COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP369-CR **Cir. Ct. No. 2014CF2230**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER DANIEL BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirm*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Christopher Daniel Brown appeals from a judgment of conviction for one count of resisting or obstructing an officer and one

count of throwing or discharging bodily fluid at a public safety worker, contrary to WIS. STAT. §§ 946.41(1) and 941.375(2) (2013-14).[1] Brown also appeals from the denial of his postconviction motion. Brown argues that his trial counsel provided ineffective assistance in two ways. He also argues that § 941.375(2) is unconstitutional as applied in this case. We conclude that the trial court did not erroneously exercise its discretion when it denied Brown's ineffective assistance claims without a hearing, and we decline to address the merits of Brown's constitutional challenge because it is raised for the first time on appeal. We affirm the judgment and the order.

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[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted, except all references to WIS. STAT. § 941.375(2) are to the 2013-14 version, which provided:

> **Throwing or discharging bodily fluids at public safety workers. (1)** In this section:
>
> (a) "Ambulance" has the meaning specified in s. 256.01 (1).
>
> (b) "Public safety worker" means an emergency medical technician licensed under s. 256.15, a first responder certified under s. 256.15 (8), a peace officer, a fire fighter, or a person operating or staffing an ambulance.
>
> **(2)** Any person who throws or expels blood, semen, vomit, saliva, urine, feces, or other bodily substance at or toward a public safety worker under all of the following circumstances is guilty of a Class I felony:
>
> (a) The person throws or expels the blood, semen, vomit, saliva, urine, feces, or other bodily substance with the intent that it come into contact with the public safety worker.
>
> (c) The public safety worker does not consent to the blood, semen, vomit, saliva, urine, feces, or other bodily substance being thrown or expelled at or toward him or her.

The 2015-16 version of § 941.375(2) defines and adds "prosecutor" to the list of those individuals covered by the statute.

BACKGROUND

¶2 According to the criminal complaint, officers responded to a phone call indicating that a man "had just threatened to kill his wife." The officers located Brown, who matched the description of the man. He resisted being handcuffed, and he continued to kick, yell, and threaten officers after he was handcuffed. The officers decided that based on his behavior, Brown should be "medically cleared" at a hospital before being taken to jail.

¶3 The complaint further alleged that at the hospital, a female employee who was later identified as an emergency medical technician ("EMT") attempted to draw Brown's blood "to determine what substances, if any, were contributing to his behavior." As the EMT approached Brown, he "gathered sal[iv]a and mucus in his mouth and spit that at her[,] striking the lower left abdomen area of her uniform." Eventually, the EMT was able to draw Brown's blood. The test results revealed that Brown's blood alcohol content was .376.

¶4 Brown was charged with one count of resisting or obstructing an officer and one count of throwing or discharging bodily fluid at a public safety worker. The case proceeded to a jury trial. The State introduced the testimony of two officers and the EMT. Brown did not call any witnesses and did not testify. He stipulated to the results of the blood alcohol test.

¶5 At closing argument, trial counsel argued that Brown was not able to form the requisite intent to spit at the EMT because he was so intoxicated at the time the EMT drew his blood. With respect to the resisting charge, trial counsel argued that Brown engaged in only "mild resistance." The jury found him guilty of both counts. Brown was subsequently sentenced to a total of twenty-one months of initial confinement and eighteen months of extended supervision.

¶6 Postconviction counsel was appointed and he filed a postconviction motion raising several issues, including ineffective assistance of trial counsel. After reviewing briefs from the parties, the trial court denied the motion in a written order, without a hearing. This appeal follows.

LEGAL STANDARDS

¶7 In his postconviction motion, Brown argued that he was entitled to relief based on ineffective assistance of trial counsel. To prove ineffective assistance, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Id.*** at 697. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations and internal quotation marks omitted).

¶8 An evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A motion for a ***Machner*** hearing may, at the discretion of the trial court, be denied "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not

entitled to relief.'" ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

DISCUSSION

¶9 On appeal, Brown has not pursued every issue raised in his postconviction motion. We will address only those issues discussed in his appellate briefs. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (noting that issues not briefed or argued are deemed abandoned). First, Brown argues that he was denied the effective assistance of trial counsel in two ways. Second, he argues that WIS. STAT. § 941.375 is unconstitutional as applied to him in this case. We consider each issue in turn.

I. Ineffective assistance of trial counsel.

A. Presentation of the voluntary intoxication defense.

¶10 Brown's postconviction motion asserted that trial counsel provided ineffective assistance when he presented a voluntary intoxication defense to the bodily fluid count because the legislature repealed that defense effective April 18, 2014 (about one month before the incidents at issue here). *See* 2013 Wis. Act 307. The motion argued that "[t]rial counsel's use of this repealed defense and the failure to explore alternative[] defenses foreclosed the defendant's options and prevented the consideration[] of more viable defenses." The motion added, without elaboration: "Even self-defense may have been warranted as a defense given the intrusion of a forced blood draw in this case."

¶11 In response, the State asserted that even though the voluntary intoxication defense had been repealed, "it is still possible to utilize this defense under appropriate circumstances … based on the defendant's constitutional right

to present a defense." The State also argued that Brown had failed to demonstrate prejudice, noting that Brown was allowed to present the intoxication defense, the jury was instructed on that defense, and the jury could have found Brown not guilty based on that defense.

¶12 The trial court agreed with the State's arguments. With respect to prejudice, it recognized that it had allowed Brown to present the voluntary intoxication defense. The trial court also said that Brown failed to show how the other potential defenses he cited in his motion and reply brief—self-defense and mistake—"would have been viable."

¶13 On appeal, Brown argues that it was trial counsel's "duty to know that at the time of the trial … the defense of voluntary intoxication had been repealed." He does not address the arguments the State made to the trial court concerning the continuing viability of a voluntary intoxication defense in certain cases. With respect to prejudice, Brown asserts that he "provided sufficient information to trial counsel to pursue self-defense as a defense to the charges," implying that a claim of self-defense should have been offered instead of voluntary intoxication. Brown's appellate brief does not discuss the elements of self-defense or adequately explain how the specific facts would have supported a self-defense claim.

¶14 We conclude that the trial court did not erroneously exercise its discretion when it rejected Brown's ineffective assistance argument without a hearing. At minimum, Brown has not demonstrated how he was prejudiced by his

trial counsel's alleged error.[2] Brown's argument that more viable defenses were available was not sufficiently supported in his postconviction motion or on appeal, and we decline to develop an argument for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (court will not develop argument for litigant). Brown's bald assertions that a self-defense claim would have been viable, without references to the facts of the case and applicable legal standards, do not demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Love***, 284 Wis. 2d 111, ¶30 (citations and internal quotation marks omitted).

B. Lack of a suppression motion challenging the blood draw.

¶15 Brown's postconviction motion alleged that "[t]rial counsel should have challenged the nonconsensual and warrantless blood draw." (Bolding omitted.) Brown argued that he had "a right to protest this unlawful intrusion." He acknowledged that it is "possible that trial counsel did not challenge the blood draw because he wanted to use the blood test results as part of the voluntary intoxication defense," but he asserted that defense should not have been pursued.

¶16 The trial court rejected this argument on grounds that Brown had not shown trial counsel performed deficiently. The trial court said there was "nothing improper about trial counsel's utilization of a voluntary intoxication defense under the circumstances of this case," and that suppressing the results of the blood test

[2] We decline to address whether it was appropriate for trial counsel to assert a voluntary intoxication defense despite the repeal of that statutory defense—as the State argued in the trial court—because it is clear that Brown has not demonstrated he was prejudiced by the presentation of that defense.

"would have undermined his defense." The trial court also concluded that a suppression motion would have failed.

¶17 On appeal, Brown continues to assert that the blood draw should have been challenged. He argues the merits of whether a suppression motion would have been granted. But, as in his postconviction motion, Brown does not adequately explain how he was prejudiced by his trial counsel's failure to file a suppression motion. As the State points out:

> Brown was convicted of obstructing or resisting an officer, and discharging bodily fluids onto a public safety worker. The State did not need to prove Brown's blood alcohol concentration, because Brown was not charged with any offense for which his blood alcohol concentration mattered. Therefore, even if Brown had moved to suppress the blood test results, and even if the motion had been successful, it would have made no difference.

We are not convinced that if trial counsel had filed a successful suppression motion—which would have resulted in the suppression of the blood alcohol test results—the result of the proceedings would have been different. *See* ***id.*** Therefore, Brown's ineffective assistance claim fails.

II. Constitutional challenge to WIS. STAT. § 941.375.

¶18 On appeal, Brown argues that WIS. STAT. § 941.375, the statute that prohibits throwing or discharging bodily fluid at a public safety worker, "is unconstitutional as applied to the circumstances of this case." (Bolding and capitalization omitted.) He contends the statute is unconstitutional because it does not require that the accused person have knowledge that the victim falls within the class of individuals protected by the statute. Brown presents extensive argument about strict liability and due process.

¶19 We decline to address the merits of Brown's claim because he did not previously challenge the constitutionality of the statute. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (appellate courts generally will not address issues raised for the first time on appeal). Brown disagrees. In his reply brief, Brown asserts that he *did* challenge the statute in the trial court, pointing to his postconviction motion argument that the interpretation of WIS. STAT. § 941.375 employed in this case deprived him "of due process and equal protection under the law."

¶20 We have carefully reviewed the postconviction motion and Brown's appellate brief. The issues raised are not the same. In his postconviction motion, Brown argued that his trial counsel provided ineffective assistance by not challenging his conviction for throwing or discharging bodily fluids at a public safety worker. The motion asserted trial counsel should have argued that even though the woman who drew Brown's blood at the hospital was technically an EMT (which is included in the definition of "Public safety worker" under WIS. STAT. § 941.375), she "was not acting as an EMT in this case and was not a 'public safety worker' while working at the … Hospital Emergency Room."

¶21 In contrast, Brown's argument on appeal is that WIS. STAT. § 941.375 is unconstitutional because it does not require the actor to have knowledge that the person at whom he or she throws or discharges bodily fluids is a "public safety worker" under that statute. Brown's appellate argument is not even couched in terms of ineffective assistance, unlike Brown's trial court argument about the application of the statute. We decline to address Brown's constitutional argument because it is presented for the first time on appeal. *See* ***Schulpius***, 287 Wis. 2d 44, ¶26.

By the Court.—Judgment and order affirmed.

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