COURT OF APPEALS DECISION DATED AND FILED

February 17, 2010

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. 2009AP590-CR

Cir. Ct. No. 2006CF123

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON T. HERRERA,

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. Jason Herrera appeals a judgment convicting him of one count of physical abuse of a child and an order denying his postconviction motion. Herrera argues (1) he was deprived of his right to a public trial and (2) he received ineffective assistance of trial counsel. We affirm.

BACKGROUND

¶2 On February 2, 2006, Herrera was charged with one count of intentional physical abuse of a child. The charge was tried to a jury on May 14 and 15, 2007. Just after the jury was sent to deliberate at 4:37 p.m., the court announced the courthouse doors would be locked. The courthouse's exterior doors are automatically locked each day by computer at approximately 4:45 p.m. None of the parties objected to the locked doors. The jury returned with its verdict at 7:13. The court read the verdict, granted judgment in favor of the State, and scheduled a sentencing hearing.

¶3 Herrera later moved for postconviction relief, arguing he was deprived of his Sixth Amendment right to a public trial because the courthouse doors were locked while the jury deliberated and the court read the verdict. He also contended his trial counsel was ineffective for failing to object to the locked doors. The circuit court denied the motion, concluding Herrera's attorney was not ineffective because there was no Sixth Amendment violation.

DISCUSSION

¶4 On appeal, Herrera again argues he was deprived of his rights to a public trial and the effective assistance of counsel. The State counters that Herrera forfeited his Sixth Amendment argument because he did not object to the locked doors at trial, and that Herrera's ineffective assistance argument must fail because Herrera concedes he cannot prove he was prejudiced by the alleged error.

1. Forfeiture

¶5 The State argues Herrera forfeited his argument that he was deprived of his right to a public trial because he did not object when the court announced

the courthouse doors would be locked. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶6 Herrera does not directly respond to this argument. We deem unrefuted arguments conceded. ***Charolais Breeding Ranches, LTD v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶7 Herrera's failure to address the State's forfeiture argument is particularly problematic because he simply ignores recent, critical case law on this issue. In ***State v. Ndina***, 2007 WI App 268, 306 Wis. 2d 706, 743 N.W.2d 722 *aff'd* 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, the defendant argued he was deprived of the right to a public trial because the circuit court excluded some of his family members from the courtroom during his trial. We concluded the defendant forfeited his right to direct appellate review of his Sixth Amendment claim because he failed to object during the trial. ***Id.***, ¶23. On review, our supreme court observed that case law is divided about whether the forfeiture rule applies to alleged public trial violations, but declined to resolve this discrepancy and affirmed our decision on other grounds. ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. The concurrence argued the majority should simply have applied the forfeiture rule. ***Id.***, ¶121 (Prosser, J. concurring).

¶8 Although the State discusses ***Ndina*** at length, Herrera neither acknowledges this crucial case, nor replies to the State's argument it supports applying the forfeiture rule here. We will not develop an argument for Herrera. *See* ***State v. West***, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993). We therefore conclude Herrera has conceded the argument that the forfeiture rule applies to his Sixth Amendment claim. *See* ***Charolais***, 90 Wis. 2d at 109.

2. Ineffective Assistance of Counsel

¶9 Although a defendant whose attorney does not object to an alleged error at trial generally forfeits direct appellate review of that issue, the defendant may challenge the failure to object within the context of an ineffective assistance of counsel claim. *See* ***Ndina***, 306 Wis. 2d 706, ¶12. A defendant alleging ineffective assistance of counsel must show his or her attorney's performance was both deficient and prejudicial. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. We may address either prejudice or deficient performance first; if we determine the defendant has made an inadequate showing on one, we need not address the other. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

¶10 Herrera acknowledges a defendant claiming ineffective assistance of counsel must show both deficient performance and prejudice, but he explicitly concedes he cannot show prejudice. Instead, he contends, without reference to legal authority, that he does not need to make this showing because of the nature of the right allegedly infringed.[1] Because he has provided no legal authority for this argument, we decline to consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1993) ("Arguments unsupported by references to legal authority will not be considered."). Herrera's concession he cannot show

[1] In his reply brief, Herrera provides citations to authority for the idea that he does not need to show prejudice to succeed on a direct appeal of his Sixth Amendment claim, but he nowhere provides authority that he need not show prejudice to succeed on his ineffective assistance claim. Nor does he argue any of the authority he cites supports his argument that prejudice is not required for an ineffective assistance of counsel claim based on a public trial violation.

prejudice is therefore deemed a concession his ineffective assistance argument is without merit.

By the Court.— Judgment and order affirmed.

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