COURT OF APPEALS DECISION DATED AND FILED

April 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2015AP2125-CR

Cir. Ct. No. 2012CF1508

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAQUAN JAY RILEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DAVID L. BOROWSKI and DANIEL L. KONKOL, Judges. *Affirmed*.

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. Laquan Riley appeals a judgment of conviction for second-degree reckless homicide with a dangerous weapon, attempted armed robbery, and felon in possession of a firearm following a jury trial at which the

State presented evidence that Riley, together with Steven Hopgood and George Taylor, participated in an armed robbery in which Riley fatally shot Vincent Cort.[1] Riley argues that a new trial is required because the circuit court erroneously exercised its discretion in denying mistrial motions based on two sets of improper statements by a prosecutor. Separately, although Riley's request for relief is unclear, he suggests that his trial counsel provided ineffective assistance in failing to request that the jury be instructed on the lesser included offense of felony murder, because if he had been convicted of felony murder instead of second-degree reckless homicide and attempted armed robbery, his maximum sentence would have been lower. We reject Riley's mistrial-related arguments for reasons that we have already explained in a separate opinion and conclude that Riley's ineffective assistance argument is undeveloped. Accordingly, we affirm.

BACKGROUND

¶2 The following basic background provided in ***State v. Hopgood***, No. 2014AP2742-CR, unpublished slip op. (WI App June 2, 2016), is not now disputed by either party:

> One evening in June 2010, Vincent Cort pulled his orange Oldsmobile sedan into a Milwaukee liquor store

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[1] Riley, Taylor, and Hopgood were codefendants in a single December 2012 trial, resulting in convictions of each, and each pursued a direct appeal. Last year, we affirmed Hopgood's conviction, ***State v. Hopgood***, No. 2014AP2742-CR, unpublished slip op. (WI App June 2, 2016), and by separate opinion issued today we address Taylor's direct appeal, ***State v. Taylor***, No. 2015AP1325-CR.

The Honorable David L. Borowski presided over the joint trial of Riley, Taylor, and Hopgood, and Judge Borowski sentenced Riley. The Honorable Daniel L. Konkol addressed Riley's post-conviction motions and Judge Borowski addressed Riley's supplemental motion for post-conviction relief, which involved the claim of ineffective assistance of counsel based on failure to request a lesser included offense.

> parking lot. Cort entered the store, exited with a bottle, and returned to his car. A person approached Cort, pointed a gun at him, and yelled, "Give it up." Cort did not immediately submit, and the person fired at least one round, hitting Cort. Cort managed to drive out of the parking lot, and he was transported to a hospital, where he later died.
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> In February 2012, 20 months later, police arrested Paris Saffold in connection with a drug investigation unrelated to Cort's homicide. At that time, Saffold told police that he had been an eyewitness to events leading up to and including Cort's homicide. More specifically, Saffold said that, at the time of Cort's homicide, Saffold had been living in an apartment complex across the street from the liquor store where Cort was fatally shot, and that Saffold had witnessed three individuals—whom police identified as [Steven] Hopgood, Laquan Riley, and George Taylor—plan the armed robbery. Saffold told police that Riley shot Cort using a gun that Hopgood had just provided to Riley.
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> … [A]t the joint trial of Hopgood, Riley, and Taylor, the State relied heavily on Saffold's eyewitness testimony.

Id., ¶¶4-6. We reference additional pertinent facts in the Discussion section below.

¶3 Riley was charged with first-degree reckless homicide while armed with a dangerous weapon, as a party to the crime, attempted armed robbery with use of force, as a party to the crime, and possession of a firearm by a felon. The jury convicted Riley of the lesser included offense of second-degree reckless homicide, as a party to the crime, attempted armed robbery, as a party to the crime, and possession of a firearm by a felon.

¶4 Riley was sentenced to the following, each sentence consecutive to the others: 25 years for the second-degree reckless homicide (20 years' initial confinement, 5 years' extended supervision); 7 years for the attempted armed robbery (5 years' initial confinement, 2 years' extended supervision); and 10 years

for the felon in possession (5 years' initial confinement, 5 years' extended supervision).

¶5 Riley filed a post-conviction motion, which the circuit court denied in a written decision. Riley filed a supplemental motion for post-conviction relief, which the court denied in a written decision. Riley appeals these post-conviction decisions of the circuit court, as well as rulings during trial.

DISCUSSION

I. DENIALS OF MISTRIAL MOTIONS

¶6 Riley argues that the circuit court erroneously exercised its discretion in denying motions for mistrial based on improper statements by a prosecutor: first, a reference to Saffold's testimony being "the truth" and, second, references made during the rebuttal closing argument suggesting that the State possessed extensive incriminating evidence that had not been presented to the jury. As we now briefly explain, we reject these arguments for reasons that we explained in ***Hopgood***.

¶7 "A motion for mistrial is committed to the sound discretion of the circuit court. An erroneous exercise of discretion may arise from an error in law or from the failure of the circuit court to base its decisions on the facts in the record." ***State v. Ford***, 2007 WI 138, ¶28-29, 306 Wis. 2d 1, 742 N.W.2d 61 (circuit court has discretion to order mistrial after considering whether "in light of the entire facts and circumstances ... the defendant can receive a fair trial").

¶8 Addressing first the prosecutor's reference to Saffold's testimony being "the truth," we explained the background in detail in ***Hopgood***, and there is no reason to repeat it here. *See* ***Hopgood***, No. 2014AP2742-CR, ¶¶79-81. After

providing the background, we explained why we concluded that the prosecutor blurting out the statement, "it's the truth," would have had little to no impact on the jury. ***Id.***, ¶87. Riley's brief substantive argument on this topic adds nothing to the argument by Hopgood that we rejected, and we see no reason to take a different approach here.

¶9 Turning to the prosecution rebuttal closing argument, again we explained the background in detail in ***Hopgood***, which we also need not repeat here. ***Id.***, ¶¶82-85. We then explained why the references made by the prosecutor were "concerning," but why we concluded that a reasonable juror would not "have been able to reach any particular conclusion about any issue in the case based on these comments," and why "we cannot say that the circuit court erroneously exercised its discretion in determining that they did not prevent a fair trial." ***Id.***, ¶¶88-89. As with the first topic, Riley's substantive argument on this topic adds nothing to the rejected Hopgood argument, and we see no reason to take a different approach here.

II. LESSER INCLUDED OFFENSE

¶10 We reject as undeveloped whatever argument or arguments Riley intends to make on the lesser included offense topic. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (the court of appeals need not address the merits of inadequately briefed issues). For all intents and purposes we would have to construct an argument for Riley, including conducting what might involve extensive legal research without the assistance of any argument made by either party, which we decline to do.

¶11 Additional background is necessary to explain why Riley's appellate briefing does not present any developed argument on this topic. Concessions by both sides leave no dispute about the pertinent background that follows.

¶12 Although the circuit court could have instructed the jury on the lesser included offense of felony murder on the facts here, Riley's trial counsel elected not to request a felony murder instruction. As a result, without objection from either side, the court gave instructions on first-degree reckless homicide and the lesser included offense of second-degree reckless homicide (along with attempted armed robbery and felon in possession), but not felony murder. The co-defendants, Hopgood and Taylor, were both charged with and convicted of felony murder, as parties to the crime.

¶13 If the court had given the felony murder instruction in Riley's case, and the jury had returned a verdict on that charge, then the attempted armed robbery charge would have fallen away. This is because attempted armed robbery would have been the predicate felonious conduct for the felony murder charge and Riley could not have been convicted of both felony murder and attempted armed robbery. And, because the attempted armed robbery charge would have fallen away, a felony murder conviction would have carried a maximum total sentence exposure of 15 fewer years than if Riley had been convicted of second-degree reckless homicide and attempted armed robbery—45 years of total imprisonment instead of 60 years of total imprisonment. Riley's actual sentence of 42 years of total imprisonment is below the 45-year total maximum sentence with a felony murder conviction.

¶14 Riley contended in his supplemental motion for post-conviction relief that a ***Machner***[2] hearing "is required to determine the prejudicial ineffectiveness of [trial counsel] in order to determine whether or not Mr. Riley may have his Judgment of Conviction vacated." The circuit court denied this motion based on a lack of a showing of prejudice:

> The sentence that the defendant actually received was less than what his maximum exposure for felony murder and felon in possession of a firearm would have been under the defendant's argument, and therefore, the defendant was not prejudiced by counsel's failure to pursue a lesser included instruction on felony murder.

¶15 On appeal, although it is unclear, it could be that a developed argument by Riley might involve a dispute with the State about the proper application of the legal standards governing ineffective assistance of counsel as to the lesser included offense topic. Accordingly, we first summarize the ineffective assistance of counsel legal standards, and then explain why we conclude that Riley fails to present a developed argument that would provide at least a starting point for ineffective assistance analysis.

¶16 In order to establish ineffective assistance of counsel the defendant must show both that trial counsel's performance was deficient and that trial counsel's deficient performance prejudiced the defense. ***State v. Carter***, 2010 WI 40, ¶21, 324 Wis. 2d 640, 782 N.W.2d 695 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). In this case, the State takes the position on appeal, as did the circuit court, that there is no need to address the deficiency topic, because of the clear absence of prejudice.

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[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶17 The test for prejudice is whether "'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.'" ***State v. Jenkins***, 2014 WI 59, ¶37, 355 Wis. 2d 180, 848 N.W.2d 786 (quoted sources omitted).

¶18 Riley provides no developed argument supported by legal authority on the prejudice topic in his principal brief, and we conclude that this omission is dispositive. Before explaining further, we emphasize that we intend to express no views on the merits on this issue. Because Riley has not given us a proper starting point for analysis, we do not proceed with any analysis beyond explaining why Riley's prejudice argument is not developed.

¶19 In his principal brief, Riley may intend to argue that prejudice was automatically established because his trial counsel "exposed [Riley] to a substantial amount of additional prison due to [counsel's] conduct." Riley argues that it does not matter that the sentence actually imposed fell below the maximum that would have applied if he had been convicted of felony murder, because

> the trial court could, just as easily, have imposed a sentence that would have been much greater, and not legal, under such an instruction. Accordingly, the trial court's sentencing, several months later, is irrelevant to Defendant's actual exposure due to trial counsel's prejudicial ineffectiveness of counsel. Defendant suffered actual prejudice.

¶20 Without purporting to fully understand what Riley means to convey in these statements, we have the following observations about them. Riley appears to disavow an argument that there was a reasonable probability that Riley would

have received a lower sentence if the jury had received a felony murder instruction.[3] The assertion that the sentence the court imposed "is irrelevant to [Riley's] actual exposure" appears to presuppose the categorical rule concept that we have referenced, under which that greater exposure automatically establishes ineffective assistance. In his reply brief, Riley apparently intends to elaborate slightly on this categorical rule concept: "[T]rial counsel's ineffectiveness in handling the issue of lesser included offense instructions, by itself, was prejudicial." Riley argues that this argument is supported by ***State v. Jones***, 228 Wis. 2d 593, 598 N.W.2d 259 (Ct. App. 1999). It is not.

¶21 ***Jones*** is not an ineffective assistance of counsel case. After the circuit court rejected a joint request from the parties to instruct on the lesser included offense of theft, Jones was convicted of armed robbery. ***Id.*** at 595, 597-98. This court reversed on appeal, concluding that the theft instruction should have been given. ***Id.*** at 599-600. Not only were the pertinent facts different from the facts here, the court in ***Jones*** had nothing at all to say generally about the topic of ineffective assistance of counsel or more specifically about the prejudicial effects of differing sentencing outcomes. Riley argues that it is "telling" that the court in ***Jones*** does not address the sentence that Jones received for armed robbery. However, we see nothing telling in ***Jones***, because the topic of

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[3] For the first time in his reply brief Riley seems to advocate for a new approach, suggesting in the course of a single paragraph that we should attach significance to the fact that the court sentenced him on each of the three counts of conviction and "discussed each of the three guilty convictions [sic] separately." Not only is this suggestion conclusory and not tied to any pertinent legal authority, it comes too late. We see no reason to depart here from the general rule that we ignore arguments raised for the first time in a reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

sentencing was apparently never raised and the only issue addressed in that case is narrow and not in dispute in this appeal.

¶22 To summarize, Riley fails to provide Wisconsin law or other persuasive authority that supports his apparent argument that, whenever a trial counsel fails to request a lesser included charge that could have been given, this automatically constitutes ineffective assistance of counsel.

¶23 In addition, Riley's appellate briefing is insufficiently developed with respect to the remedy he seeks. Riley may intend to argue that this supposedly automatic category of ineffective assistance in turn automatically requires reversal for a new trial. For example, Riley makes references on appeal, albeit unclear ones, suggesting a request for a new trial, and he requested this relief in his post-conviction motion. However, Riley never explains why the situation here can be remedied only by a new trial. To illustrate, in his principal brief Riley does not argue that, if the jury had been given a felony murder instruction, this might have produced verdicts more favorable to him than convictions for second-degree reckless homicide and attempted armed robbery, putting sentencing issues to the side.[4] Rather, by the logic of some of his appellate briefing, an amendment to the judgment and resentencing would provide an adequate remedy, not a new trial. Thus, Riley presents neither a developed

[4] For the first time in his reply brief Riley apparently intends to argue that he was prejudiced by the following fact, considered alone: that he was convicted of two counts (second-degree reckless homicide and attempted armed robbery) instead of one count (felony murder) due to the alleged ineffective assistance. Whatever the possible merits of an extra-count prejudice argument, we reject it as forfeited because in his supplemental post-conviction motion in the circuit court and in his principal brief on appeal, Riley's entire focus was on the exposure-to-more-time concept.

argument on the underlying merits nor on the appropriate remedy, were he to succeed on the merits.

CONCLUSION

¶24 For these reasons, we affirm the judgment of conviction and the challenged decisions of the circuit court.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under RULE 809.23(3)(b).