COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1960-CR **Cir. Ct. No. 2008CF2860**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELVIN L. CRENSHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: KEVIN E. MARTENS and PATRICIA D. McMAHON, Judges.[1] *Affirmed*.

[1] The Honorable Kevin E. Martens presided over trial and entered the judgment of conviction. The Honorable Patricia D. McMahon presided over all postconviction motions. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

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

¶1 BRENNAN, J. Kelvin L. Crenshaw appeals from a judgment of conviction entered following a jury trial and orders denying his motions for postconviction relief. The jury found Crenshaw guilty of first-degree reckless injury by use of a dangerous weapon, as a habitual criminal; felon in possession of a firearm, as a habitual criminal; and possession of a short-barreled rifle, as a habitual criminal. Crenshaw raises the following issues on appeal: (1) that he received ineffective assistance of trial counsel; (2) that his convictions were multiplicitous and violated his constitutional protections against double jeopardy; (3) that the trial court erroneously denied his motion for postconviction discovery of DNA evidence; and (4) that the trial court erred in adopting the State's brief *in toto* when it denied his second postconviction motion. We affirm.

BACKGROUND

¶2 Karl Peterson testified that on June 1, 2008, he was outside walking two puppies, a boxer and a pit bull, when he was passed by an individual riding a bicycle. The next thing Peterson knew, a man, later identified as Crenshaw, walked up to him, stuck a gun in his face, and shouted: "hey, mother fucker, give it up, old school." Peterson scrambled in an effort to give Crenshaw what he wanted when Crenshaw shot him twice—once in the chest and once in the bicep. Peterson then struggled with Crenshaw and successfully grabbed the gun away from him. Immediately after Peterson wrestled the gun away from Crenshaw, the police arrived, and gave Peterson medical attention. Peterson recalled that the robber was wearing a black hooded sweatshirt and orange shoes.

¶3 Sergeant Christopher A. Kraft testified that when he arrived at the scene of the crime he observed two men on the street. One was Peterson, who was sitting on the curb in a bloody white T-shirt. The other was an unidentified witness who simply told Sergeant Kraft: "I think this man's been shot." Sergeant Kraft also observed a rifle, a tan or orange shoe, a dirty sock, and a black hooded sweatshirt. The gun recovered from the scene was later identified as a modified rifle, in that the stock on the rear of the weapon and the barrel had both been cut shorter. The orange shoe appeared to have been chewed on.

¶4 Officer Wesam Yaghnam testified that he was one of the police officers on the scene looking for the gunman. While canvassing the area, he heard a chain-link fence move, and used his flashlight to find Crenshaw hiding in some brush. Officer Yaghnam instructed Crenshaw to come out, but Crenshaw refused. Officer Yaghnam and another officer then approached Crenshaw. Officer Yaghnam observed that Crenshaw had a dog leash wrapped around his leg and foot, that the leash was caught on the top of the chain-link fence, and that Crenshaw had a puncture wound on his bare foot. Officer Yaghnam also noticed that Crenshaw was missing a shoe and sock on his right foot, but that he was wearing a sock and a "yellow and red or orange" shoe on his left foot. The officer cut the leash to release Crenshaw from the chain-link fence and took him into custody. Crenshaw was taken to the hospital.

¶5 Crenshaw was charged with: (1) first-degree reckless injury by use of a dangerous weapon, as a habitual criminal; (2) attempted armed robbery by use of force, as a habitual criminal; (3) felon in possession of a firearm, as a habitual criminal; and (4) possession of a short-barreled rifle, as a habitual criminal.

¶6 During her opening statement at trial, Crenshaw's counsel told the jury that, on the day of the attack, Peterson was walking down the street with the rifle and the puppies and he attempted to rob Crenshaw. However, later in the trial, Crenshaw waived his right to testify, and, therefore, did not explain to the jury his version of events. Crenshaw told the trial court that he understood the legal rights he was waiving by not testifying, that no one had threatened him or promised him anything for not testifying, and that the decision not to testify was his own, made after conferring with his trial counsel. Crenshaw was then given an additional opportunity to speak with his counsel, which he did, before ultimately signing a form entitled "Waiver of Right to Testify." (Some capitalization omitted.)

¶7 Before closing arguments, the State moved to bar Crenshaw from arguing to the jury during closing that Peterson was the aggressor. The trial court upheld the motion, stating:

> I agree with the State …. Now, I think that certainly it's fair to obviously argue inferences and what might be some reasonable hypotheticals, but at least as far as facts and evidence[,] I was reviewing my notes again and certainly my best memory, there [are] no facts in evidence that would support in my view an argument by the defense to the jury specifically that Mr. Peterson was involved in any attempted robbery of the defendant.

Consequently, in her closing argument, Crenshaw's counsel chose to attack the credibility of the State's witnesses and the lack of evidence pointing to Crenshaw as the aggressor.

¶8 The jury found Crenshaw guilty of first-degree reckless injury by use of a dangerous weapon, possession of a firearm by a felon, and possession of a short-barreled rifle. The jury found Crenshaw not guilty of attempted armed robbery by use of force.

¶9 Crenshaw subsequently filed a postconviction motion arguing that he was entitled to postconviction discovery and DNA testing of cotton swabs taken from the gun. The trial court denied the motion pursuant to ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999) ("***O'Brien II***"), concluding that "there is not a reasonable probability that a different outcome would occur in this case" regardless of the outcome of the DNA tests. Crenshaw subsequently filed a second motion for postconviction relief requesting a new trial based on ineffective assistance of trial counsel, double jeopardy, and his theory that the real controversy had not been tried. The trial court denied the motion, adopting the State's analysis of the issues in its brief *in toto*. This appeal followed.

DISCUSSION

¶10 Crenshaw asserts that: (1) he received ineffective assistance of trial counsel; (2) his convictions for both possession of a short-barreled rifle and the use-of-a-dangerous-weapon penalty enhancer violated his double jeopardy protection against multiplicity; (3) the trial court erred in denying his motion for postconviction discovery of DNA evidence; and (4) the trial court erred in adopting the State's brief *in toto* when denying Crenshaw's second motion for postconviction relief. We address each argument in turn.

I. Ineffective Assistance of Counsel

¶11 Crenshaw asserts that he received ineffective assistance of trial counsel because his counsel failed to: (1) argue that Peterson was the aggressor and Crenshaw was acting in self-defense; (2) introduce into evidence Crenshaw's medical records to demonstrate police bias; (3) object to the jury verdict form; and (4) object to an improper statement in the State's closing argument. He further argues that the cumulative effect of all of trial counsel's errors was highly prejudicial to his defense. We disagree.

¶12 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶13 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

¶14 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious so as to deprive him or her of a fair trial and a reliable outcome. ***Johnson***, 153 Wis. 2d at 127. The defendant must also show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶15 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

1. Failure to Argue that Peterson was the Aggressor

¶16 Several of Crenshaw's ineffective-assistance-of-counsel claims center around the idea that his trial counsel failed to raise a defense that Crenshaw believes should have been raised, to wit, that Peterson and another individual attacked and robbed Crenshaw and that Crenshaw was acting in self-defense. Specifically, Crenshaw contends that his trial counsel was ineffective in this regard for failing to: (1) obtain and present medical records setting forth Crenshaw's head injuries, which he argues supports his theory that he was attacked by two men; (2) argue that Crenshaw's bicycle was never recovered at the scene of the crime, which he argues supports his theory that he was robbed; (3) present sufficient evidence throughout the trial to argue that Peterson was the

aggressor during closing arguments; and (4) request the necessity and privilege jury instructions. We disagree.

¶17 First, Crenshaw waived his right to testify at trial. Crenshaw submits that he "was unaware that his failure to testify would result [sic] his theory being nullified." However, Crenshaw does not claim that he would have testified had he known that he could not otherwise raise his theory that Peterson was the aggressor, nor could he logically make that argument. Crenshaw waived his right to testify at the end of the defense's case. It should have been obvious to Crenshaw at that point in the trial that if he did not testify, the jury would not hear anymore about his version of events than had already been presented.

¶18 Furthermore, if this is Crenshaw's attempt to argue that he did not knowingly, intelligently, and voluntarily waive his right to testify, not only is his argument conclusory, it is not supported by the record. Our review of the record revealed that the trial court conducted the standard colloquy with Crenshaw to assure that he was knowingly, intelligently, and voluntarily waiving his rights. *See* ***State v. Weed***, 2003 WI 85, ¶¶42-43, 263 Wis. 2d 434, 666 N.W.2d 485. Following the colloquy, and after conferring with his counsel, Crenshaw expressly waived his right to testify. Crenshaw also signed a form entitled "Waiver of Right to Testify" (some capitalization omitted), stating that he "knowingly, understandingly, intelligently and voluntarily waived his right to testify in the above matter" and that "the decision not to testify has been arrived at independently … after consulting with and advising counsel … of said decision."

¶19 Without Crenshaw's testimony, his trial counsel was limited in her ability to raise a theory of self-defense. The evidence that Crenshaw argues his trial counsel should have admitted in support of the defense—namely, Crenshaw's

medical records detailing a head hematoma he sustained the day of the attack and evidence that the bicycle he was allegedly riding was not recovered at the scene—without more, is hardly enough to permit an inference that Peterson was the aggressor. The medical records, without Crenshaw's explanation, merely demonstrate that Crenshaw suffered a head injury, which is consistent with the State's theory that Crenshaw and Peterson struggled. And there was conflicting testimony at trial regarding whether Crenshaw was riding a bicycle or was on foot at the time of the shooting. In other words, a missing bicycle alone, when there was no definitive evidence that Crenshaw was even riding a bicycle, hardly supports Crenshaw's theory that Peterson attacked and robbed him. Those two pieces of evidence alone do not undermine our confidence in the outcome at trial, much less support Crenshaw's theory on appeal that Peterson was the aggressor. *See* ***Strickland***, 466 U.S. at 694. Consequently, Crenshaw's trial counsel was not ineffective for failing to introduce the evidence.

¶20 Second, Crenshaw's trial counsel was not ineffective for failing to introduce sufficient evidence throughout the trial to argue during closing argument that Peterson was the aggressor. When Crenshaw chose not to testify, he gave up his ability to tell the jury, in his own words, what he claims happened on the day of the attack, and, as set forth above, other than the medical records and allegedly missing bicycle, he does not specify any other evidence that his trial counsel could have submitted to support Crenshaw's story that Peterson attacked him. Without such evidence, his argument that his trial counsel acted deficiently is conclusory. Conclusory arguments are not enough on which to determine that trial counsel was ineffective. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (requiring specificity in postconviction motions).

¶21 Nor was trial counsel ineffective for failing to request the necessity[2] and privilege[3] jury instructions. Because there was not sufficient evidence

[2] Crenshaw argues that his trial counsel should have requested the necessity instruction set forth in WIS JI—CRIMINAL 792:

> The defense of necessity is an issue in this case. The defense of necessity allows a person to engage in conduct that would otherwise be criminal under certain circumstances.
>
> The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of necessity.
>
> The law allows the defendant to act under the defense of necessity only if the pressure of natural physical forces caused the defendant to believe that his act was the only means of preventing imminent death or great bodily harm to himself (or to others) and which pressure caused him to act as he did.
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant[']s beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

(Footnotes omitted.)

[3] Crenshaw argues that his trial counsel should have requested the privilege instruction set forth in WIS JI—CRIMINAL 1343A:

> The law allows a person convicted of a felony to possess a firearm under certain circumstances.
>
> The [S]tate must prove by evidence which satisfies you beyond a reasonable doubt that the circumstances permitting the defendant to possess a firearm did not exist in this case.
>
> The law allows the defendant to possess a firearm if all the following circumstances are present:

(continued)

submitted at trial to support the theory that Peterson attacked Crenshaw, there was no basis for the jury to find in Crenshaw's favor on those instructions even if they had been given. Consequently, Crenshaw was not prejudiced by the failure to instruct the jury on necessity and privilege. *See* ***Strickland***, 466 U.S. at 694.

¶22 Trial counsel and the defendant have the discretion to choose the theory of the defense. ***Felton***, 110 Wis. 2d at 501-03. Here, the record shows that trial counsel chose to attack the credibility of the State's witnesses after Crenshaw chose not to testify and Crenshaw does not argue that counsel did not discuss this strategy with him. Because Crenshaw has not demonstrated that his self-defense theory was viable given his choice not to testify and the evidence in the record, we cannot say that trial counsel's strategy was not rationally "founded on the facts

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> (1) the defendant reasonably believed he was under an unlawful threat of imminent death or great bodily harm;
>
> (2) the defendant reasonably believed he had no alternative way to avoid the threatened harm other than by possessing a firearm;
>
> (3) the defendant did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to possess a firearm; and,
>
> (4) the defendant possessed the firearm only for the time necessary to prevent the threatened harm.
>
> If you are satisfied beyond a reasonable doubt that the defendant knowingly possessed a firearm, that the defendant had previously been convicted of a felony and that the circumstances permitting the defendant to possess a firearm did not exist, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty.

(Footnotes omitted.)

and the law." *See* ***id.*** at 502. Therefore, we conclude that trial counsel was not ineffective for failing to raise self-defense at trial.

2. Failure to Present Medical Records to Show Police Bias

¶23 Crenshaw also argues that his trial counsel was ineffective for failing to introduce Crenshaw's medical records because he argues they would have demonstrated police bias. He relies on a notation in the records which states:

> According to the police department, the patient tried to steal someone's pit bull dog. He said the dogs turned on the patient and attacked him. The patient then shot the owner of the dogs in the shoulder, however, the owner of the dogs apparently was able to wrestle the weapon away from the suspect and basically beat him up and call police.

Crenshaw submits that this statement in the medical records demonstrates that "the police had already settled on Peterson's side of the story" and "were only concerned with leg bites, not head wounds." However, Crenshaw fails to explain how this alleged bias, buried under several layers of hearsay, affected the police investigation or the outcome of his trial. In other words, he has not shown prejudice. *See* ***Strickland***, 466 U.S. at 694.

¶24 Crenshaw further submits that the medical records, demonstrating that he suffered from a head injury, were admissible to attack Officer Yaghnam's credibility because they allegedly conflicted with his testimony that he was only aware of the dog bite and did not know of Crenshaw's head wounds. However, in the passage from Officer Yaghnam's testimony cited by Crenshaw, Officer Yaghnam was asked whether "during the two hours that [he was at the hospital] while [Crenshaw] was being treated, did [he] witness Crenshaw [being] treated for a head injury?" Officer Yaghnam replied, "Not that I recall. I don't believe so." Officer Yaghnam never stated that he was unaware of Crenshaw's head injury,

only that he did not recall seeing Crenshaw treated for a head injury. Furthermore, Crenshaw has presented us with no evidence demonstrating that Officer Yaghnam was the officer who gave the statement in the medical records or that Crenshaw's head injury should have been obvious to police. Accordingly, Crenshaw has not demonstrated deficient performance or prejudice. *See* ***Strickland***, 466 U.S. at 687.

3. Failure to Object to the Jury Verdict Form

¶25 Crenshaw claims that he received ineffective assistance of counsel because his trial counsel failed to object to the jury verdict form, and that the failure prejudiced Crenshaw because "the jury was not correctly instructed on what it was to decide." The jury verdict form asked the jurors to answer the following question if they found Crenshaw guilty of first-degree reckless injury: "Did the defendant, *as party to a crime*, commit the crime of First Degree Reckless Injury while possessing a dangerous weapon?" (Emphasis added.) The jury checked the box marked "YES." It is undisputed that the verdict form should not have included the phrase "as party to a crime" because Crenshaw was not charged as party to a crime. Crenshaw claims the incorrect jury verdict form prejudiced him because "there were now two ways for the jury to find [him] guilty." We disagree because Crenshaw has failed to show that this error was sufficiently serious so as to deprive him of a fair trial and a reliable outcome. *See* ***Johnson***, 153 Wis. 2d at 127.

¶26 When the trial court read the jury verdict form to the jury prior to the jury's deliberations, the court properly instructed the jury, omitting the "as party to a crime" language. While Crenshaw correctly states that the verdict form itself included the incorrect language, the jury found Crenshaw guilty of first-degree reckless injury prior to reading the jury verdict form question about possessing a

dangerous weapon as party to a crime. And the jury's later findings that Crenshaw was guilty of possession of a firearm by a felon and guilty of possession of a short-barreled rifle are consistent with its conclusion that Crenshaw committed the reckless injury charge while possessing a dangerous weapon. Because the error on the jury verdict form does not give rise to a reasonable probability sufficient to undermine confidence in Crenshaw's conviction, we conclude that his trial counsel was not ineffective for failing to object. *See* ***Strickland***, 466 U.S. at 694.

¶27 We also reject Crenshaw's argument that the error in the jury verdict form prevented the real controversy in this case from being tried. While this court possesses the discretionary authority under WIS. STAT. § 751.06 to reverse a conviction in the interest of justice if the real controversy was not fully tried, we do so "only in exceptional cases." ***State v. Hicks***, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996). Such exceptional cases are generally limited to cases in which: (1) the jury was erroneously denied the opportunity to hear important testimony bearing on an important issue of the case, ***id.*** at 160; (2) the jury had before it evidence not properly admitted that "so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried," ***id.***; or (3) the jury was erroneously instructed, preventing the real controversy in a case from being tried, ***State v. Bannister***, 2007 WI 86, ¶41, 302 Wis. 2d 158, 734 N.W.2d 892. This is not such a case.

¶28 The trial court properly relayed the instructions to the jury before deliberations, omitting the "as party to a crime" language. Furthermore, the jury's findings, independent of the erroneous jury verdict form—that Crenshaw was guilty of first-degree reckless injury, possession of a firearm by a felon, and possession of a short-barreled rifle—are consistent with its finding that Crenshaw committed the crime by use of a dangerous weapon. Given these findings, any

other finding by the jury with regards to the penalty enhancer would have been nonsensical, and there is ample evidence in the record to support the jury's findings. The controversy here was fully tried.

4. Failure to Object to the State's Closing Argument

¶29 Crenshaw's final argument in support of his theory of ineffective assistance of trial counsel arises from his counsel's failure to object to the State's closing argument. Crenshaw claims that his trial counsel should have objected during the State's closing when the prosecutor said, "she does a typical defense attorney trick." Crenshaw argues that the statement was improper, comparing it to statements made by a prosecutor that were found improper in ***State v. Mayo***, 2007 WI 78, ¶17, 301 Wis. 2d 642, 734 N.W.2d 115. Crenshaw submits that the statement was prejudicial because his "case was a credibility contest between Peterson and Crenshaw." This argument is without merit.

¶30 To begin, even if we accept Crenshaw's argument that the prosecutor's statement that "she does a typical defense attorney trick" is similar to the prosecutor's statements in ***Mayo*** "that the role of defense counsel was to 'get his client off the hook' and 'not to see justice done but to see that his client was acquitted,'" *see* ***id.***, ¶42, Crenshaw fails to mention that the court in ***Mayo*** concluded that even though the statements were improper, when viewed against the backdrop of the entire trial, they were not prejudicial, *see* ***id.***, ¶43. Such is the case here.

¶31 The State introduced sufficient evidence at trial to support the jury's verdict, including: Peterson's testimony that Crenshaw tried to rob him at gun point, that the two fought, and that Crenshaw shot Peterson in the chest and bicep; evidence demonstrating that Crenshaw was injured by a dog around the time of the

crime, and that Crenshaw was missing a sock and a shoe matching the ones found at the crime scene. Given that evidence, the sole challenged statement made by the prosecutor during closing that "she does a typical defense trick" did not leave the jury's result unreliable. *See* ***Johnson***, 153 Wis. 2d at 127.

¶32 Furthermore, Crenshaw's argument that the prosecutor's statement left the outcome of the case unreliable because the "case was a credibility contest between Peterson and Crenshaw" is nonsensical because Crenshaw never testified. Consequently, that argument is a non-starter.

5. Cumulative Effect of Errors

¶33 Crenshaw asserts that the cumulative effect of the foregoing instances of trial counsel's alleged ineffectiveness prejudiced him and warrants a new trial. We disagree. Lumping together failed ineffectiveness claims does not create a successful claim. As our supreme court has often repeated, "[a]dding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

II. Double Jeopardy

¶34 Crenshaw claims that his convictions for both possession of a short-barreled rifle and the use-of-a-dangerous-weapon penalty enhancer were multiplicitous, thereby violating his constitutional guarantees against double jeopardy.[4] Whether an individual's constitutional right to be free from double

[4] The Fifth Amendment to the United States Constitution states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Article I, section 8 of the Wisconsin Constitution states: "no person for the same offense may be put twice in jeopardy of punishment."

jeopardy has been infringed is a question of law that we review *de novo*. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998).

¶35 The double jeopardy provision of the Wisconsin and United States Constitutions prohibits multiplicitous charges. ***State v. Grayson***, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992). Multiplicity occurs when the State charges more than one count for a single criminal offense. ***Harrell v. State***, 88 Wis. 2d 546, 555, 277 N.W.2d 462 (Ct. App. 1979).

¶36 We apply a two-part test to determine whether charges are multiplicitous. First, we inquire whether the charged offenses are identical in law and fact. ***State v. Tappa***, 127 Wis. 2d 155, 162, 378 N.W.2d 883 (1985). If so, the charges are multiplicitous. Second, if the charges are different in law or fact, they are still multiplicitous if the legislature intended them to be brought as a single count. ***Id.*** at 164.

¶37 Crenshaw only argues that the possession of a short-barreled rifle and the use-of-a-dangerous-weapon penalty enhancer are identical in law and fact; he does not argue that the legislature intended that the two charges be brought as a single count. Consequently, we analyze the charges only under the first prong of the multiplicitous test. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments). We decline to develop Crenshaw's arguments for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶38 Possession of a short-barreled rifle required the State to prove that: (1) Crenshaw possessed a rifle; and (2) the rifle was short-barreled. *See* WIS JI—CRIMINAL 1342; *see also* WIS. STAT. § 941.28. The use-of-a-dangerous-weapon penalty enhancer required the State to prove that Crenshaw committed the

crime of first-degree reckless injury while using, threatening to use, or possessing to facilitate the crime, a dangerous weapon. *See* WIS JI—CRIMINAL 990; *see also* WIS. STAT. § 939.63. The elements required to prove each charge are not the same. *See* ***Tappa***, 127 Wis. 2d at 162. Possession of a short-barreled rifle punishes mere possession, while the use-of-a-dangerous-weapon penalty enhancer punishes use of a dangerous weapon in furtherance of a crime. *See* ***State v. Peete***, 185 Wis. 2d 4, 18, 517 N.W.2d 149 (1994) (concluding that "the language 'while possessing' in [WIS. STAT. §] 939.63 requires the [S]tate to prove a nexus between the weapon and the predicate offense"). Therefore, we affirm the trial court.

III. Postconviction Discovery of DNA Evidence

¶39 Crenshaw also appeals from the trial court's order denying his WIS. STAT. § 974.07 motion for postconviction discovery of DNA evidence. In order to obtain postconviction discovery, a defendant must generally show that the evidence sought is "relevant to an issue of consequence," meaning that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***O'Brien II***, 223 Wis. 2d at 320-21. We review the trial court's relevancy finding for an erroneous exercise of discretion. ***State v. O'Brien***, 214 Wis. 2d 328, 344, 572 N.W.2d 870 (Ct. App. 1997) ("***O'Brien I***"). We will not find an erroneous exercise of discretion if there is a reasonable basis in the record for the trial court's decision. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶40 Crenshaw filed a postconviction motion requesting cotton swabs used by the police on the gun to collect DNA evidence, or if the swabs had already been tested, the results of the tests. Crenshaw argued before the trial court and argues on appeal that the DNA swabs or test results are "relevant to an issue of

consequence" because they could identify a third person at the scene, corroborating Crenshaw's theory that Peterson and another individual attacked and robbed him. The trial court denied the motion, concluding that "[t]he evidence in this case was overwhelming against the defendant. Based upon the totality of the evidence presented at trial, … there is not a reasonable probability that a different outcome would occur in this case." (Footnote omitted.) We agree.

¶41 Even if a DNA swab taken from the gun was shown to be from a third person, Crenshaw cannot demonstrate that the third person was at the scene of the crime. The DNA could have been transferred onto the gun at a time other than during the crime. Furthermore, without Crenshaw's testimony, there was no evidence in the record that anyone other than Crenshaw and Peterson was present during the shooting. In short, there was a reasonable basis for the trial court's decision denying Crenshaw's postconviction motion, and so we affirm. *See* ***Pharr***, 115 Wis. 2d at 342.

¶42 We also reject the State's argument that we do not have jurisdiction over this issue. The State submits that because Crenshaw filed his postconviction discovery motion with the trial court pursuant to WIS. STAT. § 974.07, and because that statute permits appeals taken from orders issued pursuant to § 974.07 to be taken as from a final judgment, *see* § 974.07(13), Crenshaw was required to file his notice of appeal within twenty days of the entry of the order, *see* WIS. STAT. § 809.30(2)(j). Because Crenshaw did not file his notice of appeal within twenty days, the State argues we have no jurisdiction over Crenshaw's appeal of the order. *See* WIS. STAT. § 809.10(1) (appeal is initiated by filing a notice of appeal with clerk of the circuit court). We disagree.

¶43 WISCONSIN STAT. § 974.07(13) states that "[a]n appeal may be taken from an order entered under this section as from a final judgment." We have previously held that "[t]he word 'may' in a statute is generally construed as permissive unless a different construction is required by the statute to carry out the clear intent of the legislature." ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2011 WI App 12, ¶9, 331 Wis. 2d 64, 793 N.W.2d 896. In other words, § 974.07(13) did not require Crenshaw to appeal from the trial court's order.

¶44 Moreover, it made little sense for Crenshaw to appeal from the trial court's order denying his motion for postconviction discovery because the time for filing postconviction motions had not expired and Crenshaw subsequently filed a second postconviction motion. Had he hastily appealed from the first order, his appeal of the second would have been barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

IV. Adoption of the State's Brief *In Toto*

¶45 Finally, Crenshaw argues that the trial court's order denying his postconviction motion without a ***Machner*** hearing was clearly erroneous because it adopted the State's brief *in toto*, thereby failing to exercise any independent rationale for its decision. We review a trial court's decision on whether to hold a ***Machner*** hearing under the two-part test enunciated in ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing....
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson*** [***v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).]

Bentley, 201 Wis. 2d at 310-11. A trial court properly exercises its discretion if it reaches "a reasonable conclusion, based upon a consideration of the appropriate law and facts of record." ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995). We conclude that the trial court properly exercised its discretion here.

¶46 In support of his argument that the trial court erred by adopting the State's brief *in toto*, Crenshaw relies on ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 504 N.W.2d 433 (Ct. App. 1993), in which we rejected the trial court's temporary maintenance order in a divorce action. *See* ***id.*** at 540. We concluded that by adopting the wife's memorandum in its entirety "the court failed to articulate the factors upon which it based its decision as required" because the wife's memorandum was "devoid of any explanation or reasoning as to why the court accepted [the wife's] views regarding the disputed facts and law over [the husband's] views." ***Id.*** at 542. That is not the situation here.

¶47 Here, the trial court adopted the State's brief in its entirety, as did the court in ***Trieschmann***, but here, the State's brief properly set forth the facts it considered, the law it utilized, and, unlike the wife's brief in ***Trieschmann***, logically reasoned to its conclusions. Consequently, in adopting the State's brief as its reasoning, the trial court properly exercised its discretion.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.