COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP358-CR **Cir. Ct. No. 2010CF30**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY LEE ROSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Randy Ross appeals a judgment convicting him of four crimes and an order denying his postconviction motion. Ross asserts he was denied effective assistance of trial counsel. We affirm because Ross has failed to respond to the State's arguments, *see* ***Charolais Breeding Ranches, Ltd. v. FPC***

Securities Corporation, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded), and, in any event, has not adequately developed an appellate argument, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court need not address undeveloped arguments).

¶2 Ross was convicted by a jury of three counts of felony theft and a single count of burglary. He filed a motion for postconviction relief, asserting numerous instances of ineffective assistance of trial counsel. The circuit court denied this motion on January 30, 2012, citing the overwhelming evidence of guilt at trial and finding that Ross had failed to show that the allegedly deficient performance would have changed the outcome.[1]

¶3 Ross generally raises the same arguments on appeal. He alleges seven instances of ineffective assistance of trial counsel: (1) failure to seek suppression, under WIS. ADMIN. CODE § DOC 328.21 (Dec. 2006), of evidence of stolen goods discovered during a probation search of Ross's residence stemming from an unrelated drug violation; (2) failure to request probation records of an AODA meeting during which Ross told another attendee that police would want to speak to Ross about a theft at his workplace; (3) failure to object to the AODA meeting testimony at trial; (4) presentation of an unreasonable defense; (5) failure to investigate or cross-examine the victim about the value of the stolen property and the size of a window broken during the crime; (6) failure to object to the

[1] Out of fifty-two pages in Ross's appendix, only one page—the first—is correctly oriented. The remaining pages are either upside down or out-of-order, or both. Needless to say, this careless construction of the appendix causes significant delay, as we must either continually untangle the brief or dig through the file and search for the pertinent parts of the record. *See* ***State v. Bons***, 2007 WI App 124, ¶28, 301 Wis. 2d 227, 731 N.W.2d 367 (Brown, J., concurring) ("The good appellate litigators, and there are many, provide us with the information we need so that we can do our work in an efficient manner.").

victim's telephone testimony; and (7) failure to object to alleged other acts evidence.

¶4 The question of whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Smith***, 207 Wis. 2d 258, 266, 558 N.W.2d 379 (1997). "The circuit court's findings of fact will not be reversed unless they are clearly erroneous." ***Id.*** "Findings of fact include the circumstances of the case and ... counsel's conduct and strategy." ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305 (internal quotation omitted). The ultimate conclusion of whether counsel rendered constitutionally sufficient representation is a question of law that we decide de novo. ***Smith***, 207 Wis. 2d at 266-67.

¶5 A defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). This requires proof that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Our review of counsel's performance is highly deferential and a fair assessment requires that "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689.

¶6 A defendant must also show that any deficiencies in the representation prejudiced the defense. ***Id.*** at 692. To demonstrate prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694). A reasonable

probability is a probability sufficient to undermine our confidence in the outcome. ***Id.*** "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***Id.*** (quoting ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

¶7 As an initial matter, we note Ross failed to file a reply brief. Thus, he has not responded to any of the State's arguments. Ross has conceded these arguments, and we affirm the judgment and order on this basis. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 108-09 (unrefuted arguments are deemed conceded).

¶8 Moreover, Ross has not developed a cognizable prejudice argument. He continually equivocates about how the result of the proceedings would have been different if trial counsel had done everything he asks. For example, Ross does not explain how the search of his residence violated WIS. ADMIN. CODE § DOC 328.21; he merely thinks trial counsel should have sought suppression.[2] He does not identify what allegedly exculpatory information he expects to find in the probation records or explain what role the AODA testimony played at trial.[3] He does not explain why a jury would have acquitted him if counsel pursued a

[2] In any event, the record shows that trial counsel did seek to suppress evidence obtained during the probation search, citing an alleged violation of the probation search procedures outlined in the Division of Community Corrections manual. Counsel made this request both orally and in writing.

[3] In fact, Ross does not explain why trial counsel should have objected to the meeting testimony at all. His bald assertions that his statement to another attendee was taken "out of context" and "used in a highly inflammatory way" are not sufficient, standing alone, to establish inadmissibility. Indeed, by arguing that trial counsel should have presented evidence to explain the context and timing of his statement, Ross appears to assume that any objection would have been overruled.

different defense, or further cross-examined witnesses,[4] or objected to the victim's telephone testimony.[5] As for other acts, Ross argues only that the evidence "increase[d] the risk that the jury would determine the ultimate question on an improper basis."

¶9 We need not go on describing every way in which Ross's argument is deficient. Suffice it to say that most of his ineffective assistance arguments are downright incomprehensible. These scattershot arguments do not constitute developed themes reflecting legal reasoning. *See* ***Pettit***, 171 Wis. 2d at 646. We need not address undeveloped and inadequately briefed arguments. ***Id.*** In any event, we agree with the State that the overwhelming evidence at trial proved that Ross was guilty, such that none of the alleged errors—at least, those that we can decipher—prejudiced him.

¶10 Ross also argues the circuit court should have ordered transcripts of telephone recordings played for the jury and offered into evidence. This argument

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[4] Ross claims only that the unspecified cross-examination "*could* have led to credibility problems for this witness also that *could* have affected the credibility of testimony related to other items such as the window." (Emphasis added.) Ross's brief is not even clear which witness he is referring to.

[5] Ross concedes he would have been convicted even if one of the victims had not testified by telephone, but then cryptically states "the jeopardy would have been much less."

To the extent Ross is suggesting he would have been convicted of a lesser crime without the victim's testimony, we must reject this suggestion because Ross misapprehends the nature of the charges against him. Ross asserts that if the victim had not testified at trial, there would have been "no way to determine what time of day this occurred [and] it may have been possible to consider theft instead of burglary." Burglary requires only that the defendant enter a specified place without consent and with intent to steal or commit a felony. *See* WIS. STAT. § 943.10(1m). Contrary to Ross's apparent belief, there is no temporal element to burglary.

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

is frivolous. Ross cites SCR § 71.01(2), which generally requires that all proceedings in the circuit court be recorded. Ross acknowledges that "[t]here are exceptions under the rule," but fails to discuss them. In fact, one such exception states that audio recordings need not be reported if "played during the proceeding, marked as an exhibit, and offered into evidence." SCR § 71.01(2)(e).

¶11 Finally, Ross argues he is entitled to postconviction discovery. This is an extension of his argument that trial counsel should have sought the probation records of another AODA meeting attendee. However, Ross has not identified what exculpatory information he expects to find in the probation records.[6] Thus, Ross has not established that the records are relevant to an issue of consequence. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). He has not presented even a mere possibility—let alone reasonable probability—that the evidence would have changed the outcome of the trial. *See* ***id.***

By the Court.—Judgment and order affirmed.

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

[6] Ross's only statement about the content of these records is extraordinarily vague and underdeveloped: "Therefore there would be material information in those logs that would assist the Defense in its investigation and the Defendant believe [sic] establish dates that are contrary to what the State argued."