COURT OF APPEALS DECISION DATED AND FILED

July 29, 2008

David R. Schanker
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. 2007AP521-CR

Cir. Ct. No. 2005CF117

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TEREZ LAMAR COOK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Terez Cook appeals a judgment, entered upon a jury's verdicts, convicting him of armed robbery, armed burglary, battery, theft of moveable property, mistreatment of an animal resulting in death and three counts of false imprisonment, all counts as a repeater and as party to a crime. Cook

argues the trial court erred by admitting: (1) Cook's statements to police; (2) DNA evidence; and (3) witness testimony regarding Cook's identification in a photo lineup. Cook also claims he was denied the effective assistance of trial counsel and is otherwise entitled to a new trial on grounds of newly discovered evidence. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 An Information charged Cook with armed robbery, armed burglary, battery, theft of moveable property, mistreatment of an animal resulting in death and three counts of false imprisonment, all as a repeater and as party to a crime. The charges arose from allegations that Cook burglarized the residence of Margaret and Jim Harper, stealing speakers, an amplifier, and ninety-one dollars. The Information additionally alleged that during the course of the burglary, Cook kicked Jim and shot the Harpers' dog, resulting in its death. After a trial, the jury found Cook guilty of the crimes charged. Cook was convicted upon the jury's verdicts and the court imposed consecutive and concurrent sentences totaling fifty-eight years, consisting of forty years' initial confinement and eighteen years' extended supervision. This appeal follows.

DISCUSSION

A. Claims of Trial Court Error

¶3 Cook argues the trial court erred by admitting: (1) Cook's statements to police; (2) DNA evidence; and (3) witness testimony regarding Cook's identification in a photo lineup. The State contends that Cook did not object to the admission of these matters at trial. The State properly notes that issues not preserved in the trial court are waived on appeal. *See* ***Terpstra v.***

Soiltest, Inc., 63 Wis. 2d 58, 59, 218 N.W.2d 129 (1974). Cook did not file a reply refuting the State's claims. Arguments not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). We therefore reject Cook's claims of trial court error.

B. Ineffective Assistance of Counsel

¶4 Cook nevertheless raises his claims of trial court error under the guise of ineffective assistance of trial counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. As a preliminary matter, we note that any claim of ineffective assistance must first be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The subpoenaing and taking of testimony from an attorney whose representation is challenged is a prerequisite to an ineffectiveness claim. ***Id.*** A claim of ineffective assistance of trial counsel may, however, be denied without an evidentiary hearing if the defendant fails to allege sufficient facts in the motion to raise a material dispute, if the defendant presents only conclusory allegations or "if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶5 Here, Cook failed to file a postconviction motion requesting a ***Machner*** hearing in the trial court. However, even had Cook filed the motion, his ineffective assistance claim fails on the merits. "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449, N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Cook must show both: (1) that his counsel's representation was deficient; and (2) that this

deficiency prejudiced him. ***Strickland***, 466 U.S. at 694. We may address the tests in the order we choose.

¶6 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶7 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. If Cook fails to establish prejudice, we need not address deficient performance. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 First, Cook argues trial counsel was ineffective by failing to move the court for suppression of his statements to police. We are not persuaded. At

trial, officers testified that when Cook was arrested and taken to the Sheboygan Police Department, he was given and waived his ***Miranda***[1] rights. The interview was terminated when Cook stated that he did not want to talk further. The next day, while being transported to the Marinette County Sheriff's Department, Cook re-initiated discussion with the officers about the crime by asking if he was going to be charged. The officers told Cook they could not discuss the matter without first giving Cook his ***Miranda*** rights. Cook was consequently re-read his rights. Cook waived his rights and was told that he had not yet been charged.

¶9 Upon arrival at the Marinette County Sheriff's Department, the interrogation continued without giving Cook ***Miranda*** rights. Cook stated that he had been in Marinette County and in the company of witnesses on the day of the crime, but continued to deny involvement in the crime.

¶10 Citing ***State v. Hartwig***, 123 Wis. 2d 278, 366 N.W.2 866 (1985), Cook argues that his right to silence was not "scrupulously honored" by the officers during his transport to Marinette County. The ***Hartwig*** court acknowledged that in ***Michigan v. Mosley***, 423 U.S. 96 (1975), the United States Supreme Court focused on the following factors in concluding that the interrogation of a defendant was properly resumed and the defendant's right to silence was not violated:

> (1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time. (3) The suspect was given complete ***Miranda*** warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

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[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Hartwig, 123 Wis. 2d at 284. The ***Hartwig*** court recognized, however, that the absence or presence of the ***Mosley*** factors was "not exclusively controlling" and did not establish a test that could be "woodenly applied." ***Id.*** at 284-85. "The essential issue is whether, under the circumstances, the defendant's right to silence was scrupulously honored." ***Id.*** at 285. Here, Cook initiated discussion in the car by asking the officers whether he was being charged. An accused person may initiate contact with authorities without consulting his or her attorney. *See* ***Edwards v. Arizona***, 451 U.S. 477, 485 (1981). Cook was consequently read and waived his ***Miranda*** rights for a second time. Under these circumstances, we conclude that Cook's right to silence was scrupulously honored.

¶11 To the extent Cook intimates that he should have been read his ***Miranda*** rights for a third time upon arrival at the Marinette County Sheriff's Department, Cook provides no authority for the proposition that a suspect must be given his rights every few hours. Moreover, our supreme court has recognized that "where the ***Miranda*** rights were properly administered and where there was then a break in the interrogation, under the totality of the circumstances, it was not necessary to re-administer the ***Miranda*** warnings when it was undisputed that the defendant understood them." ***Grennier v. State***, 70 Wis. 2d 204, 213, 234 N.W.2d 316 (1975). Cook demonstrated that he fully understood his rights when he exercised his right to terminate the interview at the Sheboygan Police Department.

¶12 Cook also mentions, without citation to authority, that "[t]he concern is … also whether … he was prejudiced by the jury being made aware of the defendant's decision to remain silent." This court declines to consider arguments that are unexplained, undeveloped or unsupported by citation to authority. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶13 Ultimately, we conclude that even if counsel was deficient for failing to challenge the admission of Cook's statements, their admission was harmless. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. Cook never confessed to the crime but, rather, admitted to being in the vicinity on the day in question. This was consistent with the defense's claim that Cook drove to the area with John Egerson, backed out of committing the crime, and was replaced by another man with a similar appearance to Cook.

¶14 Second, Cook argues counsel was ineffective for failing to object to the admission of DNA evidence—specifically, that Cook's DNA matched that found on a cigarette butt retrieved from the getaway car. Cook claims that he was prejudiced by disclosure of the DNA results "after the trial had started." The State, however, contends Cook knew well before trial that his DNA had been matched to the cigarette butt. In fact, during opening statements, defense counsel told the jury that this fact was admitted, but that Cook smoked the cigarette in the car a week or two before the crime. Because Cook does not refute the State's claim, it is deemed admitted. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109. Because Cook knew before trial that his DNA had been matched to the cigarette butt, he fails to establish prejudice.

¶15 Third, Cook claims that counsel was ineffective for failing to elicit testimony from Jessica Babic and Ashley Sadowski regarding their respective photo identifications of Cook. At trial, two officers testified as to their firsthand observations during the photo identification. Cook does not explain how he was prejudiced by the officers' testimony but, nevertheless, intimates that Babic and Sadowski should have been examined regarding the photo identifications. At trial, both Babic and Sadowski identified Cook as one of the two perpetrators. The State contends that additional testimony by Babic and Sadowski regarding Cook's

identification would only have served to strengthen the witnesses' in-court identification of Cook. We agree and conclude that counsel's performance in this regard, even if deficient, did not result in prejudice.

¶16 Fourth, Cook argues counsel should have asked for a continuance in order to secure the attendance of David Hall, the man Cook claims replaced him in the crime. To support this defense theory, counsel emphasized Hall's resemblance to Cook by introducing a photo of Hall and questioning witnesses about Hall's general appearance. Counsel further elicited testimony regarding Hall's connection with Egerson and his appearance near the scene of the crime. Cook therefore fails to establish how he was prejudiced by the absence of Hall at trial. As the State aptly points out, "it defies credulity to suggest that Hall, in a Perry Mason moment, would have proclaimed his own guilt and exonerated Cook."

¶17 Finally, Cook claims counsel should have moved for a change of venue because of Cook's race. Cook, however, does not develop this argument and provides no citation to authority in support of his claim. We will not develop an appellant's amorphous and unsupported arguments for him. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

C. New Trial on Grounds of Newly Discovered Evidence

¶18 Cook claims he is entitled to a new trial in the interest of justice, but then proceeds to argue his claim under the standard for newly discovered evidence. In ***State v. Coogan***, 154 Wis. 2d 387, 453 N.W.2d 186 (Ct. App. 1990), this court outlined the criteria for seeking a new trial based on newly discovered evidence, stating that due process requires a new trial where the following factors are met:

> (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue; (4) the evidence is not merely cumulative to the evidence presented at trial; and (5) a reasonable probability exists of a different result in a new trial.

Id. at 394-95. If the newly discovered evidence fails to meet any of these factors, the moving party is not entitled to a new trial. ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997). Here, Cook claims that approximately one month after his trial concluded, the State provided defense counsel with a disk of 241 pages of discovery that had been made available to the district attorney in co-defendant Egerson's case.

¶19 The State argues that Cook has failed to establish that this evidence is material and not otherwise cumulative to the evidence presented at trial. Cook concedes that all of the evidence has not been fully reviewed but, nevertheless, claims some of the evidence raises "issues about Sadowski's relationship with … Egerson," thus affecting Sadowski's credibility. Cook also contends, without more, that evidence of phone records "may" provide an alibi defense. Cook's claims are merely speculative and fail to establish a reasonable probability of a different result. We therefore reject Cook's request for a new trial.

By the Court.—Judgment affirmed.

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