COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2626-CR **Cir. Ct. No. 2007CF3558**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DION M. ECHOLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Dion M. Echols appeals the judgment convicting him of two counts of attempted first-degree homicide, contrary to WIS. STAT.

§§ 940.01(1)(a) & 939.32 (2009-10), and one count of first-degree sexual assault, contrary to WIS. STAT. § 940.225(1)(a).[1] He also appeals the order denying his postconviction motion. Echols presents eight arguments on appeal, all of which we reject for the reasons set forth below. We affirm both the judgment of conviction and postconviction order.

I. BACKGROUND.

¶2 On July 14 and 15, 2007, what began as a verbal dispute over a modest amount of cash escalated into a heinous sexual assault and shooting. Echols had been accused of stealing $130 from his then-girlfriend, Samekiea Merriweather. Echols admitted taking the money, and at one point even offered to return it. But then he changed his mind. Instead of returning the money, Echols went to Merriweather's apartment, sexually assaulted her sister and her sister's boyfriend, and shot them both in the head—twice. In his own words, Echols sent Merriweather a message that she had "fucked" with the wrong guy.

¶3 At the court trial that followed the assault and shooting, Merriweather—along with her sister, M.F., and her sister's boyfriend, G.H.—explained what had happened.

¶4 Merriweather testified that on the evening of July 14, 2007, she had gone to a club with her cousins while seventeen-year-old M.F. stayed behind to babysit. Beginning around midnight on July 15, Merriweather began receiving calls on her cell phone from Echols, who was her boyfriend at the time. At first,

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

Merriweather refused to answer his calls; she suspected that he had stolen $130 from her dresser drawer a few days earlier. Eventually, however, as she was leaving the club, she answered her phone. Echols asked her to spend the night with him but she refused. Echols then promised to return the money he had stolen. Merriweather agreed to let him return the money that night; she explained she would be back home soon and that, in the meantime, her sister would be there.

¶5 When Merriweather returned home, she found the door cracked open; her sister was nowhere to be found. Items were scattered around the living room, and in the bedroom, Merriweather's top dresser drawer was open. Suspicious, she called Echols the next morning. He essentially told her that she had gotten what she deserved.

¶6 M.F. testified that she had gone to Merriweather's house at about 2:00 p.m. the afternoon of July 14, 2007 to help with Merriweather's children and to babysit. After Merriweather left for the evening—around 8:00 p.m.—M.F. called her boyfriend, eighteen-year-old G.H., to come over.

¶7 Sometime after the children were put to bed, the doorbell rang downstairs. When M.F. asked who it was, a man identifying himself as "Dion" said that he had something for "Meeka." M.F. opened the door. Echols, whom M.F. recognized because she had seen him twice before, pointed a gun at her, ordered her upstairs, and demanded money from G.H. G.H. had no money, but M.F. did. She gave Echols $30 of her own money. Echols then directed both M.F. and G.H. into Merriweather's bedroom. Echols asked M.F. whether her sister had any money. M.F. went through the dresser drawers, tossing her clothes around the room, searching in vain.

¶8 When M.F. asked Echols what this was all about, Echols told her, "[j]ust know your sister messing with the wrong person." Echols then ordered M.F. and G.H. to disrobe. At gunpoint, he ordered G.H. to perform cunnilingus on M.F., and then ordered M.F. and G.H. to have intercourse with each other. Echols also ordered M.F. to perform fellatio on G.H., as well as on himself. Echols then asked G.H. if he had a car. G.H. tossed Echols the keys, but Echols refused to leave alone, responding, "no, you coming with me." Echols ordered G.H. and M.F. to get dressed and directed them out through the back of the house to the parking lot where G.H.'s car—a Chevrolet Caprice—was parked. Echols ordered both of them into the car and ordered G.H. to drive. They drove a short distance to an alley where a large dog was barking. Echols ordered G.H. and M.F. out of the car and onto the ground. The last thing M.F. remembered was hearing a gunshot. She sustained two bullet wounds to the left side of her head.

¶9 G.H.—who was shot in the middle of his forehead and in the left temple—corroborated virtually all of M.F.'s testimony.

¶10 At trial, Milwaukee Police Detective Louis Johnson recounted, over trial counsel's objection, the statements he obtained from M.F. and G.H. Johnson obtained the statement from M.F. nine days after the shooting. M.F. had been unconscious and otherwise in great pain for almost the entire nine days between the shooting and the July 24th interview. Johnson interviewed G.H. in November 2007, just after G.H. had been released from the hospital. The trial court allowed these hearsay statements under the "excited utterance" exception to the hearsay rule. Detective Johnson testified that, as he tried to interview her, M.F. was "very excited," became "hysterical" and had to be calmed down—especially when she was asked to describe the sexual assault. At those points during the interview M.F. grabbed onto her mother and would not let go.

¶11 M.F. and G.H. also attended separate photo arrays. Each selected Echols' photo without hesitation. Milwaukee Police Detective Scott Gastrow recalled that when shown Echols' photo, M.F.,

> exhibited an extremely emotional response. With her left finger she began pointing and punching at the photo … and stated, 'this is him, this is him.' And her eyes welled up with tears. She almost began crying.

¶12 In addition, surveillance video of the parking lot behind Merriweather's building corroborated M.F.'s and G.H.'s testimony and statements. The video showed three people exiting the rear door of the building—about a half mile from where the shooting would take place—at 1:22 a.m. on July 15th. At trial, Merriweather said she recognized Echols in the dark, grainy video from his gait and his unique shoes. She also thought she recognized portions of his face that were not concealed.

¶13 Su Xiong, who lives at 2134 North 24th Street, near where the shooting took place, also testified. Xiong heard the gunshots and called police. Xiong heard his dogs barking at about 1:30 a.m. on July 15, 2007, and went out to his back porch to see what the matter was. He saw a man standing next to what appeared to be an older model Caprice. Xiong saw the man fire four or five shots into the ground and then flee in the car.

¶14 Echols was arrested late July 15th while fleeing the home of Delaney Coleman at 4319 North Congress Street. Police located a Caprice—G.H.'s Caprice—on July 17, 2007 in front of 5240 North 31st Street, one block from where Echols was staying at the time. On July 24th, Coleman's ten-year-old son discovered a .44 caliber revolver hidden under his mattress when changing the

sheets. Coleman wrapped the gun in a towel and called police, who retrieved it and sent it to the State Regional Crime Lab.

¶15 State Crime Lab firearm and tool mark examiner Reginald Templin compared the two bullet fragments recovered from inside G.H.'s head to the .44 caliber revolver found in the home where Echols was arrested. Templin opined that the fragments had similar "class characteristics" to bullets he test-fired through that revolver. Templin could not positively identify the fragments as having in fact been fired through the revolver because of the damage they had sustained. He could only state that they had been fired through the barrel of a revolver having five lands and grooves with a right-hand twist—characteristics shared by the gun in question. Echols did not object to Templin's expertise or testimony; in fact, he stipulated to Templin's expert qualifications.

¶16 State Crime Lab firearm and tool mark expert Kyle Anderson compared a bullet jacket fragment and a lead fragment removed from the inside of M.F.'s head to the .44 caliber revolver believed to have been used by Echols in the shootings. Anderson was unable to compare the lead fragment with the gun because the fragment came from inside the bullet. He was, however, able to compare the bullet jacket with the gun. Anderson opined that the jacket was in fact fired through the barrel of the .44 caliber revolver, and through that particular gun only. Echols did not object to Anderson's expertise or testimony.

¶17 The trial court found Echols guilty of two counts of attempted first-degree intentional homicide and one count of first-degree sexual assault. With regard to the sexual assault charge, the trial court found that the shooting of the victims subsequent to the sexual assault met the requirements for the "great bodily harm" element.

¶18 Echols then filed a motion for postconviction discovery seeking independent firearm and tool mark testing of bullet fragments by his defense expert. The trial court denied the motion. Echols sought reconsideration, and a hearing was held. At the motion hearing, the trial court ordered the State to allow the defense expert, John Nixon, to test the bullet fragments in his laboratory in Indiana, but also granted the State's request that two detectives convey the fragments and passively observe the testing in order to preserve the chain of custody. Echols' attorney agreed to this procedure, but argued that only one detective was required to preserve the chain of custody. Nixon ultimately declined to work on the case.[2]

¶19 Echols subsequently filed a motion for postconviction relief on July 20, 2010, seeking a new trial on numerous grounds. The trial court denied the motion and Echols now appeals.

II. ANALYSIS.

¶20 Echols brings eight arguments on appeal. He contends that: (1) the evidence was insufficient to convict him of sexual assault; (2) the trial court erred in admitting Detective Johnson's testimony regarding what M.F. and G.H. told him; (3) the firearm and tool mark identification evidence did not qualify for admission as expert testimony; (4) trial counsel was ineffective; (5) newly

[2] Echols' recitation of the facts states that Nixon's decision not to work on Echols' case was precipitated by the trial court's order. Echols provides no citation to the record for this contention, however, and the part of the record counsel cites to regarding the Nixon saga merely states that "Mr. Nixon declined to work on this case." It does not explain why Nixon declined to do so. Failure to cite the portion of the record upon which a litigant relies violates WIS. STAT. RULE 809.19(1)(e), which requires an appellant to cite those portions of the record upon which he or she relies.

discovered evidence warrants a new trial; (6) the interests of justice warrant a new trial; (7) the trial court erroneously exercised its discretion by allowing two Milwaukee Police detectives to accompany bullet fragment evidence to Nixon's lab in Indiana and to passively observe the testing; and (8) he was entitled to an evidentiary hearing on his postconviction motion. We discuss each argument in turn.

A. There was sufficient evidence to convict Echols of first-degree sexual assault.

¶21 Echols argues that there was insufficient evidence to convict him of first-degree sexual assault under WIS. STAT. § 940.225(1)(a), which provides that whoever: (a) has "sexual contact or sexual intercourse with another person"; (b) "without consent of that person"; and (c) causes "great bodily harm to that person" is guilty of a Class B Felony. Echols does not argue that there is insufficient evidence to prove beyond a reasonable doubt that he had sexual contact with M.F. without her consent; nor does he argue that there is insufficient evidence to prove beyond a reasonable doubt that he caused her great bodily harm. Instead, citing ***State v. Schambow***, 176 Wis. 2d 286, 299, 500 N.W.2d 362 (1993) (adopting as law the jury instruction statement, "[i]t is sufficient if great bodily harm was caused by the defendant during the course of conduct that immediately preceded or followed the act of nonconsensual intercourse"), he argues that the evidence of "great bodily harm"—the shooting—occurred too long after the nonconsensual sex act.

¶22 "The standard for determining whether sufficient evidence supports a finding of guilt" is "well established." ***State v. Watkins***, 2002 WI 101, ¶67, 255 Wis. 2d 265, 647 N.W.2d 244. We may not substitute our judgment for the trial court's unless the evidence, "viewed most favorably to the [S]tate and the

conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the trial court could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn a verdict even if we believe that the trial court should not have found Echols guilty. *See* ***id.***

¶23 In this case, the trial court properly determined that Echols' shooting M.F. subsequent to the nonconsensual sexual contact constituted great bodily harm. The facts of the case plainly demonstrate that the shooting occurred "'during the course of conduct that immediately … followed'" the nonconsensual intercourse. *See* ***Schambow***, 176 Wis. 2d at 299 (citation omitted). The only event separating the sex act from the shooting was Echols' corralling his victims from a bedroom to a nearby alley, which—given that the security video shows three people leaving Merriweather's apartment at about 1:22 a.m. and Xiong heard shooting at about 1:30 a.m.—took mere minutes. Moreover, Echols points to no authority for his contention that the trial court "impermissibly stretched the definition of 'immediately following' in finding Echols guilty of first-degree sexual assault." In fact, in ***Schambow***, the only case Echols does cite for this contention, the exact timeline of events—including when the sexual assault and great bodily harm occurred—was unclear. *See* ***id.*** at 291.

¶24 Echols met M.F. and G.H. at the door at gunpoint, sexually assaulted M.F. at gunpoint, and then shot both M.F. and G.H. within minutes of the sexual assault. We therefore conclude that the trial court did not err in finding evidence of great bodily harm beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶25 Furthermore, even if we were to conclude that the shootings were too removed in time and place from the sexual assault, we conclude, as the trial court did in its decision denying postconviction relief, that the information could have been properly amended to charge Echols with first-degree sexual assault under WIS. STAT. § 940.225(1)(b), which provides that anyone who has: (a) "sexual contact or sexual intercourse with another person," (b) "without consent of that person," and (c) "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon" is guilty of a Class B felony. *See* WIS. STAT. § 971.29(2) ("At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.").

¶26 "Whether to allow amendment of the information to conform to the proof is within the discretion of the trial court and will not be reversed absent an erroneous exercise of discretion." ***State v. Malcom***, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918. "Therefore, we will uphold the trial court's decision to allow an amendment if the record shows that discretion was exercised and a reasonable basis exists for the trial court's ruling." ***Id.*** "[T]he application of constitutional principles to the facts" is, however, "a question of law which we review de novo." ***Id.***

¶27 Echols cites ***State v. Duda***, 60 Wis. 2d 431, 210 N.W.2d 763 (1973), for the proposition that allowing amendment of the information to charge Echols with first-degree sexual assault pursuant to WIS. STAT. § 940.225(1)(b) instead of § 940.225(1)(a) would be incorrect as a matter of law because in that case our

supreme court noted, "[w]e are of the opinion that the sentence regarding amendment after verdict was intended to deal with technical variances in the complaint such as names and dates." ***Duda***, 60 Wis. 2d at 439-40. But in so arguing, Echols fails to acknowledge the numerous cases published after 1973, when ***Duda*** was decided, that allow substantive, not just typographical, amendments to the complaint. *See*, *e.g.*, ***Malcom***, 249 Wis. 2d 403, ¶¶19-30 (amendment at close of evidence adding additional theory of liability); ***State v. Frey***, 178 Wis. 2d 729, 734-37, 505 N.W.2d 786 (Ct. App. 1993) (amendment of charge during trial from sexual intercourse to sexual contact was proper because the "amended information was based on exactly the same conduct as described in the criminal complaint" and because the defense was that the defendant did not do it at all); ***State v. Nicholson***, 160 Wis. 2d 803, 806, 467 N.W.2d 139 (Ct. App. 1991). Given this development, we are not convinced that WIS. STAT. § 971.29(2) is to be interpreted as narrowly as Echols argues. Moreover, Echols has not shown that amendment of the information would prejudice him. *See* ***State v. Flakes***, 140 Wis. 2d 411, 418, 410 N.W.2d 614 (Ct. App. 1987) ("The rule in Wisconsin is that the trial court may allow amendment of an information at any time in the absence of prejudice to the defendant."). Therefore, we conclude that the trial court properly determined that the information could have been amended to include a charge of first-degree sexual assault under § 940.225(1)(b).

B. The trial court properly admitted Detective Johnson's testimony regarding statements that M.F. and G.H. made to him because they were "excited utterances."

¶28 Echols next argues that the trial court erred in admitting Detective Johnson's testimony regarding statements M.F. and G.H. gave after the incident as "excited utterance" testimony. As noted, at trial Johnson testified that he obtained the statement from M.F. nine days after the shooting. M.F. had been unconscious

and otherwise in great pain for almost the entire nine days between the shooting and the July 24th interview. Similarly, Johnson interviewed G.H. in November 2007, just after G.H. had been released from the hospital. Over defense counsel's objection, the trial court allowed both M.F.'s and G.H.'s statements, reasoning that they were "excited utterances" and therefore excepted from the traditional hearsay rule. *See* WIS. STAT. § 908.02 (hearsay generally not admissible at trial unless otherwise allowed); WIS. STAT. § 908.03(2) (allowing admission of excited utterance testimony).

¶29 We view the trial court's decision to admit or exclude evidence "as a proper discretionary determination so long as it was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" *See* ***State v. Rhodes***, 2011 WI 73, ¶22, ___ Wis. 2d ___, 799 N.W.2d 850 (citation omitted). "To this end, we consider whether the [trial] court 'reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion.'" *See* ***id.*** (citation omitted); *see also* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The admissibility of hearsay statements also is a discretionary decision. ***State v. Mayo***, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115. However, whether the trial court employed the proper legal standard is a question we consider *de novo*. *See* ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶18, 319 Wis. 2d 397, 768 N.W.2d 729.

¶30 "'The excited utterance exception ... is based upon spontaneity and stress' which, like the bases for all exceptions to the hearsay rule, 'endow such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.'" ***State v. Huntington***, 216 Wis. 2d 671, 681-82, 575 N.W.2d 268 (1998) (citations omitted). "Accordingly, the excited utterance exception has three requirements": (1) "a 'startling event or condition'"; (2) "the declarant must make

an out-of-court statement that relates to the startling event or condition"; and (3) "the related statement must be made while the declarant is still 'under the stress of excitement caused by the event or condition.'" ***Id.*** (citations omitted). In other words, the proponent of the statement must show "'that the statement was made so spontaneously or under such psychological or physical pressure or excitement that the rational mind could not interpose itself between the spontaneous statement or utterance stimulated by the event and the event itself.'" *See* ***id.*** (citation omitted).

¶31 We conclude that the trial court properly admitted M.F.'s statement to Johnson as an excited utterance. M.F. was either unconscious or in great pain for nearly nine days between the shooting and Johnson's July 24th interview. Johnson testified that, as he tried to interview M.F., she became "very excited," grew "hysterical" and had to be calmed down—especially when she was asked to describe the sexual assault. Indeed, at those points during the interview M.F. grabbed onto her mother and would not let go. Contrary to what Echols argues, the record is not "completely devoid of any explanation of how [M.F.] was under the stress of the event." Rather, it was, given the circumstance of the statements at issue, "a proper discretionary determination." *See* ***Rhodes***, 2011 WI 73, ¶22.

¶32 We also conclude that the trial court properly admitted G.H.'s statement to Johnson as an excited utterance. Although Johnson did not interview G.H. until November 2007—four months after the assault and shooting—it is undisputed that the interview occurred as soon as G.H. was released from the hospital and medically cleared to speak with police. Given that G.H. had spent four months in the hospital before he could even speak to police, and given the terrifying events he recalled, it was not erroneous for the trial court to determine

that he was still under the stress of the event. *See* ***Huntington***, 216 Wis. 2d at 681-82; ***Rhodes***, 2011 WI 73, ¶22.

¶33 Furthermore, even if the trial court did err in allowing Johnson to testify regarding what M.F. and/or G.H. said, the error was harmless. Both M.F. and G.H. testified in explicit detail about what happened to them. Thus, even if Detective Johnson would not have been allowed to testify as to what they recalled, the trial court's verdict would have been the same. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (test for harmless error is whether "there is a reasonable possibility that the error contributed to the conviction").

C. The firearm and tool mark identification properly qualified as expert testimony.

¶34 Echols also argues that the firearm and tool mark evidence provided by Anderson and Templin did not qualify for admission as expert testimony. Echols concedes that he cannot prevail on this issue under current law, *see* ***State v. Jones***, 2010 WI App 133, ¶¶19-26, 329 Wis. 2d 498, 791 N.W.2d 390, and is only pursuing this issue in order to preserve his right to pursue it in the future. Consequently, we must reject Echols' argument. *See* ***State ex rel. Swan v. Elections Board***, 133 Wis. 2d 87, 93-94, 394 N.W.2d 732 (1986) (the court of appeals is primarily an error correcting court); *see also* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not reverse itself).

¶35 However, even if Echols' argument regarding Anderson's and Templin's testimony were not foreclosed by this court's prior opinion in ***Jones***, it would still fail because Echols did not object to either expert's qualifications or testimony on appeal. Echols thus forfeited his right to direct review of this matter, *see* ***State v. Johnson***, 2004 WI 94, ¶25, 273 Wis. 2d 626, 681 N.W.2d 901, and

the issue should be addressed under the rubric of ineffective assistance of counsel context, *see* ***id.***; *see also* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (in the absence of an objection, we address issues under the ineffective assistance of counsel rubric).

D. Trial counsel was not ineffective.

¶36 Echols' fourth argument on appeal is that trial counsel was ineffective for failing to investigate weaknesses in Templin's and Anderson's testimony and for failing to object to their admission as experts at trial. In order to establish that he did not receive effective assistance of counsel, Echols must prove two things: (1) that trial counsel's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Trial counsel's performance is not deficient unless he "made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***id.*** Even if Echols can show that trial counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that trial counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *See* ***id.*** Stated another way, to satisfy the prejudice prong, Echols "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***id.*** at 694. In assessing Echols's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***id.*** at 697.

¶37 Trial counsel was not ineffective because, as Echols concedes in his previous argument, any challenge to Anderson's or Templin's expertise or testimony would have failed. *See* ***Jones***, 329 Wis. 2d 498, ¶¶19-26. Trial counsel is not ineffective for failing to bring meritless challenges. ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110. Because Echols is unable to prove deficient performance, his challenge of trial counsel's effectiveness fails. *See* ***Strickland***, 466 U.S. at 687, 697.

¶38 Moreover, even assuming without deciding that Echols' trial counsel was deficient in not further exploring some of the infirmities of firearm and tool mark evidence, Echols has not shown ***Strickland*** prejudice. As seen from our review of the evidence—especially the compelling eyewitness testimony of M.F. and G.H.—the evidence against Echols was overwhelming, and would have been so even if the bullet fragments, bullet jacket fragment, and gun had never been found. Significantly, Jones does not challenge the testimony of either of these witnesses—both of whom separately picked Echols in a lineup without hesitation, and whose testimony was corroborated by the security video tape, which shows three people leaving Merriweather's building less than ten minutes before Xiong, who, from just a half mile away, saw and heard gunshots in the alley. Therefore, assuming that Anderson and Templin had never testified or, more likely, that Echols' trial counsel had attacked the validity of their conclusions, we have no doubt that the result of the trial would have been the same.

¶39 In addition, in arguing that trial counsel was ineffective, Echols further contends that the trial court erred in determining that Anderson's and Templin's testimony did not carry much weight given all of the eyewitness testimony in this case. According to Echols, this is because Merriweather "lied" at trial, and Xiong was "too far away to identify the person he claimed he saw."

However, we reject this argument because it is not our role to re-weigh the trial evidence. *See* ***Poellinger***, 153 Wis. 2d at 507.

E. Counsel's affidavit is not "newly discovered evidence" warranting a new trial.

¶40 Echols' next argument is that confirmation testimony that Merriweather "embellished her identification of Echols" (some capitalization omitted) constitutes newly discovered evidence warranting a new trial. The confirmation testimony that Echols brings before us consists of the following two sentences in an affidavit provided by Echols' counsel:

> I[, Echols' attorney,] hired Jeffrey Taylor from Taylor Pro to analyze the surveillance video depicting three people leaving the apartment complex, isolate the relevant portions of the video and enlarge them.
>
> If called to testify, I[, Echols' attorney,] believe Mr. Taylor would state that in his professional opinion there is no way to extract any more clarity or definition from the media and he therefore concludes that the surveillance video footage does not give enough detail for any sort of positive identification of the persons shown.

According to Echols, this evidence confirms that Merriweather embellished her story when she testified at trial that she could see portions of Echols' face when she viewed a "zoomed in" portion of the videotape.

¶41 To obtain a new trial based on newly discovered evidence, Echols must establish, by clear and convincing evidence: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). If those four criteria have been established, we then determine "'whether a reasonable probability exists that a

different result would be reached in a trial.'" ***Id.*** (citation omitted). "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Id.***

¶42 Trial counsel's affidavit testimony does not constitute newly-discovered evidence.

¶43 First, the evidence was not "'discovered after conviction.'" *See* ***id.*** (citation omitted). Echols argues that the expert testimony he now seeks to introduce was discovered after conviction because "there was no mention of viewing enlarged portions of the videotape prior to trial"; in other words, he argues that Merriweather's testimony unfairly took him by surprise and he should have another shot at rebutting or impeaching it. This is not enough to establish that any expert testimony Echols may now want to submit is new. *See, e.g.*, ***Simos v. State***, 53 Wis. 2d 493, 192 N.W.2d 877 (1972) ("Discovery of new evidence which merely impeaches the credibility of a witness [is] not a basis for a new trial on that ground alone."). Moreover, Echols did challenge Merriweather's identification of Echols on the video tape at trial. Trial counsel thoroughly cross-examined Merriweather regarding what she saw on the video tape.

¶44 Second, Echols does not sufficiently explain how he was "'not negligent'" in seeking out this evidence. *See* ***id.*** (citation omitted). While Echols argues that "there was no mention of [Merriweather's] viewing enlarged portions of the videotape prior to trial," he does not explain why this knowledge would have been necessary for him to hire an expert to testify at trial; furthermore, he does not cite to any portion of the record to support his contentions. We will not consider this argument because it is inadequately briefed. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (we "may choose not to

consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record").

¶45 Finally, Echols has not shown that the evidence is material to an issue in the case, or that his expert's testimony would not be cumulative. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13. Merriweather did more than identify portions of Echols' face on the tape; she also testified that she recognized Echols by his unique shoes and the way that he walked. Given that Merriweather identified Echols by factors other than his facial features, and given the overwhelming evidence of guilt as provided by both victims in this case, we cannot say that Echols' proposed "new" testimony would impact the trial's result at all. *See* ***id.*** Therefore, we conclude that no newly discovered evidence warrants a new trial.

F. A new trial is not warranted in the interest of justice.

¶46 Echols argues that he should be granted a new trial in the interest of justice because "the admission of the inaccurate and misleading testimony" of "Merriweather and firearm experts Reginald Templin and Kyle Anderson, coupled with the inadmissible testimony of Detective Johnson, resulted in the real controversy not being tried." We disagree. Reversal in the interests of justice is justified only in "exceptional cases." *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). For all of the reasons discussed regarding Echols' first five arguments above, Echols has not shown that the trial court was prevented from hearing "'important testimony that bore on an important issue.'" *See* ***State v. Williams***, 2000 WI App 123, ¶17, 237 Wis. 2d 591, 614 N.W.2d 11 (citation omitted). Nor has Echols shown that justice was miscarried in any respect. *See* ***id.*** As our supreme court has explained, adding together numerous failed arguments

does not create one successful one. *See*, *e.g.*, ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Evidence of Echols' guilt was overwhelming. Justice would not be served by granting him a new trial.

G. The trial court properly exercised its discretion in allowing two detectives to accompany bullet fragment evidence to Nixon's lab in Indiana and to passively observe the testing.

¶47 Echols next argues that the trial court erroneously exercised its discretion by allowing two Milwaukee detectives to escort the bullet fragment evidence to Nixon's lab in Indiana and to passively observe the testing. As noted, Echols previously agreed to allow one detective to be present for the testing. Echols now argues—for what appears to be the first time—that the trial court erred because it should have allowed the evidence to be mailed. Echols' argument fails because we do not consider arguments raised for the first time on appeal. ***Meas v. Young***, 138 Wis. 2d 89, 94 n.3, 405 N.W.2d 697 (Ct. App. 1987).

¶48 Echols alternatively contends that requiring two detectives was too drastic an order, and that his expert, Nixon, refused to test the evidence because he found the presence of two detectives too disruptive. As noted in an earlier footnote, however, the problem with Echols' argument is that he presents no proof that the trial court's order was in fact the reason Nixon declined to work on the case. Therefore, because the issue has been inadequately developed, we need not consider it. *See* ***McMorris***, 306 Wis. 2d 79, ¶30. Moreover, there is every indication that the trial court, in determining that two detectives should accompany the evidence in order to preserve the chain of custody, properly exercised its discretion as to Echols' proposed postconviction discovery. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (proper exercise of

discretion is the product of a rational mental process which states the facts of record and the law relied upon).

H. Echols is not entitled to an evidentiary hearing on his postconviction motion.

¶49 In his final argument, Echols contends that the trial court erred in denying Echols' postconviction motion without a hearing.

¶50 The standard for defendants who assert that they are entitled to a postconviction evidentiary hearing is well known:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review *de novo*. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added; citations omitted).

¶51 Echols' argument essentially reworks his earlier arguments challenging Merriweather's, Templin's and Anderson's testimony. Therefore, for all of the reasons set forth regarding Echols' preceding arguments, we conclude that he was not entitled to relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.