COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP512 **Cir. Ct. No. 2010CF127**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT JOHN KLINE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: JAMES A. MORRISON, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Scott Kline, pro se, appeals an order denying his WIS. STAT. § 974.06 (2011-12)[1] postconviction motion without a hearing.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Because Kline had a prior postconviction motion and appeal, his motion was procedurally barred unless he could show sufficient reason for his failure to have raised the present issues in the earlier proceedings. Kline attempts to establish sufficient reason by alleging ineffective assistance of his postconviction counsel for failing to raise ineffective assistance of Kline's pretrial and trial counsel based on their failure to raise five issues: (1) Whether there was probable cause for Kline's arrest; (2) Whether a probable cause determination was made within forty-eight hours of Kline's arrest; (3) Whether the State presented sufficient evidence at the preliminary examination to support the bindover; (4) Whether Kline's two convictions for aggravated battery were multiplicitous; and (5) Whether the district attorney solicited perjurous testimony from the victim, Jarrid Larson, at Kline's trial.[2] Because none of these issues are meritorious, we affirm the order.

BACKGROUND

¶2 The jury convicted Kline of two counts of aggravated battery and one count of first-degree reckless endangerment, all while possessing a dangerous weapon. The charges arose out of an incident in which several individuals fought with Larson, trying to get him to leave a residence. Kline picked up a sword and stabbed Larson in the buttocks, severing veins and arteries, constituting the first aggravated battery charge. Larson rolled over and saw Kline holding the sword and, according to Larson's trial testimony, "he sticks it to my chest and he's like, 'do you want more?'" That act constituted the basis for the first-degree reckless

[2] Kline also contends the district attorney waived the State's right to respond to these issues by failing to cite portions of the record in the brief it submitted in the circuit court. He cites cases in which this court refused to consider arguments that were not supported by appropriate references to the record as required by WIS. STAT. RULE 809.19(1)(d). That rule of appellate procedure does not apply to briefs submitted to the circuit court.

endangerment charge. Larson then grabbed the sword by the blade and Kline "looks at me [Larson] and he looks at the sword and he pulls it out," seriously injuring Larson's fingers, the basis for the second aggravated battery charge.

¶3 When police arrived at the scene, they found Larson outside the residence bleeding profusely. He told officers he had been stabbed and the people who stabbed him were upstairs. When officers entered the upstairs residence, they found several intoxicated adults and a three- or four-year-old child. When an officer attempted to speak with Jane Kloida, Kline told her to remember what they had talked about. When the officer said he wished to speak with the child, Kline told the child not to go with the officer and not to talk to him. Kline was then placed in a squad car. The child then identified Kline as the person who stabbed Larson.

DISCUSSION

¶4 The circuit court has the discretion to deny a postconviction motion without an evidentiary hearing if the motion presents only conclusory allegations, or if the record conclusively shows the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Whether the motion meets this requirement is a question we review independent of the circuit court. ***Id.*** at 310.

¶5 When a defendant claims ineffective assistance of counsel, he must establish both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). When a defendant claims ineffective assistance of postconviction counsel, to establish prejudice he must assert more than his counsel's failure to raise an issue. ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. He must show the issues raised in his present

motion are clearly stronger than the issues his counsel presented. ***State v. Romero-Georgana***, 2014 WI 83, ¶4, __ Wis. 2d __, 849 N.W.2d 668. If the motion fails to establish ineffective assistance by postconviction counsel, the motion is procedurally barred by the rule against successive postconviction motions set out in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

Probable Cause for Arrest

¶6 Kline contends he was arrested without probable cause when he was placed in the squad car. As a result, he seeks suppression of all evidence seized subsequent to his arrest. That argument fails for two reasons. First, the police had probable cause to take Kline into custody. Larson told officers that the people who stabbed him were upstairs. Kline was upstairs. His effort to impede the investigation by directing the child not to talk to the police would lead a reasonable police officer to believe Kline probably committed a crime. That satisfies the test for probable cause. *See* ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Kline's attempt to interfere with the investigation showed consciousness of guilt, which distinguished him from the other individuals found in the residence. *See generally* ***State v. Bauer***, 2000 WI App 206, ¶6, 238 Wis. 2d 687, 617 N.W.2d 902. In addition, Kline's attempt to impede the investigation created grounds for arrest for obstructing an officer. *See* WIS JI−CRIMINAL 1766.

¶7 Second, the remedy for an arrest without probable cause is not suppression of all evidence seized following the arrest. Rather, it is suppression of evidence obtained by "exploitation of that legality." *See* ***Wong Sun v. United***

States, 371 U.S. 471, 487-88 (1963). The interviews of other witnesses following Kline's arrest were not the product of the arrest.

¶8 Kline also argues that the circuit court lacked jurisdiction because the arrest was made without probable cause. Probable cause for an arrest is no longer considered a jurisdictional defect. ***State ex rel. Zdanczewicz v. Snyder***, 131 Wis. 2d 147, 151-52, 388 N.W.2d 612 (1986).

Probable Cause Determination within Forty-Eight Hours of Arrest

¶9 Kline contends he was held without a probable cause determination for more than forty-eight hours, in violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991). The State presented evidence at the postconviction hearing that a probable cause determination was made by a court commissioner within forty-eight hours of Kline's arrest. Citing cases involving certiorari review of administrative agencies, Kline contends the State was not authorized to add that documentation to the record. Because this issue does not involve certiorari review of an administrative agency, the law Kline cites is not applicable to this case. As part of this argument, Kline also contends the district attorney committed misconduct when he "falsified" the commissioner's order. He offers no support for that conclusory allegation, and we will not consider it. ***M.C.I. Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

Defects in the Preliminary Hearing

¶10 Kline contends the State failed to establish probable cause at the preliminary hearing because its evidence was based on hearsay and perjury. That argument fails for four reasons. First, a conviction resulting from a fair and

errorless trial cures any error at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

¶11 Second, Kline has not established prejudice from his counsel's failure to challenge the bindover. Had he successfully challenged the bindover, there is no prohibition against recharging the defendant and presenting additional evidence at a new preliminary hearing. *See* ***State v. Twaite***, 110 Wis. 2d 214, 219-20, 327 N.W.2d 700 (1983). Because the State had sufficient evidence to establish Kline's guilt beyond a reasonable doubt, it necessarily had sufficient evidence to support a bindover. Therefore, Kline was not prejudiced by his counsel's failure to challenge the bindover.

¶12 Third, contrary to Kline's argument, the State was not required to call Larson as a witness at the preliminary hearing. Probable cause could be found based on the testimony of other witnesses and reasonable inferences that could be drawn from their testimony.

¶13 Fourth, the State's witnesses established probable cause to believe Kline committed a felony. Although Ashley Lindquist did not see the stabbing, she testified at the preliminary hearing that she was in another room at the time the men were fighting with Larson. Then "Scotty came and grabbed the sword," and was moving "towards the hallway," in the direction of the stabbing. Shortly thereafter, she heard Larson say, "I'm done. I will walk out that door," and then heard Kline say, "Do you want some more of this." Co-defendant Daniel Jewell was holding Larson in a headlock at the time of the stabbing. Although he did not see the stabbing itself, Jewell saw Kline holding the sword immediately after the stabbing. He asked Kline, "Why did you do it?" Kline responded, "That's what he gets." Kline contends Jewell's testimony should be discredited because he is an

accomplice. A witness's credibility is not a matter that is resolved at a preliminary examination. ***State v. Fry***, 129 Wis. 2d 301, 304, 385 N.W.2d 196 (Ct. App. 1985). Lindquist's and Jewell's testimony established probable cause to believe Kline committed a felony.

¶14 Kline also contends the State failed to establish probable cause because its DNA analyst testified that Kline's DNA was not found on the sword. Lack of DNA evidence does not negate probable cause.

Double Jeopardy

¶15 Kline contends the two aggravated battery charges are multiplicitous because they are identical in law and fact.[3] *See* ***State v. Davis***, 171 Wis. 2d 711, 715-16, 492 N.W.2d 174 (Ct. App. 1992). They are not identical in fact. Stabbing Larson in the buttocks and cutting his fingers constituted separate volitional acts, even thought the acts occurred seconds apart. *See* ***Harrell v. State***, 88 Wis. 2d 546, 572, 277 N.W.2d 462 (Ct. App. 1979). The two acts resulted in separate injuries and involved separate muscular contractions. *See* ***id.*** Parts of Kline's brief could be construed as arguing double jeopardy based on the aggravated battery to Larson's fingers and the charge of endangering safety by conduct regardless of life. Those counts do not violate Kline's right against double jeopardy because those offenses are not identical in law. Each of those charges required proof of an element not contained in the other. Aggravated battery requires injury and criminal intent. WIS JI—CRIMINAL 1225. Endangering safety

[3] Kline's postconviction motion and brief on appeal do not address the second element of multiplicity, whether the legislature intended to allow multiple convictions for the offenses charged. *See* ***State v. Carol M.D.***, 198 Wis. 2d 162, 169, 542 N.W.2d 476 (Ct. App. 1995). We could reject Kline's multiplicity argument on that basis alone.

requires recklessness showing an utter disregard for human life. ***State v. Dibble***, 2002 WI App 119, ¶11, 257 Wis. 2d 274, 650 N.W.2d 908.

State's Solicitation of Perjured Testimony

¶16 Larson testified that the sword left a mark on his chest. The district attorney had Larson show the mark to the jury. Because the State's medical witnesses and reports did not mention any injury to Larson's chest, Kline contends Larson committed perjury and the district attorney knowingly solicited that perjurous testimony. The absence of any mention of an injury to Larson's chest by medical personnel does not exclude the possibility that the sword left a mark on Larson's chest. The medical personnel were primarily interested in stopping Larson's profuse bleeding and saving his fingers. Other less serious injuries were not the focus of the treatment providers.

¶17 Although it has little relationship with Kline's perjury argument, he also contends the mark on Larson's chest "represents the permanent disfigurement injury" that constitutes the basis of first-degree endangerment. That offense does not require any injury, only the *risk* of death or great bodily harm to another person. WIS JI−CRIMINAL 1345. The mark left on Larson's chest shows the risk presented by Kline's use of the sword. It does not establish permanent disfigurement, nor was that required. Because actual injury is not an element of endangering safety, Kline is wrong when he argues "without an injury that caused a permanent disfigurement under circumstances that showed utter disregard for human life that the jury would ACQUIT Mr. Kline." We conclude there was no error in allowing Larson to show the injury, no proof of perjury, and no proof of the prosecutor's knowledge of any perjury.

By the Court.—Order affirmed.

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