COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1022 **Cir. Ct. No. 2009CF256**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL BUCHANAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Daniel Buchanan, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2015-16)[1] motion without a hearing. Buchanan raised four claims of error, which the circuit court rejected. Buchanan renews those arguments on appeal. We also reject Buchanan's arguments and affirm the order.

BACKGROUND

¶2 On January 8, 2009, Vamonta Ward and Dentonicco Magett devised a plan to rob the Mobile Mall, a van from which Ahmadou Fall and Roderick Crape sold shoes and other clothing items. They set up a meeting with the van. Ward subsequently called Buchanan and told him to bring a gun. Ward, Magett, and Deangelo Cunningham, whom Ward and Magett had picked up earlier in the afternoon, picked up Buchanan and drove to the meeting spot. Ward and Buchanan got out while Magett drove to a nearby location to wait. Buchanan gave Ward his gun.

¶3 When the Mobile Mall arrived, Ward and Buchanan approached the van. Ward told Fall, the driver, to "give it up." When Fall realized this was an attempted robbery, he started to drive away. This caused Ward to jump back, and he claimed the gun accidentally discharged as he moved out of the way. Fall was struck by a bullet but continued driving. He eventually lost consciousness and control of the van, ultimately succumbing to the gunshot wound. Ward, Buchanan, and Magett were each charged with felony murder.[2] Buchanan was

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] It is not evident whether charges were contemplated against Cunningham, though it appears he was never charged in connection with these events.

convicted by a jury and sentenced to twenty years' imprisonment and five years' extended supervision.[3]

¶4 Buchanan filed a postconviction motion alleging that the trial court had erroneously admitted hearsay in the form of Ward's recorded statement to police and the transcript thereof. He also alleged his trial attorney was ineffective for not seeking to limit the amount of the recording and transcript used, and he complained that his sentence was unduly harsh compared to his co-defendants' sentences. The trial court denied the motion. On appeal, we affirmed. *See* ***State v. Buchanan***, No. 2011AP830-CR, unpublished slip op. (WI App Oct. 30, 2012).

¶5 On April 22, 2016, Buchanan filed the underlying postconviction motion pursuant to WIS. STAT. § 974.06. He claimed "the jury could not have reasonably found [him] guilty of aiding and abetting as party-to-a-crime of Felony-Murder" because he was not in the car when Ward and Magett initially discussed their robbery plans. He also alleged the State improperly commented on witness credibility, trial counsel was ineffective for not objecting to the State's vouching and other issues, and postconviction/appellate counsel was ineffective for failing to raise the additional claims of ineffective trial counsel Buchanan had identified.

¶6 The circuit court denied the motion without a hearing. It began by noting the general procedural bars of WIS. STAT. § 974.06 and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), which require a defendant to raise all his issues in his original postconviction motion or appeal. The circuit

[3] Ward was also convicted of felony murder and given a twenty-year sentence. Magett entered a plea to aiding a felon and received three and one-half years' imprisonment.

court also acknowledged that under ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), ineffective assistance of postconviction counsel may constitute a sufficient reason for avoiding the ***Escalona*** procedural bar. The circuit court then concluded that Buchanan's sufficiency-of-the-evidence claim could not be raised in a § 974.06 motion but, rather, had to be raised in this court through a petition for a writ of *habeas corpus* under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), as a challenge to appellate counsel's performance. The circuit court then jointly considered the prosecutorial vouching and related ineffective-assistance claims, ultimately concluding that the State's comments were "pure argument" and, thus, not improper, which made the related claims against Buchanan's attorneys non-viable. Finally, the circuit court stated that to the extent there were other claims not addressed, those issues lacked merit as well. Buchanan appeals.

DISCUSSION

I. Postconviction Motions Generally

¶7 After the time for direct appeal or postconviction relief under WIS. STAT. § 974.02 has expired, a person in custody under sentence of a court may seek relief through the procedure set out in WIS. STAT. § 974.06. *See* ***State v. Balliette***, 2011 WI 79, ¶34, 336 Wis. 2d 358, 805 N.W.2d 334. However, issues that could have been raised in a prior appeal or postconviction motion are barred absent a showing of a sufficient reason why those issues were not previously raised. *See* ***Escalona***, 185 Wis. 2d at 181-82. In some instances, ineffective assistance of postconviction counsel may constitute a sufficient reason. *See* ***Rothering***, 205 Wis. 2d at 682. Only constitutional or jurisdictional issues may be raised in a § 974.06 motion. *See* ***State v. Evans***, 2004 WI 84, ¶33, 273 Wis. 2d

192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900.

II. Sufficiency of the Evidence

¶8 Buchanan claims there was insufficient evidence for a jury to find that he aided and abetted a felony murder as a party to a crime. The circuit court determined, and the State reiterates on appeal, that this sufficiency claim cannot be raised through a WIS. STAT. § 974.06 motion but must be pursued as a claim of ineffective appellate counsel in this court unless Buchanan is claiming "an utter failure to produce any evidence" of his guilt, *see* ***Weber v. State***, 59 Wis. 2d 371, 379, 208 N.W.2d 396 (1973), which he has not claimed.

¶9 A claim that insufficient evidence supported the verdict need not be raised in the circuit court by postconviction motion before that issue can be raised on appeal. *See* WIS. STAT. § 974.02(2). This means that appellate counsel could have raised sufficiency of the evidence on appeal; postconviction counsel did not need to preserve it by motion. Because appellate counsel did not raise the issue, the State and the circuit court reasoned that Buchanan would have to reach the sufficient-evidence issue by challenging appellate counsel's performance with a petition for a writ of *habeas corpus* in this court. *See* ***Knight***, 168 Wis. 2d at 520. The only way the issue could be raised in the circuit court now, the State asserts, is if Buchanan were claiming there was utterly no evidence against him, thereby implicating constitutional due process concerns. *See* ***Weber***, 59 Wis. 2d at 379.

¶10 However, in ***State v. Miller***, 2009 WI App 111, ¶28, 320 Wis. 2d 724, 772 N.W.2d 188, we concluded that "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." ***Miller*** makes no qualifications based on the alleged quantity of evidence or lack thereof.

¶11 But we need not discuss the procedural posture further because Buchanan's sufficiency claim simply fails. We concluded in his prior appeal that there was "overwhelming evidence" of his guilt. *See* ***Buchanan***, No. 2011AP830-CR, ¶20. Further, while Buchanan seems to believe he cannot have aided and abetted the attempted armed robbery—the predicate offense for the felony murder—because he was not with Ward and Magett when they discussed it, Buchanan misunderstands the State's burden of proof.

¶12 The elements of aiding and abetting that the State had to prove are "(1) that the defendant undertook some conduct (either verbal or overt) that as a matter of objective fact aided another person in the execution of the crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance." ***State v. Rundle***, 176 Wis. 2d 985, 990, 500 N.W.2d 916 (1993). It is not necessary for an aider and abettor to "share the intent required for direct commission of the offense."[4] *See* ***State v. Sharlow***, 110 Wis. 2d 226, 238, 327 N.W.2d 692 (1983). Intent can be inferred from an aider and abettor's conduct. *See* ***State v. Hecht***, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984).

¶13 The evidence presented was that Ward called Buchanan shortly before the shooting and told him to bring his gun. Magett dropped Ward and

[4] Presumably, Buchanan is arguing that because he was not in the car with Ward and Magett when they planned the armed robbery, he could not have formed the intent to commit the crime of armed robbery, *see* WIS JI—CRIMINAL 582, or the intent to steal, *see* WIS JI—CRIMINAL 1480, in relation to the predicate attempted armed robbery.

Buchanan off to wait for the Mobile Mall and then left the scene. Buchanan gave Ward the gun, then the duo approached the van. Ward told Fall to "give it up," causing Fall to start driving away, which, according to Ward, caused him to fall back and caused the gun to discharge. This evidence is sufficient for a reasonable jury to infer that Buchanan took some action—*i.e.*, bringing the gun along and giving it to Ward—that objectively aided Ward's attempted armed robbery and that, by providing the gun and approaching the van with Ward, Buchanan had a conscious desire and intent to aid Ward in the commission of a felony.

¶14 Thus, the record conclusively shows that Buchanan is not entitled to relief on a claim that insufficient evidence supported the verdict against him. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

III. Improper Vouching and the Related Ineffective-Assistance Claims

¶15 Buchanan complains that the State improperly vouched for the truthfulness of Ward and Cunningham, who testified against Buchanan at his trial, during closing arguments by stating that Ward was purging his soul and that Cunningham corroborated Ward's statement to police. Buchanan also claims that trial counsel was ineffective for not objecting to the State's commentary and postconviction counsel was ineffective for not raising an ineffective-assistance claim against trial counsel for the lack of objection.

¶16 Prosecutors must refrain from using improper methods calculated to produce a wrongful conviction. *See* ***United States v. Young***, 470 U.S. 1, 7 (1985). In Wisconsin, a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on the evidence presented. *See* ***State v. Adams***, 221 Wis. 2d 1, 16-18, 584 N.W.2d 695 (Ct. App. 1998). "Improper vouching occurs when a prosecutor expresses her personal opinion about the truthfulness of

a witness or when she implies that facts not before the jury lend a witness credibility." ***United States v. Cornett***, 232 F.3d 570, 575 (7th Cir. 2000).

¶17 On appeal, Buchanan does not directly identify any specific improper statements by the prosecutor. Instead, he disputes the prosecutor's opinion that Cunningham's testimony corroborated Ward's. However, we have reviewed the entirety of the State's closing arguments and conclude that they do not constitute an explicit personal assurance of the witnesses' veracity, nor are they an implicit indication that information not presented to the jury supports the witnesses' testimony. *See* ***id.***; *see also* ***United States v. Bowie***, 892 F.2d 1494, 1498 (10th Cir. 1990).

¶18 Because there is no merit to a claim that the State improperly vouched for witnesses, there was no basis for trial counsel to object, so trial counsel could not have been ineffective for failing to do so. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Because there was no ineffective performance by trial counsel, postconviction counsel was likewise not ineffective for failing to challenge trial counsel's performance.[5] *See* ***id.*** Accordingly, the circuit court properly denied Buchanan's motion for relief without a hearing.

By the Court.—Order affirmed.

[5] Buchanan has also failed to address why this particular claim against trial counsel was clearly stronger than the claims that postconviction counsel actually did raise in the postconviction motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶58, 360 Wis. 2d 522, 849 N.W.2d 668.

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