's and Montonio Wilson's statements on the first day of trial, within a stack of discovery materials, prevented David Wilson from discovering those statements, Wilson was not prejudiced. Anjonette and Montonio's statements given a few days after the shooting were qualitatively different from the testimony provided by Wilson's alibi witnesses at trial. After the shooting, Anjonette Wilson told Detective Allen Schoessow that "she last saw [David Wilson] on Saturday when she got married to his brother"; and both Antonio and Montonio Wilson told police officers that they

[4] The specific witnesses and their testimony were as follows. Angela Hartley, a sister-in-law of Anjonette Wilson, who is also David Wilson's sister-in-law, testified that she saw David Wilson at the wedding reception at approximately 7:30 p.m. James Hartley, who is Angela Hartley's husband, and Anjonette Wilson's brother, testified, although somewhat inconsistently, that he saw David Wilson at the wedding reception at approximately 12:45 a.m. Anjonette Wilson, and Montonio Wilson, who is David Wilson's brother, testified that they saw David Wilson at the reception in the parking lot at approximately 12:45 a.m. Montonaze Wilson, who is also David Wilson's brother, testified that, at approximately 1:00 a.m., he drove David Wilson from the wedding reception to Shema Huff's house, arriving at approximately 1:15 or 1:20 a.m. Finally, Bonita Fields, who is David Wilson's girlfriend, testified that she talked with Wilson at Huff's house at approximately 7:00 p.m.; that she then drove home in her car and went to sleep at approximately 10:00 p.m.; that she awoke when Wilson called her at approximately 1:00 a.m.; that she left her house at approximately 1:30 a.m. and picked Wilson up at Huff's house at approximately 2:00 a.m.; that she and Wilson drove to a bar called Vandomes where they allegedly had their picture taken; and that eventually Wilson spent the night at her house.

"both ... saw David [Wilson] at their wedding on Saturday, August 12, 1995." As the State points out, however, there is no dispute that David Wilson attended Anjonette and Montonio Wilson's wedding. Jones, one of the State's most important witnesses, testified at trial that he and David Wilson were at the wedding on the evening of August 5, 1995. The wedding ceremony commenced at approximately 2:00 p.m. and the reception ended at approximately 12:45 a.m. The critical issue, not discussed in either Anjonette's or Montonio's statements, was not whether David Wilson had attended the wedding, but how long he had remained at the reception. After the shooting, neither Anjonette nor Montonio Wilson told police that David Wilson was still at the wedding reception when it ended at 12:45 a.m. At trial, however, both Anjonette and Montonio Wilson, along with numerous other witnesses, specifically testified that they saw David Wilson at the wedding reception as late as 12:45 a.m. Additionally, Montonaze Wilson testified at trial that he not only saw David Wilson at the wedding reception as late as 12:45 a.m., but also drove him to Huff's house, arriving at approximately 1:15 a.m. Finally, Bonita Fields presented elaborate testimony at trial describing how Wilson called her from Huff's house shortly after 1:00 a.m., and how she picked him up there at approximately 2:00 a.m., went to a bar, had her picture taken with Wilson, and then returned with Wilson to her house where she and Wilson spent the night. None of this completely new testimony which was presented at trial was contained in the statements which Anjonette and Montonio Wilson gave police after the shooting. Therefore, had the discovery arrived earlier, David Wilson still could not have successfully countered the prosecutor's valid comment on the "eleventh hour" nature of the alibi witnesses testimony. Thus, because it is not reasonably probable that the result of David Wilson's trial would have been different if the State had delivered Anjonette's and

Montonio's statements earlier than the first day of trial, those statements were not material evidence for the purpose of a due process analysis.

At trial, Bell testified that, after the shooting, Wilson got back into his car on the passenger side, that Pee-Wee (Lataro Jones) backed the car around the corner, and that Pee-Wee and Wilson then drove away. Bell specifically testified that he did not see the gun. In Reese's fourth statement to the police, however, she stated that, after the shooting, she saw Bell near the blue station wagon, and then saw him put something under his shirt, into his waistband. She then saw the car drive away. After the car left, Reese said that she again saw Bell, and that Bell gave her a small, black revolver, which she eventually gave to a man named Joe, who threw it in his backyard. Wilson claims that this information was exculpatory and could have been used to impeach Bell's testimony at trial. Wilson, however, fails to acknowledge other aspects of Reese's statement to the police. In addition to the preceding statements, Reese also told police that, before the shooting, she saw Snake (Wilson) standing with Nathaniel Bell, Jimmy Bell, Pee-Wee and a woman named Tracy, talking to a "white guy."[5] Also, Reese said that, after the shooting, she saw that "Pee-Wee was driving and Jimmy was in the back seat and Snake (Wilson) was the passenger in the front seat." This testimony directly contradicted the testimony of the defense alibi witnesses who claimed that Wilson was still at his brother's wedding reception near the time of the shooting. It also appears from Reese's report that someone in the blue station wagon gave the gun to Nathaniel Bell for him to discard. This tends to prove not that Bell did the shooting, but that someone inside the car did the shooting and wanted to get rid of the gun. Therefore, Reese's statement, viewed as a whole, had minimal, if any,

[5] Quinn, the victim, was a white male.

exculpatory value. In light of the other evidence against Wilson which was produced at trial, it is not reasonably probable that the result of Wilson's trial would have been different if the State had delivered Reese's statement earlier than the first day of trial. Therefore, Reese's statement was also not material evidence for due process purposes.

In sum, because Anjonette and Montonio Wilson's statements and Reese's statement did not constitute material evidence for due process purposes, the State's delivery of those statements on the first day of David Wilson's trial did not violate Wilson's constitutional rights. *See* ***Ray***, 166 Wis.2d at 870, 481 N.W.2d at 294. Additionally, because Wilson was not prejudiced by the State's actions, the trial court did not erroneously exercise its discretion when it denied Wilson's motion for an adjournment or a continuance. *See* ***Kutchera***, 69 Wis.2d at 545, 230 N.W.2d at 756.

B. Alleged Prosecutorial Comment on Wilson's Choice Not to Testify.

Wilson claims that the trial court erred by concluding that the prosecutor did not impermissibly comment on Wilson's choice not to testify at trial. Again, we are not persuaded.

It is normally error for the State to comment on a defendant's choice not to testify at trial. *See* ***Griffin v. California***, 380 U.S. 609 (1965). The test for determining whether remarks are directed to a defendant's failure to testify is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." ***State v. Johnson***, 121 Wis.2d 237, 246, 358 N.W.2d 824,

828 (Ct. App. 1984) (quoting ***Bontempo v. Fenton***, 692 F.2d 954, 959 (3d Cir. 1982)).

As the trial court stated in its written decision and order denying Wilson's motion for postconviction relief:

> The credibility of Lataro Jones was of critical importance to the state. At the close of the direct examination of Lataro Jones, the prosecutor briefly brought out that Jones had voluntarily turned himself in to the police and had cooperated with their investigation. The defendant then elicited considerable additional testimony regarding Jones' encounter with the police and his decision to talk about the case, causing Jones to twice indicate that "I was read my rights." The idea that Jones figured to get a pass on possible drug dealing charges was an important theme of the cross-examination. His statements to the police were revisited later in the cross-examination and by the prosecutor on redirect.
>
> In her closing argument, the prosecutor commented about Lataro Jones' decision to talk to the police even though he did not have to, and the defendant contends that these comments unfairly drew attention to the defendant's choice not to testify. The challenge [sic] remarks, along with some of the context, were as follows:
>
> > --and I think he was pretty clear as to what his situation was when he gave his information to the police. He knew he was under arrest and being interrogated. They read him his rights. They told him: You have the right to remain silent. They told him: Anything you say can and will be used again you in a court of law. They told him: You have the right to a lawyer. They told him: You have the right to have a lawyer present before we question you. They told him that you have the right to pick and choose the questions that you want to answer. They told him that if he decided to stop answering questions, that would not be held against him. He could have said nothing that night, but he told them what he knew.
> >
> > He told them what he has told you, and he did more than that. He took them – or they took him actually – he cooperated with them by trying to

> locate the houses where other people involved in this could be found.
>
> If Mr. Jones wasn't being candid about his role or his involvement, why would he take the police to other people who could tell them what happened? ... He went with Detective Zibolski to show Detective Zibolski where Snake lived, where he believed Snake lived ….
>
> Why would he do that if what he was saying was not the truth? ... Why would Mr. Jones direct us to Mr. Bell if what he knew about this wasn't the truth? Why would he tell about people who could tell that wasn't the truth?

Wilson claims that, by making these remarks, the prosecutor made a "thinly-veiled argument that defendant Wilson was not truthful because he remained silent." We disagree.

As Wilson states in his brief, he believes that "Jones was helpful and candid with the police because he was the neighborhood dope dealer," and presumably lied at trial in order to avoid criminal charges. Wilson clearly wanted the jury to reach this conclusion at trial. For example, in closing argument, Wilson's counsel stated:

> Now, let's think. What happened here? Well, [Jones] finds out that the police are looking for him. He starts to think to himself: Now what can I do? What am I gonna be able to do to protect myself here? How can I cover up my involvement or what can I do here?
>
> Well, maybe a good defense is an offense. Maybe I'll be the first one to get to the police, and maybe I'll tell them a story, and then maybe they won't charge me. Maybe I'll tell them: Yeah, I was there, but I'll give them somebody else, and maybe they'll go easy on me.

The prosecutor's remarks were not a comment, direct or indirect, on Wilson's choice not to testify. Instead, they were a direct comment on Jones's cooperation

and on Jones's credibility, and a direct attempt to rebut Wilson's argument that Jones had cooperated only to avoid criminal charges. Therefore, we conclude that the prosecutor's comments were not "manifestly intended or [were] of such character that the jury would naturally and necessarily take [them] to be a comment on the failure of the accused to testify." *See* ***Johnson***, 121 Wis.2d at 246, 358 N.W.2d at 828.

C. Denial of Wilson's Ineffective Assistance Claim Without a Hearing.

Wilson claims that the trial court erroneously exercised its discretion by denying his ineffective assistance of counsel claim without holding an evidentiary ***Machner*** hearing. We are not persuaded.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.***

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. In order to succeed, "The defendant must show that there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694. If this court concludes that the defendant has not proven one prong, we need not address the other prong. See ***id***. at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

If a motion alleging ineffective assistance of counsel on its face alleges facts which would entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary ***Machner*** hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law which we review *de novo*. ***Id.***

> However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 309-10, 548 N.W.2d at 53. The trial court's decision to deny an evidentiary hearing will only be reversed if the trial court erroneously exercises its discretion. *See* ***id.*** at 311, 548 N.W.2d at 53-54.

Wilson initially filed a postconviction motion claiming that: (1) the trial court erred when it denied Wilson's request for an adjournment on the first day of trial; and (2) the prosecutor's closing argument included impermissible

comment on Wilson's choice not to testify, thus violating Wilson's privilege against self-incrimination. Wilson did not make any argument in either his motion or his memorandum supporting his motion that his trial counsel was ineffective. The trial court then denied Wilson's postconviction motion. Thereafter, Wilson filed a motion for reconsideration in which he raised for the first time the claim that his trial counsel was ineffective for failing to renew his motion for an adjournment later in the trial. The trial court denied Wilson's motion for reconsideration, expressly pointing out the lateness of the Wilson's ineffective assistance claim, and denying an evidentiary hearing on the claim because it was conclusory in nature. The trial court specifically based its decision on the fact that: (1) instead of alleging specific facts, Wilson's motion merely "questioned" his trial counsel's effectiveness; (2) Wilson's motion set forth no coherent theory of how his attorney performed deficiently or how Wilson was prejudiced; and (3) Wilson's motion did not explain why he believed a renewed motion for adjournment would have had any more merit than his earlier unsuccessful motion for adjournment.

We agree with the trial court's decision. Wilson's motion presented only conclusory allegations in the form of questions he wanted to ask his trial attorney, and failed to allege sufficient facts to raise a question of fact. Therefore, the trial court properly denied, without holding a ***Machner*** hearing, Wilson's motion for a new trial based on a claim of ineffective assistance of counsel.

III. CONCLUSION.

If the State had earlier delivered to Wilson the evidence which it delivered to him on the first day of trial, it is not reasonably probable that the result of Wilson's trial would have been different. Therefore, because Wilson was

not prejudiced by the timing of the State's delivery of this non-material evidence, the State's actions did not violate Wilson's constitutional or statutory rights. The prosecutor did not impermissibly comment on Wilson's decision not to testify. Wilson's motion based on an ineffective assistance of counsel claim was conclusory, and, therefore, the trial court properly denied the motion without holding an evidentiary ***Machner*** hearing. For these reasons, we affirm the trial court's judgment and orders.

By the Court.—Judgment and orders affirmed.

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