**COURT OF APPEALS DECISION DATED AND FILED**

**September 20, 2005**

**Cornelia G. Clark**
**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. 2004AP2988**

**Cir. Ct. No. 2000CF4309**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RAFEAL D. NEWSON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Rafeal D. Newson appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] postconviction motion. He

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

claims the trial court erred in summarily denying his motion without conducting an evidentiary hearing. Because the record conclusively demonstrates that Newson is not entitled to relief, we affirm.

## BACKGROUND

¶2 On November 23, 1996, Terrance D. Maclin was shot to death. Newson confessed to the crime after being interrogated by Detective Michael Valuch. On March 8, 2001, a jury convicted Newson of one count of first-degree intentional homicide, party to a crime, contrary to WIS. STAT. §§ 940.01(1) and 939.05 (1995-96). Newson filed a direct appeal, challenging the admission of hearsay statements of witness Gary Bridges. Bridges's statements implicated Newson as the shooter. We held that the trial court did not erroneously exercise its discretion in admitting Bridges's hearsay statements, and affirmed the judgment. *See* ***State v. Newson***, No. 02-0959, unpublished slip op. (WI App Sept. 22, 2003).

¶3 On July 9, 2004, Newson filed, *pro se*, a postconviction motion raising issues of ineffective assistance of trial counsel and appellate counsel. He claims that his appellate counsel provided ineffective assistance by failing to raise several issues on direct appeal. The trial court denied the motion without conducting an evidentiary hearing because the record conclusively demonstrated that Newson was not entitled to relief. The trial court entered an order denying Newson's motion in October 2004. Newson now appeals.

## DISCUSSION

¶4 Newson's main claim is that the trial court erroneously denied his ineffective assistance claims without conducting an evidentiary hearing. His

claims include both allegations against trial counsel and appellate counsel. The claims against appellate counsel are presented under the framework that appellate counsel failed to raise issues related to the ineffective assistance of trial counsel. Specifically, Newson argues that the trial court erred in denying his claim that he received ineffective assistance of counsel without conducting an evidentiary hearing relating to: (1) his claim that his confession should have been suppressed; (2) trial counsel's failure to call alibi witnesses, failure to actively pursue pretrial motions/discovery and failure to communicate; (3) the prosecutor's mischaracterization of evidence during the closing argument; (4) the trial court's denial of his motion requesting self-representation; (5) the trial court's decision allowing Newson's confession, but not Bridges's statements, to go into the jury room during deliberations; and (6) the trial court's decision to require a State's witness to testify.

¶5 We hold that the trial court was not required to conduct an evidentiary hearing because the record conclusively demonstrates that Newson is not entitled to relief based on the information presented in his postconviction motion.

## STANDARD OF REVIEW

¶6 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697.

¶7 An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To satisfy the prejudice prong, appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** In other words, there must be a showing 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. The defendant must affirmatively prove that the alleged defect in counsel's performance "actually had an adverse effect on the defense." ***Strickland***, 466 U.S. at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome.

¶8 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "'The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.'" ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***Id.***

¶9 As most pertinent to this case, a trial court is not obligated to conduct a hearing every time a defendant alleges ineffective assistance of counsel. The trial court need not hold a hearing if the defendant fails to allege sufficient facts in the motion, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v.***

***Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433; ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

APPLICATION

*A. Newson's Confession.*

¶10 Newson's first argument relates to his assertions that trial counsel provided ineffective assistance relating to the admission of his confession into evidence and the failure to challenge, at the ***Miranda-Goodchild*** hearing,[2] the fact that he was interrogated in Arizona by a Milwaukee police officer after he had been charged and obtained counsel in Arizona on Arizona charges.

¶11 Detective Valuch went to Arizona because Newson was in custody there on Arizona charges. Valuch had an arrest warrant for Newson. Valuch testified at the ***Miranda-Goodchild*** hearing that he read Newson his rights, and Newson agreed to give a statement. He testified that Newson never asked for an attorney. Newson disagreed with Valuch's characterization. At the conclusion of the hearing, the trial court found Valuch's version of the evidence more credible and allowed Newson's statement to be admitted into evidence.

¶12 Newson now claims that the trial court should have found Valuch to be less credible and that his confession should have been thrown out because his Arizona attorney was not present during the questioning. We are not persuaded. The trial court's findings on credibility are not clearly erroneous and we will not

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

disturb them. Nothing Newson presented in his argument alters the trial court's credibility ruling.

¶13 With respect to his claim related to his Arizona attorney, Newson is simply wrong. An officer is permitted to interview someone represented by an attorney, as long as the questioning does not involve the particular charges for which the attorney is representing the defendant. *See* ***State v. Dagnall***, 2000 WI 82, ¶¶53-55, 236 Wis. 2d 339, 612 N.W.2d 680. There is nothing in the record to suggest that Newson was being questioned regarding the Arizona charges against him, or that he refused to talk about the Milwaukee charges, or that he requested to have his attorney present. Accordingly, the trial court did not err in summarily denying his claims regarding the admission of his statement or the manner in which his trial counsel handled the ***Miranda-Goodchild*** hearing.

*B. Trial Counsel's Failure to Call Alibi Witnesses, Pursue Pretrial Discovery and Communicate.*

¶14 Newson argues that trial counsel was ineffective for failing to call alibi witnesses. Newson has failed to demonstrate that this failure prejudiced the defense. The record reflects that Newson's conduct resulted in the ultimate decision not to call the two alibi witnesses who were present at trial. His failure to cooperate in his defense led counsel to make a strategic decision to forego that defense. The trial court ruled that that decision constituted sound trial strategy.

¶15 The record supports the trial court's ruling. The evidence overwhelmingly pointed to Newson's guilt. The alibi witnesses would have testified only that they were with Newson at some point on the day the shooting occurred. They had no other specific recollections.

¶16 Newson's statement, Bridges's statement, and Marquis Newson's statement all indicated that Newson was at the scene of the shooting. Thus, wishy-washy alibi witnesses, without any specific recollections, would not have helped Newson's defense. Similarly, Newson's claim that the police were at his apartment on the date in question and that this somehow created an alibi is meritless. The crime occurred at approximately 2:30 p.m. The police visited Newson's apartment some eight hours later, at approximately 11:00 p.m. This information would not have altered the substantial incriminating evidence identifying Newson as the shooter.

¶17 With respect to his claims of discovery and communication failings, Newson fails to allege any specific information as to how any failings prejudiced his defense. Accordingly, there was no need for the trial court to conduct an evidentiary hearing on these claims.

*C. Prosecutor's Closing Argument.*

¶18 Newson next challenges certain statements the prosecutor made during closing argument. He argues that trial counsel should have objected to the prosecutor's statements that the victim did not have a gun, that the shooter was moving around, that the defendant was a "thug," and that Bridges was terrified to testify. We are not persuaded that this claim required an evidentiary hearing.

¶19 The trial court found that the prosecutor's statements were all based on the evidence presented during trial. Our review of the record proves the trial court's statement to be correct. A prosecutor is permitted to make argument based on the evidence or reasonable inferences therefrom. The statements Newson contends were improper are clearly based on the evidence or reasonable inferences that could be drawn from the testimony and other evidence introduced during trial.

None of the prosecutor's statements were objectionable, and therefore trial counsel's failure to object cannot constitute ineffective assistance. *See* ***State v. Wheat***, 2002 WI App 153, ¶¶14, 23, 256 Wis. 2d 270, 647 N.W.2d 441. Thus, the trial court's failure to hold an evidentiary hearing on this claim was not erroneous.

*D. Self-Representation.*

¶20 Next, Newson argues the trial court erred in refusing to allow him to represent himself. He claims that appellate counsel provided ineffective assistance by failing to raise this issue in his direct appeal. We do not agree.

¶21 The record reflects that upon Newson's request to represent himself, the trial court engaged in the kind of colloquy required under ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). The trial court pointed out that the request came after the State's case was almost complete, Newson had no experience in representing himself, and he would not be capable of learning the rules of evidence. The trial court adjourned the trial to afford Newson an opportunity to think further about his request, and consult an attorney. Finally, the trial court ruled that Newson's request was not a sincere, voluntary desire to represent himself, but rather constituted an attempt to manipulate the proceedings. There is nothing in this record to demonstrate that the trial court's decision constituted an erroneous exercise of discretion. Accordingly, this issue was meritless, and therefore appellate counsel's failure to raise it during the direct appeal cannot constitute ineffective assistance.

*E. Jury Instructions/Exhibits.*

¶22 Next, Newson argues that the trial court should have held a hearing on his jury instructions/exhibits claim. He claims the trial court erred in giving the

jury some of the exhibits the jury requested, specifically Newson's statement, but refusing to send the jury other exhibits, specifically Bridges's statements. We are not persuaded.

¶23 The decision regarding whether to send exhibits to the jury room rests within the sound discretion of the trial court. WIS. STAT. § 906.11; ***Rodriguez v. Slattery***, 54 Wis. 2d 165, 172, 194 N.W.2d 817 (1972). The record reflects that the trial court decided it would not send any exhibits to the jury room unless the jury specifically requested to see them.

¶24 During deliberations, the jury requested Newson's, Marquis's and Bridges's statements. The jury was provided with only Newson's statement. The trial court explained that it could not send Marquis's statement into the jury room because it had not been received into evidence. The trial court also stated that it would not send Bridges's statements into the jury room because only certain portions of each statement had been read into evidence.

¶25 The trial court's decision was a reasonable exercise of discretion. Obviously, the jury should not be given exhibits that are not evidence. Thus, again, Newson raises an issue that is without merit. Trial counsel cannot be found deficient in his performance for failing to object to a trial court's ruling that is not erroneous. Further, Newson makes no attempt to assert prejudice with respect to this claim. Accordingly, the trial court did not err in summarily denying Newson's claim on this issue.

*F. Marquis's Testimony.*

¶26 Newson's final claim is that he should have been afforded an evidentiary hearing on his claim that appellate counsel provided ineffective

assistance by failing to argue that the trial court erred by forcing Newson's brother, Marquis, to testify against Newson. As noted by the trial court in its order denying Newson's motion, the record belies Newson's assertion that Marquis was forced to testify.

¶27 The record reflects that when Marquis was originally called to testify, he answered "No," when asked if he would swear to tell the truth. After dismissing the jury, the trial court discussed the issue with Marquis. Marquis told the court that he was afraid he would incriminate himself if he testified. The State indicated it would give Marquis immunity and Marquis asked if he could speak with someone. Marquis left the courtroom and then returned, indicating a willingness to testify.

¶28 The trial court decided to adjourn the trial for the day so that Marquis could consult with an attorney. When Marquis returned to court the following day, with counsel, he indicated he was willing to testify and to tell the truth. His attorney stated that he had explained to Marquis what his rights were, and had discussed with Marquis his concerns about testifying against a family member. At that point, Marquis indicated he was willing to testify and proceeded to do so.

¶29 Based on these proceedings, there is no indication of improper conduct by the trial court or the State with regard to Marquis's testimony. Thus, there would be no reason for trial counsel to object on this issue and no reason for appellate counsel to raise this issue during the direct appeal.

## CONCLUSION

¶30 Based on the foregoing analysis, we conclude that the record conclusively demonstrates that Newson was not entitled to an evidentiary hearing. None of his issues had any merit, and were conclusively refuted by the record. Accordingly, the trial court did not err in summarily denying his postconviction motion.

*By the Court.*—Order affirmed

Not recommended for publication in the official reports.