COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2008AP3046-CR **Cir. Ct. No. 2007CF420**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER W. ALSWAGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Roger W. Alswager has appealed pro se from a judgment convicting him after a jury trial of operating a motor vehicle while under

the influence of an intoxicant, fifth or greater offense (OWI), in violation of WIS. STAT. § 346.63(1)(a) (2009-10).[1] The jury also found Alswager guilty of operating a motor vehicle with a prohibited blood alcohol concentration (BAC) of 0.02 grams or more. Because Alswager had a BAC of 0.20 to 0.249, the applicable fine was enhanced by WIS. STAT. § 346.65(2)(g)2.

¶2 In his notice of appeal, Alswager indicated that he was also appealing from various pretrial, trial, and post-trial rulings. In addition, he stated that he was appealing from "orders entered by default or which should be entered in accordance with WIS. STAT. [RULE] 809.30(2)(i)," denying postconviction motions that previously had been filed by him. In his notice of appeal, Alswager stated that a written order denying his postconviction motions had not yet been entered. However, four weeks after Alswager filed his notice of appeal but before the record was transmitted to this court, the trial court entered a written order denying Alswager's postconviction motions. The order stated that the motions were denied "for failure to prosecute." We affirm the judgment of conviction and the order denying postconviction relief.[2]

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

[2] WISCONSIN STAT. § 808.04(8) provides that if the record discloses that an order appealed from was entered after the notice of appeal was filed, the notice shall be treated as filed after that entry and on the date of entry. Alswager contends that, pursuant to WIS. STAT. RULE 809.30(2)(i), his postconviction motions should have been deemed denied by the trial court on November 17, 2008, sixty days after he filed them. He contends that the trial court's failure to rule on his postconviction motions within sixty days of the date he filed them constituted denial of the motions by operation of law. We conclude that, regardless of whether the trial court properly relied on failure to prosecute as grounds for denying Alswager's motions or whether the motions should have been deemed denied based on RULE 809.30(2)(i) before entry of the trial court's order, Alswager's motions for postconviction relief were properly denied. We therefore affirm the order denying postconviction relief. *See* ***State v. Amrine***, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990) (an appellate court may uphold a trial court's ruling on a theory or reasoning not presented in the trial court, and may affirm the trial court if it reached the right result even if it was for the wrong reason).

¶3 Some background is necessary to understand the issues raised by Alswager, most of which relate to Alswager's contention that, on the day of his arrest, he mistakenly took an Ambien pill prescribed to his wife, which caused him to involuntarily drink alcohol and drive while intoxicated. Alswager contends that he is entitled to reversal of his judgment of conviction and the order denying postconviction relief, and remand for a new trial at which the jury is instructed on the defense of involuntary intoxication as set forth in WIS JI—CRIMINAL 755.

¶4 Alswager was arrested for operating a motor vehicle while intoxicated in the late afternoon of April 16, 2007. Testimony at trial indicated that after Alswager failed field sobriety tests, the arresting officer, Michael Ramstack, took him to Waukesha Memorial Hospital, where his blood was drawn. The blood sample was subsequently tested by the Wisconsin State Laboratory of Hygiene (WSLH). Michael Knutsen, a chemist and analyst at the WSLH, testified at trial that he tested the blood sample and that Alswager's BAC was 0.211 g/100 mL.[3]

¶5 Alswager initially retained Attorney Paul Bucher to represent him in the trial court proceedings. According to Alswager, he advised Bucher on July 5, 2007, that he may have mistakenly taken one of his wife's Ambien sleeping pills before his arrest on April 16, 2007. Shortly thereafter, Alswager asked Bucher to have the blood sample that had been drawn at the time of his arrest tested for Ambien. Pursuant to Alswager's request, Bucher arranged to have the blood sample sent to Aegis Sciences Corporation in Tennessee for testing. On

[3] Knutsen's report was also introduced into evidence at trial.

September 18, 2007, Aegis reported that, at a testing threshold of 25 ng/mL, no Ambien was detected in Alswager's blood.

¶6 While the defense was pursuing testing by Aegis, the State moved to adjourn the trial scheduled for September 11, 2007, because Ramstack was unavailable to testify that date. Bucher wrote to the trial court indicating that adjournment was also necessary to accommodate the defense's ongoing blood testing.

¶7 At a status hearing held in the trial court on October 4, 2007, the State moved for an adjournment of the trial scheduled for October 9, 2007, based on the unavailability of the WSLH analyst. Bucher indicated that the defense did not object to the adjournment because Aegis had tested at a higher threshold level than had been indicated before the testing, and the defense was looking into re-testing. The trial court then rescheduled the trial for December 4, 2007.

¶8 On November 21, 2007, Alswager informed Bucher that he wanted to retain new counsel based on what Alswager deemed to be Bucher's mishandling of the Ambien testing. At a November 30, 2007 status hearing, Bucher moved the trial court to withdraw as counsel and requested a ninety-day extension for Alswager to retain new counsel. The trial court stated that it would not grant a ninety-day extension, but set the matter over to December 14, 2007, for Alswager to obtain new counsel. Because Alswager had not yet retained new counsel on the morning of December 14, 2007, the trial court put the matter over to the afternoon, telling Alswager that he had to retain counsel by the afternoon or Bucher would continue to represent him. That afternoon, Alswager informed the trial court that he had retained Attorney Corey Chirafisi. The trial court then rescheduled the trial for February 19, 2008, stating that it would not be adjourned again.

¶9 Ultimately, Chirafisi did not represent Alswager and Alswager retained Attorney Lisa Goldman, who filed a notice of appearance on January 8, 2008. On February 14, 2008, Goldman moved to adjourn the February 19, 2008 trial date, stating that Alswager's blood sample had been sent to Rocky Mountain Laboratory (RML) in Colorado for additional testing and that the test results were not yet available. After the trial court denied the motion, Alswager, by Goldman, moved for reconsideration.[4] Counsel also filed an affidavit of Dr. Robert Lantz, the director of RML, detailing his expert qualifications and attesting that he was well versed in the effects of Ambien on human performance and memory, and would explain to the court its effects on memory and involuntary actions. Lantz attested that RML's analysis of Alswager's blood for Ambien was not yet complete and that he had been served with a subpoena to appear at trial on February 19, 2008, but would be unable to appear due to a conflicting court commitment.

¶10 The trial court denied reconsideration, and the case proceeded to trial on February 19 and 20, 2008. At trial, Alswager testified that he believed he had mistakenly taken an Ambien pill that he had set out for his wife in the early afternoon of April 16, 2007, rather than taking his Naproxen pill, which had a similar size, shape and color. Alswager testified that he remembered nothing from the early afternoon of April 16, 2007, when he was at home, until he woke up in jail at about 10:00 p.m. that night. Although no expert witness testified on Alswager's behalf at trial, the trial court permitted Alswager to testify that Ambien

[4] Alswager, by counsel, also petitioned this court for leave to appeal the trial court's order denying an adjournment, and moved for a stay of trial. Both requests were denied by this court.

can cause memory problems, hallucinations, sleep walking, sleep eating, and sleep driving, and that its effect can differ for different individuals. The trial court also granted Alswager's request to admit the Aegis report indicating that, at a testing threshold of 25 ng/mL, no Ambien was detected in his blood. However, the trial court prohibited additional testimony by Alswager concerning the effects of Ambien, and did not allow him to testify that he was waiting for Ambien testing results from RML, that he had wanted an adjournment of trial to await those results, or that Aegis had initially represented to him that it could test for Ambien at a threshold of 2 ng/mL. The trial court also denied Alswager's request that the jury be instructed on the defense of involuntary intoxication as set forth in WIS JI—CRIMINAL 755. While declining to hold that the defense could never be used in an OWI or prohibited BAC case, the trial court concluded that Alswager had not met his threshold burden of showing a basis for the defense in this case.

¶11 On February 20, 2008, the jury returned verdicts finding Alswager guilty of operating a motor vehicle while intoxicated and with a prohibited BAC. Although Goldman initially continued to represent Alswager in postconviction proceedings, she moved to withdraw as counsel after Alswager filed two pro se motions for postconviction relief on September 18, 2008, without her review and approval. In one motion, Alswager sought a new trial based on newly discovered evidence and in the interest of justice. In the other motion, he sought a new trial based on alleged ineffective assistance of counsel by Bucher. In support of his motions, Alswager filed affidavits previously prepared by Goldman, including an affidavit indicating that RML provided the test results for Alswager's blood to Goldman on February 27, 2008, approximately one week after trial. Alswager also attached an affidavit from Lantz stating that Alswager's blood sample contained Ambien consistent with ingesting one five milligram tablet of Ambien

approximately one to four hours before the collection of his blood sample. In his affidavit, Lantz attested that he could testify that ingesting one five milligram tablet of Ambien "could" render Alswager incapable of knowing the difference between right and wrong and that one side effect of Ambien is consuming and ingesting food and liquids without memory or knowledge at the time of ingestion. Lantz further attested that "while one is under the influence of Ambien, a sleeping medication, one is effectively sleep walking, sleep eating, sleep driving." Alswager also relied on a post-trial report from NMS Labs in Pennsylvania, indicating that his blood sample contained Ambien, and on two juror affidavits, one indicating that the alleged new evidence "may have made a difference in my decision," and the other stating that "evidence of a positive blood test result for Ambien would have created reasonable doubt in my mind."

¶12 On November 7, 2008, the trial court granted Goldman's motion to withdraw and set a review date so that Alswager could decide whether he was going to hire new counsel. Subsequently, in a letter dated November 10, 2008, and at a hearing on November 21, 2008, Alswager stated that he intended to hire new counsel and was not waiving his right to counsel. However, after ignoring the trial court's admonition that he could move this court for an extension of time for deciding the postconviction motions, Alswager also stated at the November 21, 2008 hearing that he "want[ed] the motions to stand" and would proceed pro se. Although the trial court expressed concern about how Alswager would represent himself in presenting his motions, the judge told him to put his waiver of counsel in writing, and stated that he would then be given a motion hearing date in January 2009. However, after the hearing, Alswager sent a letter to the trial court dated November 21, 2008, stating once again that he did not waive his right to counsel and that it was his intent to obtain new counsel.

Inconsistently, he also asked the trial court to enter an order denying his postconviction motions based on WIS. STAT. RULE 809.30(2)(i), alleging that sixty days had passed since the motions were filed. On December 1, 2008, Alswager followed up with a formal motion for entry of an order denying his postconviction motions, contending that he did not request or want the time for deciding his postconviction motions to be extended and that he was entitled to entry of an order denying his postconviction motions pursuant to RULE 809.30(2)(i). He also requested that the order reflect that his postconviction motions were denied without a ***Machner***[5] hearing as had been requested in his postconviction motion alleging ineffective assistance of trial counsel.

¶13 Four days after he filed his motion for entry of an order, Alswager filed his notice of appeal. On December 29, 2008, the trial court entered an order denying Alswager's motions. In its order, the trial court stated that Alswager could not both invoke his right to counsel and insist on proceeding with motions pro se. It then denied the motions for failure to prosecute, but stated that if Alswager hired new counsel or indicated that he had elected to proceed pro se on the motions, he could re-file them.

¶14 Alswager's first argument on appeal is that the trial court erred in denying his postconviction motions without an evidentiary hearing. He reiterates his postconviction claim that he is entitled to a new trial based on newly

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

discovered evidence or ineffective assistance of trial counsel,[6] or in the interest of justice because the real controversy has not been fully tried. Because Alswager's motions and the record provide no basis for granting relief under any of these theories, we affirm the judgment of conviction and the order denying postconviction relief. *See* ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48 (a postconviction motion may be denied by the trial court without a hearing if the motion fails to allege facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief).

¶15 To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that (1) the evidence was discovered after conviction, (2) he 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. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590. If the defendant proves these four criteria, then the court must determine whether a reasonable probability exists that a different result would be reached at trial. ***Id.*** When applying the "reasonable probability of a different outcome" criterion, the standard is 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.***, ¶22.

[6] In his appellant's brief, Alswager alleges that Bucher and Goldman both rendered ineffective assistance. The alleged ineffective assistance of Goldman was not raised in the trial court in the postconviction motions underlying this appeal, and therefore is not before this court on appeal. *See* ***State v. Waites***, 158 Wis. 2d 376, 392-93, 462 N.W.2d 206 (1990); WIS. STAT. § 974.02(2). We address that argument no further.

¶16 The evidence proffered by Alswager regarding the presence of Ambien in his blood is not material to this case and sufficient to establish a reasonable probability that a jury, looking at both the old and new evidence, would have a reasonable doubt as to Alswager's guilt. In contending that the evidence is material, Alswager asserts that the post-trial lab results and the evidence as set forth in Lantz's affidavit would corroborate the defense raised by him at trial; namely, that he believed he had mistakenly taken an Ambien pill prescribed for his wife, and this caused him to involuntarily drink alcohol and drive while intoxicated. Relying on ***State v. Gardner***, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999), he contends that after he mistakenly took the Ambien pill, he became incapable of knowing the difference between right and wrong and therefore involuntarily drank and drove, entitling him to an involuntary intoxication instruction.

¶17 To convict a defendant of operating a motor vehicle while intoxicated or operating a motor vehicle with a prohibited BAC, the State must prove that the defendant operated a motor vehicle on a highway and that he was under the influence of an intoxicant or had a prohibited blood alcohol concentration at the time. *See* WIS JI—CRIMINAL 2660 and 2663.[7] "State of mind" is not an element of these offenses. *See* ***id.*** However, Alswager contends that he has presented sufficient evidence to entitle him to an instruction on the involuntary intoxication defense set forth in WIS. STAT. § 939.42(1), which provides that an intoxicated or drugged condition is a defense if it is involuntarily

[7] In this case, the State also had to prove that Alswager had three or more prior convictions under WIS. STAT. § 343.307(1), a fact to which Alswager stipulated. *See* WIS JI—CRIMINAL 2660C.

produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.

¶18 "The involuntary intoxication standard, rather than being congruent with the lack of specific intent standard for voluntary intoxication, is coextensive with the mental responsibility test set forth in [WIS. STAT.] § 971.15(1)." ***Gardner***, 230 Wis. 2d at 38.[8] The effects of a prescription medication can form the basis for an involuntary intoxication defense. ***Id.*** at 40. However, the involuntary intoxication defense is limited to (1) the defendant's unawareness of what the intoxicating substance is, (2) force or duress, or (3) medically prescribed drugs *taken according to prescription*. ***Id.*** at 41-42. This does not include patients who knowingly take more than the prescribed dosage or mix a prescription medicine with alcohol or other controlled substances, or who voluntarily undertake an activity incompatible with the drug's side effects, like driving after taking a sleeping pill. ***Id.*** at 42.

¶19 Under ***Gardner***, a defendant who knowingly mixes a prescription sleeping pill with alcohol is not entitled to an involuntary intoxication defense. ***Id.*** Moreover, even though ***Gardner*** held that the effects of a prescription medication could give rise to an involuntary intoxication defense, that case did not involve a charge of operating a motor vehicle while intoxicated or with a prohibited BAC.

[8] Except as provided in WIS. STAT. § 939.24(3), which addresses criminal recklessness, an intoxicated or drugged condition of the actor is also a defense if such condition negatives the existence of a state of mind essential to the crime. WIS. STAT. § 939.42(2). The test applicable to this "voluntary intoxication" defense is not the same as the test applicable to the involuntary intoxication defense. ***State v. Gardner***, 230 Wis. 2d 32, 37-38, 601 N.W.2d 670 (Ct. App. 1999). However, an instruction on the voluntary intoxication defense was not requested by Alswager and is inapplicable here because, as noted above, "state of mind" is not an element of the charges of operating a motor vehicle while intoxicated or operating a motor vehicle with a prohibited BAC of more than 0.02 grams. *See* WIS JI—CRIMINAL 2663 and 2660C.

See ***id.*** at 35. This court has found no case law applying the involuntary intoxication defense to an operating while intoxicated charge.[9]

¶20 We recognize that Alswager is arguing that he is entitled to raise an involuntary intoxication defense because, unlike a defendant who knowingly mixes a prescription sleeping pill and alcohol, he did not know he was ingesting Ambien. However, even assuming that an involuntary intoxication defense could apply to the charges of operating a motor vehicle while intoxicated or with a prohibited BAC, as contended by the State, the post-trial evidence proffered here was insufficient to entitle Alswager to a new trial based on newly discovered evidence. Lantz opined only that ingesting one Ambien tablet "could" render Alswager incapable of knowing the difference between right and wrong. While he also opined about potential extreme side effects from Ambien like sleep driving and the unknowing consumption of liquids, nothing in the affidavit of Lantz provided a basis to conclude that Alswager, in fact, experienced such side effects and consumed alcohol and drove without knowing the difference between right and wrong. Because any conclusion that Alswager suffered effects that rendered him incapable of distinguishing between right and wrong would be purely speculative, the new evidence that Alswager ingested one Ambien pill on the day of his arrest was irrelevant and immaterial to the issues in this case. The post-trial

[9] As noted above, the statutes prohibiting operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited BAC do not contain an intent or state of mind element. Often, when a statute makes no reference to intent, it creates a strict liability offense. ***State v. Polashek***, 2002 WI 74, ¶28, 253 Wis. 2d 527, 646 N.W.2d 330. However, we acknowledge that the Wisconsin Supreme Court has held that defenses like entrapment, self-defense, coercion, and necessity may be available in prosecutions for strict liability civil traffic forfeiture offenses. ***State v. Brown***, 107 Wis. 2d 44, 51-56, 318 N.W.2d 370 (1982).

lab results and affidavit of Lantz provide no basis to conclude that there is a reasonable probability of a different result at a new trial.[10]

¶21 For the same reasons, Alswager's remaining postconviction arguments fail. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove prejudice, "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.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial, but on the reliability of the proceedings. ***Thiel***, 264 Wis. 2d 571, ¶20.

¶22 Alswager faults Bucher for failing to diligently pursue the testing of his blood for the presence of Ambien and for representations he made to Alswager regarding testing.[11] He contends that Bucher's alleged lack of diligence impaired

[10] In reaching this conclusion, we recognize that Alswager submitted two juror affidavits in support of his postconviction motions. One of the affidavits was vague, indicating only that Alswager's new evidence may have made a difference. Most importantly, jurors may not provide testimony in an inquiry into the validity of a verdict except on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on a juror. ***State v. Miller***, 2009 WI App 111, ¶62, 320 Wis. 2d 724, 772 N.W.2d 188, *review denied*, 2010 WI 5, 322 Wis. 2d 123, 779 N.W.2d 176. The juror affidavits submitted by Alswager therefore may not be used to impeach the jury's verdict or establish the right to a new trial.

[11] Alswager also alleges that his counsel conspired against him. These contentions are so speculative as to be patently frivolous and will be addressed no further.

his ability to negotiate a plea agreement and caused him to go to trial without test results or an expert witness who could testify on the effects of Ambien. However, the material submitted by Alswager in support of his postconviction motions details Bucher's extensive efforts to locate a laboratory that would test Alswager's blood for Ambien. Most importantly, the post-trial testing results and affidavits submitted by Alswager provide no basis to undermine confidence in the outcome of his trial. Alswager therefore failed to set forth any grounds for a court to conclude that he was prejudiced by Bucher's alleged deficient performance. His claim of ineffective assistance of counsel was therefore properly denied. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11 (in analyzing an ineffective assistance claim, this court may choose to address either the deficient performance prong or the prejudice prong, and if we conclude that the defendant has made an inadequate showing with respect to one component, we need not address the other).

¶23 Alswager's contention that he is entitled to a new trial in the interest of justice because the real controversy was not tried is equally unavailing. The real controversy has not been fully tried if a jury has not been given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial. ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436. A trial court's failure to instruct the jury on a particular defense may also result in the real controversy not being tried. *See* ***State v. Ambuehl***, 145 Wis. 2d 343, 367, 425 N.W.2d 649 (Ct. App. 1988). However, for the reasons already discussed, the post-trial lab reports and expert opinion relied upon by Alswager regarding his ingestion of Ambien is not of such significance as to

justify a new trial on the ground that the real controversy has not been fully tried, nor would it entitle him to an involuntary intoxication instruction.

¶24 Alswager's next argument is that the trial court erred in denying an adequate adjournment on December 14, 2007, denying him his right to retain counsel of his choice. He further contends that the trial court's denial of his motions for adjournment of trial on February 14 and 19, 2008, deprived him of due process by preventing him from completing blood testing for Ambien prior to trial.

¶25 A motion for a continuance is addressed to the sound discretion of the trial court, and its decision will not be reversed absent a clear showing of an erroneous exercise of discretion. ***State v. Wright***, 2003 WI App 252, ¶49, 268 Wis. 2d 694, 673 N.W.2d 386. The determination of whether the trial court erroneously exercised its discretion must be made based upon the particular facts and circumstances of each individual case. ***Id.*** We will uphold the trial court's decision if the record shows that it in fact exercised discretion and there is a reasonable basis for its decision. ***Schwab v. Baribeau Implement Co.***, 163 Wis. 2d 208, 215, 471 N.W.2d 244 (Ct. App. 1991).

¶26 Based upon the record, we conclude that the trial court acted within the scope of its discretion in denying adjournments on February 14 and 19, 2008, and in declining to grant a longer extension on December 14, 2007. This action commenced in April 2007. The record establishes that the trial court reasonably accommodated requests for adjournments of the September 11 and October 9, 2007 trial dates made by the State and joined in by the defense, which indicated that it needed the additional time for ongoing blood testing and re-testing. Although Alswager could have allowed Bucher to pursue re-testing after

receipt of the Aegis results, he chose to discharge Bucher, leading the trial court to adjourn the December 4, 2007 trial date and, on December 14, 2007, to reschedule trial for February 19, 2008. This cannot be deemed an unreasonably short period of time to accommodate Alswager's late-stage request for an extension of time to obtain new counsel. In addition, in light of the adjournments that had already been granted and the fact that Alswager's February 2008 motions for adjournments were based on nothing more than speculation that the RML blood tests would show evidence of Ambien ingestion, the trial court did not erroneously exercise its discretion in denying the February 2008 motions for adjournment.

¶27 Alswager's next argument is that he was denied his right to confrontation when the State did not produce Lindsey Asplund, the phlebotomist who performed his blood draw at Waukesha Memorial Hospital, as a witness at trial. This argument is meritless. To authenticate the blood alcohol test results at trial, the State presented the arresting officer, Michael Ramstack, and a blood/urine analysis form. The blood/urine analysis form was signed by Asplund in the "Specimen collected by" section, and indicated that she was a medical technologist.[12] Ramstack testified that he was at the hospital and observed the technologist draw Alswager's blood, package and seal it, and fill out the blood/urine analysis form. Ramstack indicated that the package containing the blood sample was given to him by the technologist, and was thereafter transmitted to WSLH. The same blood/urine analysis form indicates that the sealed sample was received at WSLH by certified analyst Michael Knutsen, who testified at trial that he tested the blood sample, and that Alswager's BAC was 0.211 g/100 mL.

[12] Paul Bayer, the laboratory manager at Waukesha Memorial Hospital, also testified to Asplund's qualification to perform blood draws.

¶28 The results of a blood alcohol test derived from a properly authenticated sample are admissible at trial under WIS. STAT. § 885.235(1g). ***State v. Disch***, 119 Wis. 2d 461, 463, 470, 351 N.W.2d 492 (1984). The blood must be drawn from the defendant by a qualified person. ***Id***. at 473; WIS. STAT. § 343.305(5)(b). Results are properly authenticated when the chain of custody is proven. *See* ***Disch***, 119 Wis. 2d at 471. The degree of proof necessary to establish a chain of custody is within the trial court's discretion. *See* ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W. 2d 48 (Ct. App. 1986). The record must be sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated, or tampered with. ***Id.***

¶29 Although the person who drew the blood must be authorized to do so under WIS. STAT. § 343.305(5)(b), the statute does not expressly require the attendance of the person who drew the blood as a witness. The evidence here sufficiently established that Asplund performed the blood draw and was qualified to do so. It also clearly established the chain of custody that led to the presentation of the blood alcohol test results at trial. Moreover, Alswager had the opportunity to confront Knutsen, the analyst who performed the blood testing at WSLH and testified as to the results. Nothing more was required.

¶30 Alswager's remaining arguments regarding denial of his right to confrontation also fail. He objects that he did not have the opportunity to confront Lantz and Travis Curtis from the Aegis lab. However, neither Lantz nor Curtis were witnesses at trial and, with the exception of the Aegis lab report, whose admission was requested by Alswager, no evidence was presented concerning testing at RML or Aegis. Lantz and Curtis were merely potential witnesses of Alswager's who did not testify at trial. No confrontation issue is presented.

¶31 Alswager also contends that prosecutorial misconduct occurred because the prosecutor allegedly called RML during the trial to inquire as to whether testing was completed. Even if true, no basis exists to conclude that this conduct had any impact on Alswager's trial. It therefore gives rise to no basis for relief on appeal. *See* ***State v. Stark***, 162 Wis. 2d 537, 547-48, 470 N.W.2d 317 (Ct. App. 1991); WIS. STAT. § 805.18(1), (2). Similarly, Alswager's objection to statements made by the prosecutor concerning the Aegis report provides no basis for relief. The prosecutor accurately stated to the jury that the report did not reveal the presence of Ambien in Alswager's blood. Since Alswager moved for the admission of the Aegis report and the report did not reveal the presence of Ambien, the prosecutor's comment was permissible.

¶32 In his final argument, Alswager alleges that the trial court judge was biased against him, undermining confidence in the outcome of his trial. In his argument, Alswager reiterates objections to rulings and statements made by the trial court at trial, and makes conclusory allegations of bias. His argument is inadequate to provide any basis for relief.

¶33 In conclusion, we express a caution concerning the procedure followed by the trial court after Alswager filed postconviction motions pro se and Goldman's motion to withdraw was granted. We recognize that Alswager was a difficult defendant and that he repeatedly stated that he was not waiving his right to counsel, while failing to take adequate steps to retain new counsel and insisting that denial of his postconviction motions was required by WIS. STAT. RULE 809.30(2)(i). In fact, after stating at the November 21, 2008 hearing that he would proceed pro se, he sent a letter to the trial court reiterating that he did not waive his right to counsel and intended to obtain new counsel, while also demanding that an

order denying his postconviction motions be entered pursuant to RULE 809.30(2)(i).

¶34 The trial court's response when Alswager stated that he would proceed pro se was to tell Alswager to put his waiver of counsel in writing. The proper procedure would have been to conduct a colloquy on Alswager's waiver of his right to counsel when he stated that he intended to proceed pro se, or to set a hearing at which a colloquy could be conducted. This is the proper procedure when a defendant indicates on the record that he wishes to proceed pro se. *See* ***State v. Imani***, 2010 WI 66, ¶22, 326 Wis. 2d 179, 786 N.W.2d 40; ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Because the trial court did not resolve the waiver of counsel issue and denied Alswager's postconviction motions for failure to prosecute without addressing the merits of the motions or holding an evidentiary hearing on them, this court essentially was asked to address the postconviction motions without the benefit of a trial court hearing or a trial court ruling on the substance of the motions. This is not the role of this court.[13] Although we were able to fully resolve the issues presented on appeal based on the existing record, the proper procedure for waiver of counsel must be followed in the future.[14]

[13] We also note that in denying Alswager's postconviction motions for failure to prosecute, the trial court stated that if Alswager hired new counsel or indicated that he elected to proceed pro se on the motions, he could re-file them. However, only this court may extend the time for filing postconviction motions under WIS. STAT. RULE 809.30(2)(h). *See* ***State v. Rembert***, 99 Wis. 2d 401, 406 n.4, 299 N.W.2d 289 (Ct. App. 1980).

[14] In concluding, we also point out that if we have not addressed with specificity some particular aspect of Alswager's many issues and sub-issues, it is because we deem it to lack sufficient merit or importance to warrant individual attention. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

By the Court.—Judgment and order affirmed.

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