COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP987-CR **Cir. Ct. No. 2008CF195**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVE JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge.[1] *Affirmed*.

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

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[1] At various times the Honorable William Sosnay, the Honorable M. Joseph Donald, and the Honorable Dennis R. Cimpl presided over this case. However, Judge Cimpl presided over trial and entered the judgment of conviction.

¶1 BRENNAN, J. Steven Johnson, *pro se*, appeals a judgment of conviction entered after a jury found him guilty of robbery by threat of force pursuant to WIS. STAT. § 943.32(1)(b) (2007-08).[2] Johnson sets forth numerous grounds for his appeal, all of which are wholly without merit. For the reasons which follow, we affirm.

BACKGROUND

¶2 On January 8, 2008, Milwaukee Police Officer Steven Strasser arrested Johnson at the Marquette University Law School ("MULS") library. Officer Strasser did not have a warrant for Johnson's arrest, but in an affidavit filed the day of the arrest, Officer Strasser set forth the following as probable cause for Johnson's arrest:

> On 1-5-08 at 1200PM, a [black male] entered the TCF bank located at 700 W. State [Street]. The [black male] actor displayed a wood cane and demanded money from the teller, a Alisha Harvey…. The [black male] obtained $1,117.00 from the teller and fled the scene. The robbery was captured on video surveil[la]nce. This video was shown to [Johnson]'s girlfriend, a Rhonda Holmes…. Holmes identified the actor robbing the TCF Bank as her boyfriend, a Steve Johnson ([black male] 2-24-55). On 1-8-08 at 229PM, we (Sqd 3169 P.O. Strasser and Richard Litwin), located Johnson at 1103 W. Wisconsin [MULS library] and placed him in custody. Johnson also had above listed warrants.

¶3 A few days later, the State filed a criminal complaint, charging Johnson with one count of robbery by threat of force. In support of the charge, the complaint described the statements that Alisha Harvey, the teller at the bank, made

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[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

to police immediately following the robbery. According to the complaint, Harvey told police that:

> an individual entered the bank … where she was working. The individual had his face partially covered by a mask, came up to her teller window, and slammed an item that she believed may have been a cane or some other type of weapon on the top of her desk and demanded money. She stated that she opened [t]he drawer and the defendant then took the money from her presence and she allowed him to do so because of his conduct threatening force against her.

The complaint also relied on Johnson's admissions to police after his arrest.[3] According to the criminal complaint, Johnson told police that:

> he had in fact gone to the [bank] because he needed money. He stated that he had taken a plastic type mat, had rolled it up so that it may have appeared to be a cane or another weapon, slammed it on the counter at the … bank and demanded money from the teller. He stated that the teller did in fact turn money over to him and that when he exited the bank, an alarm went off and he ended up throwing part of the money to stop the alarm and the rest of the money was used for the purchases of drugs.

¶4 Following extensive pretrial proceedings, during which Johnson at times represented himself and at other times was represented by counsel, and during which Johnson filed numerous pretrial motions, the case went to trial. The jury: (1) watched the surveillance video taken by the bank during the robbery; (2) heard testimony from Rhonda Holmes, a friend of Johnson's, who identified him as the individual in the surveillance video; (3) heard testimony that DNA

[3] Johnson's confession was recorded and played to the jury. Both the recording and a transcript of the recording were exhibits entered into evidence in the trial. However, neither of those documents were included in the record on appeal.

evidence linked Johnson to the robbery; and (4) heard Johnson's tape recorded confession to police.[4] Following the close of evidence, the jury found Johnson guilty.

¶5 Johnson now appeals.

¶6 More facts are included in the discussion as relevant and necessary to resolve Johnson's claims.

DISCUSSION[5]

¶7 On appeal, Johnson argues that: (1) his warrantless arrest was unconstitutional; (2) he was denied prompt judicial determination of probable cause for his warrantless arrest; (3) the criminal complaint is unconstitutional; (4) Holmes's out-of-court identification was unconstitutional; (5) he was improperly denied his right to an arraignment; (6) he was improperly denied his right to self-representation; (7) he was improperly denied his right to confront and cross-examine Harvey, the bank teller, when she did not testify at trial; (8) he was improperly denied his right to effective assistance of counsel; and (9) the State

[4] Many more witnesses testified before the jury. We merely summarize that evidence necessary to support the jury's verdict.

[5] At the outset, we note that with respect to each of the issues he raises, Johnson includes a numbered list of items which he asserts contains undisputed facts that this court is required to accept as true. Upon review, however, we determine that Johnson's list includes many disputed facts and assertions of law. Despite Johnson's claims to the contrary, these "facts" are not binding upon the court.

waived its right to argue against Johnson's claims before this court. We address each argument in turn.[6]

I. Johnson's warrantless arrest did not violate his constitutional rights.

¶8 Johnson argues that the trial court erred in denying his motion to suppress because: (1) the post-arrest affidavit filed by Officer Strasser contained materially false statements and did not establish the existence of probable cause for his arrest; and (2) his warrantless arrest violated his constitutional right to privacy in the MULS library. We disagree.

¶9 When we review a trial court's decision with respect to a motion to suppress, we uphold the trial court's findings of fact unless those findings are clearly erroneous. ***State v. Horngren***, 2000 WI App 177, ¶7, 238 Wis. 2d 347, 617 N.W.2d 508. However, we review the trial court's application of constitutional principles to the facts *de novo*. ***Id.***

¶10 Under both the United States and Wisconsin constitutions, a warrantless arrest must be supported by probable cause. ***State v. Lange***, 2009 WI 49, ¶19 & n.6, 317 Wis. 2d 383, 766 N.W.2d 551. "Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant

[6] Johnson sets forth twelve numbered issues for appeal in the section of his brief aptly entitled "Issues on Appeal" (capitalization omitted), which we summarize in the nine issues listed here. To the extent that Johnson raises other issues throughout his brief that we do not address, we conclude that such issues are inadequately briefed and lack discernable merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

probably committed … a crime." ***State v. Nieves***, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125.

¶11 The form affidavit, submitted by Officer Strasser, stated as follows:

> On 1-5-08 at 1200PM, a [black male] entered the TCF bank located at 700 W. State [Street]. The [black male] actor displayed a wood cane and demanded money from the teller, a Alisha Harvey…. The [black male] obtained $1,117.00 from the teller and fled the scene. The robbery was captured on video surveil[la]nce. This video was shown to [Johnson]'s girlfriend, a Rhonda Holmes…. Holmes identified the actor robbing the TCF Bank as her boyfriend, a Steve Johnson ([black male] 2-24-55). On 1-8-08 at 229PM, we (Sqd 3169 P.O. Strasser and Richard Litwin), located Johnson at 1103 W. Wisconsin [MULS library] and placed him in custody. Johnson also had above listed warrants.

¶12 The statement demonstrates that at the time he arrested Johnson, Officer Strasser had a video of a man matching Johnson's description robbing a bank and an acquaintance of Johnson's had identified him as the man in the video. The video, coupled with the identification, is enough evidence to "lead a reasonable police officer to believe that [Johnson] probably committed … a crime." *See* ***id.*** In other words, Officer Strasser had probable cause to arrest Johnson without a warrant.

¶13 Johnson argues that Officer Strasser's affidavit is "intentionally [and] materially false," but he points to no evidence in the record in support of his claim. His citations to the affidavit itself do not demonstrate that Officer Strasser was lying. Therefore, we do not address that argument. *See* ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988) (We do not consider arguments that are undeveloped and unsupported by citations to authority or the record.).

¶14 Johnson also claims that his warrantless arrest violated his constitutional rights because he had a reasonable expectation of privacy at the MULS library, demonstrated by the fact that he "had a property interest in the premises because [his] books, book bag, lap top computer, and cell phone were inside the library," and because the library door is locked and he had to show his driver's license to get inside. In so arguing, Johnson appears to equate his rights inside the MULS library to those extended to his home under the Fourth Amendment of the United States Constitution, and article 1, section 11 of the Wisconsin Constitution. Johnson misreads the law.

¶15 Unlike in a private home, a warrantless arrest is permitted in a public place when the arresting officer has probable cause to arrest the individual. *See* ***State v. Roberson***, 2005 WI App 195, ¶15, 287 Wis. 2d 403, 704 N.W.2d 302; ***State v. Larson***, 2003 WI App 150, ¶13, 266 Wis. 2d 236, 668 N.W.2d 338. A place is public where an individual has no expectation of privacy, in which an individual is "'not merely visible to the public but [is] exposed to public view, speech, hearing, and touch.'" ***Larson***, 266 Wis. 2d 236, ¶13 (citing ***United States v. Santana***, 427 U.S. 38, 42 (1976)). The MULS library, while part of a private institution, was open to the general public and was not a place in which Johnson had any reasonable expectation of privacy. Consequently, his constitutional rights were not violated.

II. Johnson was granted a prompt probable cause hearing.

¶16 Next, Johnson claims that his constitutional rights were violated when he was not brought in front of a judge for a probable cause hearing within forty-eight hours of his arrest. Our review of the record reveals that a probable cause hearing was held in a timely manner.

¶17 An accused detained pursuant to a warrantless arrest has a Fourth Amendment right to a hearing within forty-eight hours of his or her arrest to determine whether probable cause exists for the arrest. ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991). The accused, however, does not have a right to be present during the hearing. ***State v. Evans***, 187 Wis. 2d 66, 86, 522 N.W.2d 554 (Ct. App. 1994). Whether a probable cause hearing was promptly held is a question of law that we review *de novo*. ***Id.***

¶18 The record shows that Johnson was arrested on January 8, 2008, at 2:29 p.m. The court entered a written determination that probable cause had been established on January 10, 2008, at 11:30 a.m., less than forty-eight hours after Johnson's arrest. In other words, a probable cause determination was made within the timeframe set forth by ***Riverside***. *See* ***id.***, 500 U.S. at 56.

III. The complaint comported with the statutory requirements and was properly filed.

¶19 Johnson contends that the criminal complaint should have been dismissed because: (1) it was based upon hearsay and not the personal knowledge of the complaining officer; and (2) it was never filed. Both arguments are without merit.

¶20 A "complaint is a written statement of the essential facts constituting the offense charged." WIS. STAT. § 968.01(2). A complaint can be based on hearsay information, however, "there must be something in the complaint, considered in its entirety and given a common sense reading, which shows why the information on which belief is based should be believed." ***Ruff v. State***, 65 Wis. 2d 713, 719, 223 N.W.2d 446 (1974). Furthermore, a criminal complaint is sufficient when it recites that a participant in the crime has admitted to his

participation in the charged offense. ***Id.*** at 720. The sufficiency of a criminal complaint is a question of law that we review *de novo*. ***State v. Adams***, 152 Wis. 2d 68, 74, 447 N.W.2d 90 (Ct. App. 1989).

¶21 Here, the complaining officer based the complaint on information obtained from Harvey (the teller at the scene of the robbery) and on Johnson's confession.

¶22 Harvey's statements were based on her personal observation of Johnson entering the bank, slamming an object on the counter, demanding and taking money, and on her personal observations of Johnson's appearance. Such personal, first-hand observations render her account highly reliable.

¶23 Johnson's confession was similarly based on his own personal observation and recollection of the events that unfolded at the bank and is highly reliable because of its incriminating status as an admission against interest. That Johnson now wishes to revoke his confession does not mean that the complaining officer could not rely on it for purposes of the criminal complaint.[7]

¶24 In summary, the complaint properly sets forth facts supporting the robbery charge. Furthermore, Johnson points to no evidence in the record demonstrating that the statements in the complaint are false, much less that the

[7] Throughout his brief, Johnson makes several passing references to his confession, seemingly contending that he was not read his ***Miranda*** rights and that his confession was otherwise coerced. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). However, he does not set forth this issue in his lengthy list of "Issues on Appeal" (capitalization omitted) nor does he elaborate upon his claim, beyond making bold, unsubstantiated assertions. As we have stated previously, we do not address issues that are inadequately briefed and lack discernable merit. *See* ***Pettit***, 171 Wis. 2d at 646.

complaining officer purposefully included false information in the complaint. *See* ***Lechner***, 145 Wis. 2d at 676.

¶25 Johnson's claim that the complaint was never filed is also contradicted by the record. While he is correct that the copy of the complaint included in the record does not bear a filing stamp, the circuit court docket entries show that the complaint was in fact filed on January 13, 2008.

IV. Johnson has not demonstrated that Holmes's out-of-court identification was improperly suggestive.

¶26 Johnson next states that Holmes's out-of-court identification was based solely on "his arms" and is therefore unconstitutional pursuant to ***Neil v. Biggers***, 409 U.S. 188 (1972). We disagree.

¶27 ***Neil*** addresses the due process rights implicated by out-of-court identifications. *See* ***id.*** at 198. To demonstrate that an out-of-court identification violated due process, a defendant must first prove that the identification was impermissibly suggestive. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). We review an order denying suppression of an out-of-court identification pursuant to a mixed standard of review. *See* ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. We uphold the trial court's factual findings unless they are clearly erroneous, and we independently determine whether the identification was impermissibly suggestive, and therefore violates due process of law. *See* ***id.***

¶28 Johnson challenges Holmes's out-of-court identification. Holmes, a friend with whom Johnson lived from November 2007 through early January 2008, testified at trial that on the day of the bank robbery Johnson had taken her car without her permission. She identified the individual in the bank surveillance

video as Johnson, in considerable part relying upon the fact that Johnson was wearing a hat that her mother had given her, which was in her car on the morning of the robbery. She also recognized the shirt that Johnson was wearing as one he had been wearing the night before the robbery.

¶29 Johnson misrepresents the facts when he states that Holmes's identification was based solely upon his arms. Holmes also testified that she recognized Johnson from the video based on several items of clothing. But regardless, Johnson does not claim that the police acted in an inappropriate manner when asking Holmes to identify the individual in the surveillance video; in other words, he does not argue that the identification was impermissibly suggestive. *See* ***Mosley***, 102 Wis. 2d at 652. Because he does not assert that the identification was unduly suggestive, his claim fails.

V. Johnson was properly arraigned pursuant to WIS. STAT. § 971.05.

¶30 Next, Johnson maintains that he was not properly arraigned pursuant to WIS. STAT. § 971.05. His claim is without merit.

¶31 When a defendant is charged with a felony, WIS. STAT. § 971.05 requires that an arraignment be held before the trial court. During the arraignment: (1) if the defendant appears without counsel, the defendant should be advised of his or her right to counsel; (2) the district attorney shall deliver to the defendant a copy of the information; (3) the district attorney shall read the information to the defendant unless the defendant waives the reading; and (4) the defendant shall enter his or her plea. *See* ***id.*** Contrary to Johnson's claim, all those requirements were met here.

¶32 On January 22, 2008, Johnson appeared in person and with counsel for a preliminary hearing before a court commissioner. The State presented one witness, Milwaukee Police Detective Ralph Spano, who testified to taking Johnson's confession. After the court commissioner ruled that probable cause for a bindover had been established, the court conducted a routine arraignment. The defense was given a copy of the information and a packet of discovery from the State, and Johnson's counsel stated: "Waive its reading. Enter a plea of not guilty." Thus, the requirements of WIS. STAT. § 971.05 were met.

VI. Johnson was not denied his constitutional right to self-representation.

¶33 Johnson argues that the trial court did not explicitly find that he was "'incompetent' to proceed pro se on the issue of DNA [and,] therefore, as a matter of law, [his] conviction must be reversed." The State counters that because Johnson was not prepared on the issue of DNA evidence, and because the trial court could have concluded that Johnson's intent was to postpone the proceedings, the court's holding "reflected a fair exercise of the court's discretion to accommodate Johnson's right to self-representation with the fair administration of justice." We agree with the State.

¶34 Article I, section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution guarantee both a criminal defendant's right to counsel and the right to defend oneself. ***State v. Klessig***, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716 (1997). The Wisconsin Supreme Court has noted "the apparent tension between these two constitutional rights," stating "'that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the

assistance of counsel.'" ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40 (citation omitted).

¶35 In order to ensure that the right to counsel is upheld, before a defendant is permitted to represent himself or herself, "the [trial] court must ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** "If the [trial] court finds that both conditions are met, the court must permit the defendant to represent himself or herself." ***Id.*** Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact which we review independent of the trial court. ***Id.***, ¶19.

¶36 "In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." ***Klessig***, 211 Wis. 2d at 212. "In making a determination on a defendant's competency to represent himself, the [trial] court should consider factors such as 'the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.'" ***Id.*** (citation omitted). However, "[a] defendant of average ability and intelligence may still be adjudged competent for self-representation, and accordingly, a defendant's 'timely and proper request' should be denied only where the [trial] court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense.'" ***Imani***, 326 Wis. 2d 179, ¶37 (citation omitted).

¶37 Almost immediately after he was arraigned and although he was represented by counsel, Johnson began filing motions on his own behalf, including several asking the trial court to permit him to proceed *pro se*. Following a hearing

in September 2008, the trial court granted Johnson's motion but appointed standby counsel.[8]

¶38 In May 2009, the State filed a motion asking the trial court to reconsider its decision permitting Johnson to proceed *pro se* because Johnson had recently filed a number of motions that the State believed demonstrated he was not competent and because the issue of DNA evidence had arisen since the court's previous decision, an issue that the State argued Johnson was not competent to handle. During a motion hearing that same day, the trial court granted the State's motion for reconsideration,[9] stating:

> We now have the specter of DNA evidence. In my brief colloquy with Mr. Johnson, he doesn't know what DNA stands for, he doesn't know how to attack DNA evidence; there are things that only an experienced lawyer would know what to do and I am frankly worried, if I allow him, that it will be a disadvantage to him and his rights.
>
> I am also deeply disturbed by the motion that he filed on April 28, it had no basis in law, it had no basis in fact. For those reasons, I am going to reconsider the decision … and I am not going to allow Mr. Johnson to represent himself in this matter any more.

¶39 In August 2009, on the eve of trial, Johnson again asked the court to allow him to proceed *pro se*, and his counsel moved to withdraw. The trial court asked Johnson if he had done any research on DNA evidence since the May 2009 hearing. Johnson responded that he had "just recently received the DNA report …

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[8] Judge Sosnay originally denied Johnson's motion to proceed *pro se*. After the case was transferred to Judge Donald, Johnson filed another motion to proceed *pro se*, which Judge Donald granted in September 2008.

[9] Judge Cimpl was presiding over the case by this time.

two days ago" and that he "didn't even know the State was going to use DNA," even though DNA evidence had been discussed at length during the May 2009 hearing and was the reason the court had prohibited Johnson from representing himself. Johnson further stated that he was not prepared to go to trial on the DNA evidence at that time. The trial court then gave Johnson the option of representing himself on all matters except DNA. Johnson refused the court's compromise, became belligerent, and refused to be physically present in the courtroom for the remainder of the hearing and for trial. Consequently, the trial court denied his motion.

¶40 Johnson had almost four months after the May 2009 hearing to familiarize himself with DNA evidence and to assist his counsel in preparing for trial. Instead, he sat on his hands and told the court in August 2009 that he was unaware that DNA evidence was at issue, despite having been ordered by the court to give a DNA sample in February 2009 and despite discussing his competency to defend against DNA evidence during the May 2009 hearing. Johnson's misrepresentation to the court demonstrated an inability to grasp basic courtroom decorum and ethics, and suggested that his desire to represent himself was an attempt to delay court proceedings and interfere with the administration of justice. That Johnson's desire to represent himself was perhaps not sincere was confirmed by his refusal to represent himself on all issues but DNA, and his belligerent behavior towards the court after its ruling. *See* ***Hamiel v. State***, 92 Wis. 2d 656, 672, 285 N.W.2d 639 (1979) ("'[T]he right to counsel cannot be manipulated so as to obstruct the orderly procedure for trials or to interfere with the administration of justice.'") (citation and emphasis omitted). In sum, Johnson's constitutional right to self-representation was not denied.

VII. Johnson was not denied his right to confront a witness nor was he denied his right to a fair trial.

¶41 Johnson alleges that: (1) he was denied his right to confront and cross-examine Harvey, the bank teller, when the trial court permitted into evidence Harvey's out-of-court statements through the testimony of Tricia Kudla, another bank employee; and (2) he was denied his right to a fair trial when Harvey did not testify. We disagree.

¶42 WISCONSIN STAT. § 908.01(3) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Although the decision to admit or exclude evidence is generally a matter of discretion for the trial court, we review the application of the hearsay rules to undisputed facts *de novo*. ***State v. Peters***, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991).

¶43 Johnson argues that the trial court permitted hearsay testimony into evidence when Kudla testified to the following:

> Q … At any point in time did TCF Bank -- any of the agents of TCF Bank give consent to anyone to commit a robbery over there at the TCF Bank at the MATC in downtown Milwaukee?
>
> ….
>
> [A] No.
>
> ….
>
> Q Are you authorized to speak on behalf of the TCF Bank as a corporation?
>
> A Yes.

> Q And on behalf of the TCF Bank, the corporation, did the bank give consent to anyone to rob the specific branch that was robbed back on January 5th, 2008?
>
> A No.

¶44 To the extent that Kudla's testimony implies that the teller, Harvey, did not consent, there is no violation of Johnson's right to confrontation because: (1) Kudla did not expressly repeat a statement made by Harvey; and (2) ample circumstantial evidence of non-consent exists in the record. Additionally, Harvey's existence was known to Johnson and he could have subpoenaed her but did not. The State did subpoena Harvey, but he did not appear for trial.

¶45 Nor did Harvey's failure to testify deny Johnson of his right to a fair trial. The State presented sufficient evidence during the trial from which the jury could conclude beyond a reasonable doubt that Johnson robbed the bank by threat of force, to wit: surveillance video, Holmes's testimony identifying Johnson in the video, DNA evidence, and Johnson's confession (which the jury was free to accept as true even if Johnson now denies its veracity).

VIII. Johnson did not receive ineffective assistance of counsel.

¶46 Johnson argues that his counsel was ineffective for failing to: (1) move to dismiss the complaint when Harvey did not testify; and (2) object to the jury instructions because without Harvey's testimony the State could not establish the element of property being taken by threatening the use of force. The State counters that Johnson did not receive ineffective assistance of counsel because Harvey was not an essential witness and because an objection to the jury instructions would not have been sustained. We agree with the State.

¶47 A defendant asserting an ineffective assistance of counsel claim must demonstrate that: (1) trial counsel's performance was deficient; and (2) trial counsel's deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a successful ineffective assistance of counsel claim requires that the defendant show both deficiency and prejudice, the court need not address both components of the inquiry if the defendant fails to make a sufficient showing on one. ***Id.*** at 697. Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶48 Whether counsel's performance constitutes ineffective assistance is a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will uphold any factual findings by the trial court unless the findings are clearly erroneous. ***Id.*** However, the ultimate conclusion of whether counsel's performance was deficient and prejudicial, such that it constitutes ineffective assistance, is a question of law that we review independently of the trial court. ***Id.*** at 128.

¶49 As we set forth above, Harvey's eyewitness testimony was not necessary for the jury to find Johnson guilty of robbery with threat of force beyond a reasonable doubt. The jury had ample evidence of the threat of force element, to wit, the robbery video, Holmes's identification testimony, the DNA evidence, and Johnson's confession. Because a motion to dismiss the complaint or an objection to the jury's instructions based upon Harvey's absence would have been wholly without merit, counsel was not ineffective in that regard. *See* ***Toliver***, 187 Wis. 2d at 360.

IX. The State has not waived any of the issues raised on appeal.

¶50 Finally, Johnson states that he filed seven motions before the trial court raising many of the above issues, which the trial court addressed in a hearing on February 23, 2009. Johnson contends that because the State did not file a written brief in opposition to his motions, it has subsequently waived its right to contest these issues now. In support of his argument, he cites to numerous sources, including Milwaukee County Circuit Court Local Rule 365(B) (2008), several state statutes, and numerous Wisconsin cases. None of the sources that Johnson cites stand for the proposition that the State waived its right to raise an argument before the court of appeals because it failed to file a written brief before the trial court.

¶51 First, Milwaukee County Circuit Court Local Rule 365(B) (2008) merely sets forth the time line for responding to an opposing party's motion. It neither mandates a written response nor states that a party waives its appellate rights by not responding in writing.

¶52 Nor do the statutes Johnson cites stand for the proposition he asserts. WISCONSIN STAT. § 802.02(4) discusses a party's failure to respond to the pleadings; it does not address motions. WISCONSIN STAT. § 807.05 states that the parties' agreements and stipulations shall not be binding unless certain statutory requirements are met. Again, the statute does not mention waiver or mandate a written response to motions.

¶53 Finally, the cases cited by Johnson are not on point. *See*, *e.g.*, ***Marsh v. Pugh***, 43 Wis. 597, 1 (1878) (addressing averments to the pleadings); ***Czap v. Czap***, 269 Wis. 557, 560, 69 N.W.2d 488 (1955) (finding a stipulation made in open court binding on the parties); ***State v. Van Camp***, 213 Wis. 2d 131,

141-44, 569 N.W.2d 577 (1997) (discussing waiver of constitutional rights in the context of a plea waiver); ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (issues raised on appeal that are not addressed are deemed conceded).[10]

¶54 In summary, the State has not waived its legal arguments on appeal.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[10] We do not include in our summary those cases that Johnson cites that are unpublished and were decided before July 2009 or those that he cites incorrectly. *See* WIS. STAT. RULE 809.23(3). We also note that our summary is based on the court's best guess as to which portion of the cases Johnson refers to because he does not provide pinpoint citations.