COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1641 **Cir. Ct. No. 2010CF4567**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AUDIE D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Audie D. Harris, *pro se*, appeals the order denying his WIS. STAT. § 974.06 (2013-14) postconviction motion.[1] Because Harris's

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

(continued)

various claims are either without merit, undeveloped, forfeited, or not cognizable under § 974.06, we affirm.

I. BACKGROUND

¶2 According to the criminal complaint, in July 2010, two men with guns entered a Milwaukee salon wearing masks, hooded sweatshirts, and green latex gloves. The men ordered everyone to the floor as they began searching the pockets of the patrons. The salon manager, B.C., was among those who were present.

¶3 DNA evidence led police to Harris, who was initially charged with three counts of armed robbery (threat of force), one count of false imprisonment, and one count of possession of a firearm by a felon, all as party to a crime. Two counts of armed robbery were subsequently dismissed.

¶4 Following a jury trial, Harris was convicted of the remaining count of armed robbery (threat of force) and of possession of a firearm by a felon. He was acquitted on the false imprisonment charge. The trial court sentenced Harris

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The Honorable Timothy M. Witkowiak entered the order disposing of Harris's postconviction motion. The Honorable David A. Hansher presided over Harris's trial and sentencing proceedings.

Harris's postconviction motion was captioned "[WIS. STAT. §] 974.06, writ of *habeas corpus* and joint petition for redress, in accord with [42 U.S.C. §] 1983." (Uppercasing omitted.) The postconviction court construed the filing as a motion for relief pursuant to § 974.06. The State did the same in the response brief it filed with this court. Harris does not seem to challenge this approach. Consequently, we consider any argument regarding the dismissal of his § 1983 and *habeas corpus* claims abandoned and will not develop it for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (we do not develop parties' arguments for them). While this case was pending, the caption was changed to reflect that this is an appeal from the denial of a § 974.06 motion.

to thirty years of imprisonment consisting of twenty years of initial confinement and ten years of extended supervision.

¶5 Harris did not directly appeal his convictions. His appellate counsel closed the file instead of filing an appeal because counsel believed that all of Harris's possible claims were frivolous except for one claim that Harris did not want to pursue.

¶6 In June 2015, Harris filed the postconviction motion underlying this appeal. In his filing, Harris presented a number of arguments. The postconviction court, treating it as a WIS. STAT. § 974.06 motion, denied it, and this appeal follows. Additional facts relevant to the issues raised on appeal will be set forth below.

II. DISCUSSION

¶7 Harris argues: (1) the evidence at trial was insufficient to support his convictions; (2) a detective committed perjury at trial; (3) the trial court erred at trial by admitting the testimony of B.C. related to a police lineup; (4) the trial court erred at trial by admitting into evidence a State Crime Lab analyst's testimony about DNA evidence; (5) the State withheld evidence in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963); and (6) the trial court erred at the preliminary hearing by admitting into evidence a State Crime Lab report and two law enforcement officers' testimony about the report. Harris also argues that his appellate counsel provided ineffective assistance by not filing a direct appeal.

¶8 At issue is whether the postconviction court erroneously exercised its discretion when it denied Harris's postconviction motion without a hearing. WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction

based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). Our supreme court has summarized the applicable legal standards for reviewing such motions:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The [postconviction] court must hold an evidentiary hearing if the defendant's motion raises such facts. 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 [postconviction] court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (citations and internal quotation marks omitted).

¶9 At the outset, we will address Harris's claims that his appellate counsel abandoned him without filing an appeal. He asks this court "to review the records to see if he waived his rights to appellate counsel, and w[h]ether any waiver was knowingly, voluntarily, or intelligently made." Harris is not entitled to relief on this claim.

¶10 First, a WIS. STAT. § 974.06 motion is not the right vehicle to bring a claim of ineffective assistance of appellate counsel. Rather, the claims should have been brought in a *habeas corpus* petition to this court pursuant to ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992); *see also* ***State v. Flores***, 170 Wis. 2d 272, 278, 488 N.W.2d 116 (Ct. App. 1992) ("[WISCONSIN STAT. §] 974.06 … is not the appropriate vehicle for relief for a criminal defendant who asserts that his or her appellate counsel provided ineffective assistance."). Second, as the State highlights, Harris's claim of appellate counsel's ineffectiveness is undeveloped. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412

N.W.2d 139 (Ct. App. 1987) (we do not develop parties' arguments for them). And, Harris did not file a reply brief refuting this assertion; consequently, we deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶11 We will address Harris's remaining claims below.

(1) *Sufficiency of the evidence at trial.*

¶12 Harris argues that the evidence at trial was insufficient to support his convictions. We must uphold Harris's convictions "'unless the evidence is so insufficient in probative value and force that as a matter of law, no reasonable fact finder could have determined guilt beyond a reasonable doubt.'" *See* ***State v. Miller***, 2009 WI App 111, ¶31, 320 Wis. 2d 724, 772 N.W.2d 188 (citation omitted). "This test requires us to view the evidence in the light most favorable to the conviction. Whether the evidence is sufficient to support the conviction is a question of law that we review *de novo*."[2] ***Id.*** (internal citation omitted).

¶13 Harris was convicted of armed robbery (threat of force) and possession of a firearm by a felon. The following is a summation of the evidence as set forth in the State's brief, which the record supports and Harris does not refute:

[2] The postconviction court erred when it concluded that sufficiency of the evidence cannot be challenged in a WIS. STAT. § 974.06 motion. *See* ***State v. Miller***, 2009 WI App 111, ¶28, 320 Wis. 2d 724, 772 N.W.2d 188 ("[A] sufficiency of the evidence challenge may be raised directly in a WIS. STAT. § 974.06 motion because such a claim is a matter of constitutional dimension."). However, it is well established that we can affirm when the court reaches the right result for the wrong reason. *See* ***Milton v. Washburn Cty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924.

> One of the robbery victims, B.C., testified that two men wearing masks that partially covered their faces entered B.C.'s hair salon, each man was armed with a gun, one man told the salon patrons to "get the fuck down," and at least one man took possessions from several patrons….
>
> … Police officer Scott Iverson testified at trial that after he responded to the robbery, he walked through an alley a half-block from the salon and recovered rubber gloves that were lying on top of some foliage. B.C. testified that those gloves looked like the kind of gloves that the robbers wore. A State Crime Lab analyst testified that she tested the gloves for DNA evidence and determined that Harris'[s] DNA was on one of the gloves. The analyst testified that there was approximately a one in 288 quadrillion chance that the DNA on the glove that matched Harris'[s] DNA actually belonged to someone else.
>
> Police officer [Steven Strasser] testified at trial that when police officers executed a warrant to search Harris'[s] home, the officers found a Ruger .357 revolver, a .45 caliber Glock semi[]automatic handgun, and ammunition for both guns—all hidden above a ceiling tile. Officer [Richard] Litwin further testified that the two guns recovered from Harris'[s] home were not the kind of guns often used in robberies because they were difficult to conceal. Officer Litwin explained that the revolver was "very weighty" and the Glock had a "huge extended magazine." Officer Litwin also testified that the Glock's extended magazine was "somewhat rare." B.C. testified at trial that the two guns recovered from Harris'[s] home were the same guns that two men used to rob her hair salon.
>
> Detective Herb Glidewell testified at trial that B.C. had identified Harris at a police lineup as one of the robbers. Detective Glidewell's trial testimony was inconsistent with that of B.C., who testified that she had told the police after the lineup that she was unsure whether person number four (Harris) was one of the robbers….
>
> The [trial] court instructed the jury to find, based on the parties' stipulation, that Harris was previously convicted of a felony.

(Record citations omitted.)

¶14 The foregoing establishes sufficient evidence for the jury to reasonably find that Harris committed armed robbery (threat of force) and was a felon in possession of a firearm. Harris's arguments to the contrary amount to factual disputes resolved by the jury. It is not this court's function to reweigh the evidence heard at trial. If more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶15 Insofar as Harris argues that B.C.'s and Detective Glidewell's testimony about the police lineup was incredible as a matter of law, we conclude that even if it was, the remaining evidence was sufficient to support both convictions. *See, e.g.*, ***State v. Nelson***, 2005 WI App 113, ¶21, 282 Wis. 2d 502, 701 N.W.2d 32 ("The evidence available to the State, without the victim, was sufficient to find Nelson guilty beyond a reasonable doubt."). Again, as set forth by the State and supported by the record:

> As the prosecutor stated during closing argument, the guns and gloves were the "big" pieces of evidence and B.C.'s testimony about the lineup was a "little" piece of evidence. In fact, during closing argument and rebuttal, the prosecutor did not even mention Detective Glidewell's testimony about the lineup. The gloves evidence was strong because, as explained above, gloves were found near the crime scene, Harris'[s] DNA was found on one of the gloves, and an eyewitness to the robbery testified that the gloves looked like the kind that the robbers wore. The guns evidence was also strong because, as explained above, police recovered guns from a hiding place in Harris'[s] home, the guns were unusual and one had a rare feature, and an eyewitness testified that they were the same guns that the robbers used.

¶16 The State asserts, and Harris does not refute, that the jury had sufficient evidence to find Harris guilty based on the guns and gloves evidence

alone. Accordingly, we conclude that Harris has conceded this issue. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

(2) *Detective Glidewell's alleged perjury at trial.*

¶17 Next, Harris argues that the State deliberately and intentionally introduced Detective Glidewell's perjured and false testimony of B.C. picking him out of the police lineup. Harris submits that it was perjury given that B.C. never made a positive identification of any of the suspects.

¶18 Detective Glidewell testified as follows with regard to the lineup form B.C. filled out and his interview of her after the lineup:

> Q Now let's go to number four (Harris). What did she circle for number four or write? Or what did she do for number four?
>
> A It looks like she wasn't quite sure what she indicated on the form. Actually no is scratched out and then there's a line through yes and then in her own writing she placed an arrow towards yes and says unsure, maybe, not sure.
>
> Q Okay. And that was what she did in her own handwriting?
>
> A Yes. All that's in her handwriting.
>
> Q And then did you discuss it with her afterwards?
>
> A Yes. I was not with her when she filled out this form.
>
> Q Okay.
>
> A We leave them alone to fill out the form. After the lineup was over, I took her in a separate room, just her. And I, as we do with all the witnesses, and I spoke with her.
>
> Q All right. What did she tell you?

> A I asked her if she understood the lineup and if she had made any identifications.
>
> Q And?
>
> A She said yes.
>
> Q … Expound on that.
>
> A Basically she told me she—she—the person number four she says she wasn't sure which of the two males it was during the robbery, meaning she's not sure if he was the one by the door, she's not sure if he had a gun, but she was sure he was one of them.

(Parenthetical added.)

¶19 When it is asserted that the State's knowing use of perjury in a criminal prosecution violates due process, the inquiry hinges on "deliberate deception." *See* ***State v. Whiting***, 136 Wis. 2d 400, 418, 402 N.W.2d 723 (Ct. App. 1987). "The presentation of inconsistent testimony is not to be confused with presenting perjured testimony. It is the jury's role to resolve issues of credibility." ***Id.*** (internal citation omitted). A person commits perjury by making "a false material statement which the person does not believe to be true." *See* WIS. STAT. § 946.31.

¶20 Harris's perjury claim fails because he has not presented any evidence that Detective Glidewell's testimony was false or that Detective Glidewell knew it was false. *See, e.g.*, ***State v. Lock***, 2013 WI App 80, ¶¶46-47, 348 Wis. 2d 334, 833 N.W.2d 189. The inconsistency between B.C.'s and Detective Glidewell's trial testimony was a credibility issue for the jury to resolve.

(3) *B.C.'s testimony related to the police lineup.*

¶21 Harris goes on to argue that the trial court erred when it admitted B.C.'s testimony related to the police lineup. He claims this evidence was

inadmissible under WIS. STAT. § 904.03 because the danger of unfair prejudice substantially outweighed the probative value.

¶22 The State argues, and Harris does not refute, that his WIS. STAT. § 904.03 claim is not cognizable in a WIS. STAT. § 974.06 motion. *See* ***Miller***, 320 Wis. 2d 724, ¶27 ("'Such issues as … error in admission of evidence and other procedural errors cannot be reached by a sec. 974.06 motion.'") (citation omitted). Consequently, Harris has conceded this issue. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

(4) *The State Crime Lab analyst's testimony about DNA evidence.*

¶23 According to Harris, the trial court erred when it allowed the State Crime Lab analyst to testify about DNA evidence. He contends that such testimony was inadmissible under WIS. STAT. § 972.11(5), a statutory provision that was repealed long before his case arose. *See* 2001 Wis. Act 16, § 4003t.

¶24 Again, this claim is not cognizable in a WIS. STAT. § 974.06 motion because it alleges a statutory violation and an evidentiary ruling. *See* ***Miller***, 320 Wis. 2d 724, ¶27. In light of this, we need not discuss the other shortcomings to Harris's argument on this issue.

¶25 To the extent Harris vaguely alleges the DNA evidence was inadmissible "under the rules of evidence and common law," his argument is unsupported and undeveloped. He cites only our unpublished decision in ***State v. Black***, No. 2005AP2628-CR, unpublished slip op. (WI App Aug. 10, 2006). That decision, however, may not be cited. *See* WIS. STAT. RULE 809.23(3)(b) (carving out an exception to authored unpublished opinions issued *after* July 1, 2009). We will not develop Harris's argument for him. *See* ***Gulrud***, 140 Wis. 2d at 730.

(5) *The State's alleged withholding of evidence in violation of* ***Brady***.

¶26 Harris argues that the State violated ***Brady*** in two ways: (1) by failing to provide the defense with a copy of the search warrant that was executed at his mother's residence and the return affidavit; and (2) by failing to disclose information about DNA evidence.[3]

¶27 Under ***Brady***, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Id.***, 373 U.S. at 87. In order to establish a ***Brady*** violation, a defendant must demonstrate that the evidence withheld by the prosecution is material; that is, had the withheld evidence been given to the defendant, there is a reasonable probability that the result of the proceeding would have been different. ***State v. Harris***, 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737.

¶28 The State asserts, and Harris does not refute, that he forfeited his ***Brady*** claim as to the search warrant and return affidavit because he did not present it in his WIS. STAT. § 974.06 motion.[4] *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (We decline to review

[3] While Harris sets forth tangential claims that the State withheld exculpatory evidence in violation of WIS. STAT. § 971.23(5) and (7), such claims are not cognizable in a WIS. STAT. § 974.06 motion. *See* ***Miller***, 320 Wis. 2d 724, ¶27.

[4] The State used the term waiver instead of forfeiture, however, our supreme court has clarified: "[a]lthough cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" *See* ***City of Eau Claire v. Booth***, 2016 WI 65, ¶11 n.5, 370 Wis. 2d 595, 882 N.W.2d 738 (citation and one set of quotation marks omitted).

issues raised for the first time on appeal.). Harris has conceded this issue. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

¶29 Additionally, aside from conclusory assertions, Harris does not adequately develop his claim that the State failed to disclose information about DNA evidence. The postconviction court pointed out that Harris "has not identified any evidence that the State failed to disclose." This problem remains. We will not develop Harris's argument for him. *See* ***Gulrud***, 140 Wis. 2d at 730.

(6) *Purported errors in the admission of evidence at the preliminary hearing.*

¶30 Harris argues that the trial court erred at his preliminary hearing by admitting testimony from Officer Litwin and Detective Glidewell regarding a report prepared by the State Crime Lab. He submits that this testimony was inadmissible under WIS. STAT. § 907.02, the statute governing expert testimony. The State argues, and Harris does not refute, that this alleged statutory violation is not cognizable in a WIS. STAT. § 974.06 motion. *See* ***Miller***, 320 Wis. 2d 724, ¶27.

¶31 Harris seemingly attempts to convert this statutory claim into a jurisdictional claim by arguing that the trial court's erroneous ruling at the preliminary hearing deprived it of subject matter jurisdiction at trial. Harris, however, forfeited this argument by not raising it in his WIS. STAT. § 974.06 motion. *See* ***Shadley***, 322 Wis. 2d 189, ¶25.

¶32 We conclude that the postconviction court properly denied Harris's postconviction motion.

By the Court.—Order affirmed.

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