COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP416-CR **Cir. Ct. No. 2007CF7**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRICK P. JORDAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Darrick Jordan appeals a judgment of conviction for manufacturing THC, second or subsequent offense, party to a crime, and for maintaining a drug trafficking place, second or subsequent offense, and an order denying his motion for postconviction relief. Jordan argues he received

ineffective assistance of counsel for multiple reasons, he was denied timely access to evidence, he was selectively prosecuted, and the circuit court erroneously denied his suppression motion. We reject Jordan's arguments and affirm. We also sanction Jordan's appellate counsel.

BACKGROUND

¶2 Darrick Jordan has a child together with Paulette Simons, who lived at 1269 Elm Street in Green Bay with the child and Jordan's sister.[1] Simons and Jordan were involved in a domestic dispute at that address and the police were notified. The following day, Simons contacted the police and asked them to escort her back into the residence because she feared Jordan. When they arrived at the home, an officer at the rear entrance encountered two people exiting who stated Jordan was inside. Meanwhile, Jordan, smelling strongly of marijuana, exited the front of the residence and was taken into custody by another officer. The police then conducted a protective sweep of the residence and discovered a marijuana growing operation in a room off the kitchen. Simons informed the police it was solely Jordan's operation.

¶3 According to Jordan, the State's theory was that he lived at 1269 Elm Street and therefore had dominion and control over the marijuana growing

[1] WISCONSIN STAT. RULE 809.19(1)(d) mandates that an appellant's brief shall contain "a statement of facts relevant to the issues presented for review, with appropriate references to the record." In the "factual summary" portion of Jordan's brief, there is but a single citation to the trial transcripts. That citation, however, is to his trial attorney's opening statement, which does not even mention all of the facts which the citation purportedly supports. Thus, not only did Jordan's appellate counsel unnecessarily burden this court by failing to provide adequate record citations, he misled us with the single citation he did provide. We therefore sanction Jordan's appellate counsel and direct him to pay $100 to the clerk of this court within thirty days of the date of this decision. *See* WIS. STAT. RULE 809.83(2).

operation. At trial, several defense witnesses testified Jordan lived at a different address with another person. However, several prosecution witnesses testified Jordan lived at the Elm Street address.

¶4 Simons testified the domestic dispute occurred because she had damaged Jordan's growing operation. The officer who discovered the operation testified lights had been knocked over and some plants were either broken or pulled out by their roots. Simons further testified that Jordan's name was on the lease and that he obtained monetary assistance from the Oneida Tribe to pay for the apartment. Jordan was ultimately convicted on both counts. Following an evidentiary hearing, the circuit court denied Jordan's postconviction motion. Jordan now appeals.

DISCUSSION

¶5 Jordan argues his trial counsel was ineffective for numerous reasons. To demonstrate ineffective assistance, Jordan must show both that counsel's performance was deficient and that he was prejudiced thereby. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Prejudice exists if there is a reasonable probability that the verdict would have been different absent counsel's errors. ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.***

¶6 Although Jordan parades a litany of asserted errors, he focuses primarily on his trial counsel's failure to object to the testimony of a prosecution witness who was not disclosed on the State's witness list. At the commencement of the trial, the court ruled on a defense motion, stating, "Undisclosed witnesses, the prosecution will be prohibited from calling in its case in chief any witnesses not previously disclosed." The State's last witness, Joan Fruzen, testified she

booked Jordan into jail the day of his arrest and he gave the Elm Street address as his residence. Fruzen, however, was not on the State's witness list. The booking form Fruzen prepared, which listed the Elm Street address, was also introduced but not previously disclosed to the defense. That too would have been precluded by court order. Jordan's attorney did not object.

¶7 Jordan argues Fruzen's testimony, along with the booking document, was the most important evidence against him because Fruzen was essentially unimpeachable. Jordan asserts the credibility of the two other witnesses who testified he resided on Elm Street, on the other hand, could be challenged. We conclude, for two distinct reasons, that the failure to object to Fruzen's testimony did not prejudice Jordan.

¶8 First, we agree with the State that there was no prejudice because the State could have simply presented Fruzen as a rebuttal witness to contradict the defense testimony that Jordan did not live on Elm Street. The State is not required to include rebuttal witnesses on its witness list. ***Lunde v. State***, 85 Wis. 2d 80, 91-92, 270 N.W.2d 180 (1978). Additionally, Jordan concedes this issue because he does not respond to the State's rebuttal witness argument in his reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶9 Second, we independently conclude Jordan was not prejudiced because Fruzen's testimony, while potentially damaging, was not critical to the State's case. We are confident the outcome of the trial would have been the same with or without the evidence. Our limited review of the record, in the complete absence of any pertinent facts recited in Jordan's brief, reveals no testimony or other evidence that Jordan lived *exclusively* at a different address. In fact, Jordan

twice states it was the State's contention merely that the Elm Street home was Jordan's *primary* residence.

¶10 Further, the State was not required to prove Jordan resided at the location of the growing operation. Neither of the crimes Jordan was convicted of includes a residency element. The manufacturing statute simply states "it is unlawful for any person to manufacture ... a controlled substance ...." WIS. STAT. § 961.41(1).[2] The maintaining a drug place statute states it "is unlawful for any person knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft or other structure or place, ... which is used for manufacturing [or] keeping [controlled substances] .... WIS. STAT. § 961.42. That statute's application is clearly not limited to a person's residence. In light of the other evidence that Jordan had access to and was growing the marijuana, whether the jury believed he resided exclusively at the Elm Street residence was largely inconsequential.

¶11 Jordan next argues his counsel was ineffective for failing to object to the State eliciting testimony from Marvin Vandehei, a defense witness, that he had a pending charge in addition to his ten criminal convictions. The State argued the pending charge was relevant to show potential bias against the State. On appeal, Jordan argues the inquiry was collateral and solely for the purpose of impeachment. Jordan asserts the improper inquiry prejudiced him because it diminished Vandehei's credibility and he was the witness who provided the strongest evidence that Jordan did not live at the Elm Street home.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶12 We reject this argument for multiple reasons. First, Jordan's argument is not supported by a single reference to legal authority. It is therefore undeveloped and we need not address it. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Second, on the merits, counsel was not deficient because bias is not a collateral issue and extrinsic evidence may be used to prove motive to testify falsely against a party. *See* ***State v. Long***, 2002 WI App 114, ¶17, 255 Wis. 2d 729, 647 N.W.2d 884. Third, Jordan would not have been prejudiced by counsel's failure to object because residency at the Elm Street location was not a requisite element of the State's case and there was substantial evidence that the growing operation was Jordan's. Fourth, Jordan's failure to reply to the State's developed arguments, which did provide legal authority, constitutes a concession of the issue. *See* ***Charolais***, 90 Wis. 2d at 109.

¶13 Jordan asserts his counsel was also ineffective for failing to elicit Simons' testimony that she had one criminal conviction. At trial, counsel noted in the jury's absence that he "didn't see any sense in bringing that to the attention of the jury." Jordan, however, fails to apprise this court of any questioning or further explanation of the matter at the postconviction hearing. We first observe that a single conviction is not likely to seriously undermine a witness's credibility. Further, we agree with the State that it would not be an unreasonable strategy to let the jury speculate as to Simons' conviction record, in light of the defense witnesses' records—two had seven prior convictions and another had ten. Drawing the jury's attention to that disparity could just as easily contribute to, rather than diminish, Simons' relative credibility. We therefore conclude the omission was neither deficient nor prejudicial. And again, following Jordan's inadequately developed argument on this issue, he did not reply to the State's arguments. *See* ***id.*** at 109.

¶14 Jordan next sets forth a litany of claimed deficiencies by his trial counsel that he claims cumulatively prejudiced his defense. We reject those arguments because Jordan fails to explain how any of the alleged errors would have been prejudicial. We further reject his argument that trial counsel should have called additional witnesses, because none of those potential witnesses provided affidavits or testimony as to what their trial testimony would have been. As a whole, the arguments set forth in the cumulative prejudice section of Jordan's brief are not sufficiently developed to warrant our consideration. *See* ***Flynn***, 190 Wis. 2d at 39 n.2. And again, following Jordan's inadequately developed arguments, he did not reply to the State's arguments. *See* ***Charolais***, 90 Wis. 2d at 109.

¶15 Having disposed of Jordan's ineffective assistance claims, we next address his assertion he was denied his constitutional right to timely access to evidence. In that regard, we set forth the background and then Jordan's argument—as best we can decipher it. Jordan moved for a speedy trial pursuant to statute. The circuit court accommodated the request and advanced the trial date. The State, however, was not ready to proceed on the new trial date because it had not obtained laboratory test results on the suspected marijuana. The circuit court was willing to grant the State's motion to dismiss without prejudice, but the State intended to refile the charges that same afternoon. Thus, Jordan agreed to move the trial back to the originally scheduled date, and the court released him from custody on signature bond. Jordan argues he therefore had to forego his *constitutional* right to a speedy trial in order to have access to the test results prior to trial.

¶16 The test results were faxed to Jordan's counsel six days prior to trial. Jordan asserts this prevented any meaningful preparation for cross-examination of

the lab analyst and prevented him from conducting independent lab analysis on the plants. Jordan then argues this violated WIS. STAT. § 971.23(1), which requires evidence to be turned over within a reasonable time before trial, which, in turn, means the evidence must be disclosed within a sufficient time for its effective use. ***State v. Harris***, 2004 WI 64, ¶37, 272 Wis. 2d 80, 680 N.W.2d 737.

¶17 Jordan does not develop his claim of a violation of his constitutional right to a speedy trial, either separately or in the context of his timely access to evidence argument. We therefore reject any argument based on that claim. *See* ***Flynn***, 190 Wis. 2d at 39 n.2. Jordan's access to evidence argument similarly fails as undeveloped, because he does not explain how earlier access to the evidence would have had any effect on his trial. *See* ***id.*** Additionally, Jordan forfeited this argument because he does not assert he objected at trial, requested a continuance, or raised the argument in his postconviction motion. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. In any event, the constitutional right to disclosure of evidence is to evidence that is favorable to the accused, *see* ***Harris***, 272 Wis. 2d 80, ¶12, and Jordan could have sought his own scientific testing of the marijuana plants prior to trial, WIS. STAT. § 971.23(5). And again, following Jordan's inadequately developed arguments, he did not reply to the State's arguments. *See* ***Charolais***, 90 Wis. 2d at 109.

¶18 Jordan next argues he was selectively prosecuted based on his gender and the domestic abuse allegation, because Simons, a female and victim of the abuse, lived in the home full time and was not charged. A prosecutor has discretion to determine who to prosecute for a crime. ***State v. Kramer***, 2001 WI 132, ¶14, 248 Wis. 2d 1009, 637 N.W.2d 35. A selection is impermissible only when similarly situated persons are not prosecuted and the defendant is singled out for a discriminatory purpose. ***Id.***, ¶¶18-19. "We review the circuit court's

decision on whether the defendant has established a prima facie case on selective prosecution under the clearly erroneous standard because both prongs of the analysis for selective prosecution (discriminatory purpose and discriminatory effect) essentially involve factual inquiries." ***Id.***, ¶17. Here, the circuit court determined Jordan failed to present a prima facie case.

¶19 The criminal complaint indicates two people told the police Jordan was growing the marijuana, while there is no indication in the record that anyone ever stated Simons was growing it. Simons also told the police the domestic disturbance resulted from her damaging some of the plants, and the officer who discovered the plants corroborated the damage. Additionally, Jordan had a previous conviction for possessing marijuana with intent to deliver, but Simons had no prior drug convictions. Further, Simons essentially led the police to the growing operation when she invited them to the home to escort her back in. These prosecutorial factors support the decision to prosecute Jordan but not Simons, and demonstrate the two were not similarly situated. The circuit court's determination was therefore not clearly erroneous.

¶20 Finally, Jordan argues the circuit court erroneously denied his suppression motion that was based on the officer's warrantless entry and discovery of the marijuana growing operation in the home. The State responds that the officer was authorized to enter the home pursuant to the community caretaker function to ensure Simon's safety by checking whether any more of Jordan's friends were still inside. Jordan did not address the community caretaker function

in his initial brief or reply to the State's argument. We therefore deem the suppression argument conceded.[3] *See* ***Charolais***, 90 Wis. 2d at 109.

By the Court.—Judgment and order affirmed; attorney sanctioned.

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

[3] The only argument addressed in Jordan's reply brief was trial counsel's failure to object to the witness who was not named on the State's witness list, which Jordan asserts was "the most important error that occurred at the trial." Jordan further states, "[t]he remaining issues were adequately briefed in Jordan's opening brief, and Jordan asserts that the interpretation of the law and facts presented in that opening brief is the better and more accurate view of the case." This risky strategy may suffice in some cases, but it does not when, as here, arguments are inadequately developed or the respondent develops a legal argument not discussed in the brief in chief.