

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1061-CR

Cir. Ct. No. 2004CF2738

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL R. PEREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOSEPH R. WALL and KEVIN E. MARTENS, Judges.¹
Affirmed.

Before Curley, P.J., Fine and Kessler, JJ.

¹ The Honorable Joseph R. Wall presided over the trial and entered the judgment of conviction. The Honorable Kevin E. Martens issued the order denying the postconviction motion.

¶1 FINE, J. Manuel R. Perez appeals a judgment entered after a jury convicted him of conspiracy to deliver more than forty grams of cocaine, *see* WIS. STAT. §§ 961.41(1)(cm)4, 939.31, and an order denying his postconviction motion for a new trial. Perez claims that: (1) his trial lawyer was ineffective; (2) he is entitled to a new trial under the plain-error doctrine or in the interest of justice; and (3) the trial court erred when it denied his motion to suppress wiretap evidence. We affirm.²

I.

¶2 Perez was part of a drug-trafficking operation involving many people and businesses. One of the initial targets of the investigation was Perez's brother-in-law, Samuel Caraballo. As part of the investigation, a City of Milwaukee police detective applied to the trial court for an order authorizing the wiretap of a cellular telephone associated with Caraballo. The application asserted that there was probable cause to believe that the subjects had committed, were committing, and would continue to commit violations of a number of state drug trafficking, conspiracy, and racketeering statutes. It also asserted violations of federal racketeering and money-laundering statutes.

¶3 The trial court approved the wiretap and, as a result of the investigation, the State charged over thirty defendants, including Perez, with various counts of drug trafficking and conspiracy to traffic drugs. One of Perez's

² Perez has sprinkled his brief on appeal with tangential assertions that are not developed. We do not address these matters. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may “decline to review issues inadequately briefed”); *Polan v. Department of Revenue*, 147 Wis. 2d 648, 660, 433 N.W.2d 640, 645 (Ct. App. 1988) (we decline to review issues where arguments are not developed themes that reflect legal reasoning but are supported by only general statements).

co-conspirators, Jeffrey House, sought suppression of evidence from the wiretap. Perez “adopted” the motion, which argued that the order for the wiretap was unlawful because it authorized wiretaps for crimes not enumerated in WIS. STAT. § 968.28 (application for court order to intercept communications). The trial court denied the motion.³

¶4 At the trial, the State offered Detective Gerald Stanaszak, the lead investigator in the case, as an expert in “narcotics investigations, large-scale drug conspiracies.” Stanaszak testified, among other things, about the intercepted telephone conversations, including the meaning of the various narcotics code-words used in the conversations.

¶5 Caraballo also testified. Before the trial, Caraballo gave approximately five statements to Stanaszak in which he told Stanaszak that Perez had repeatedly provided him with cocaine. Caraballo testified at the trial, however, that he never dealt cocaine with Perez. The State recalled Stanaszak, who recounted to the jury Caraballo’s statements implicating Perez.

¶6 As we have seen, the jury found Perez guilty of conspiracy to deliver more than forty grams of cocaine. Perez sought a new trial, claiming, among other things, that his trial lawyer was ineffective. The trial court denied Perez’s motion without a hearing authorized by *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

³ In the motion, House also claimed that extensions for the wiretap did not receive approval from the district attorney and attorney general. *See* WIS. STAT. §§ 968.28, 968.30. The trial court granted the motion to exclude the evidence obtained during the extensions.

II.

A. *Ineffective assistance.*

¶7 Perez claims that his trial lawyer was ineffective because the lawyer: (1) did not object when Stanaszak allegedly gave improper opinion testimony; (2) did not object to what Perez alleges are inaccurate jury instructions; and (3) did not properly impeach Caraballo’s testimony. In related claims, Perez contends that the trial court violated his due-process rights when it: (1) admitted Stanaszak’s alleged opinion testimony; and (2) improperly instructed the jury. Because Perez’s trial lawyer did not object to these matters, we review them as part of Perez’s ineffective-assistance-of-counsel claims. *See* WIS. STAT. § 805.13(3) (failure to object to proposed jury instructions or verdict waives any error); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension); *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 (in the absence of an objection we address waived issues under the ineffective-assistance-of-counsel rubric).

¶8 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the prejudice aspect of *Strickland*, the defendant must demonstrate that the lawyer’s errors were sufficiently serious to deprive him or her of a fair trial and a reliable outcome, *ibid.*, and “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Ibid.* We need

not address both aspects if the defendant does not make a sufficient showing on either one. *Id.*, 466 U.S. at 697.

¶9 Perez claims that his trial lawyer was ineffective because he did not object when Stanaszak allegedly gave improper opinion testimony. He concedes that Stanaszak properly explained the meaning of the code words, *see United States v. Farmer*, 543 F.3d 363, 370 (7th Cir. 2008) (“narcotics code words are an appropriate subject for expert testimony”), but contends that Stanaszak exceeded the scope of his expertise when he allegedly gave his opinion about the general meanings of the conversions and facts of the case, *see United States v. Dukagjini*, 326 F.3d 45, 50, 54–55 (2d Cir. 2003) (case agent and expert on narcotics code words whose “conclusions appear to have been drawn largely from his knowledge of the case file and upon his conversations with co-conspirators, rather than upon his extensive general experience with the drug industry ... bolster[ed] ... the testimony of the cooperating co-defendants and ... imping[ed] upon the exclusive function of the jury”). This claim is inadequately briefed. Perez does not point to the specific testimony to which his lawyer should have objected and explain how or why that testimony improperly conveyed Stanaszak’s personal beliefs about the case. We are thus unable to evaluate whether Stanaszak’s testimony was improper, and, if improperly admitted, why its admission was not harmless error. *See id.*, 326 F.3d at 61–62 (evidentiary errors may be harmless); *see also* WIS. STAT. RULE 906.11(1) (trial court has broad discretion in controlling receipt of evidence). Accordingly, we do not address this issue. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court can “decline to review issues inadequately briefed”).

¶10 Perez next contends that his trial lawyer should have objected to what he alleges are inaccurate jury instructions. He argues that the instructions

were inaccurate because the trial court did not instruct the jury that it had to find beyond a reasonable doubt that the cocaine weighed more than forty grams. *See* WIS JI—CRIMINAL 6001.⁴ As noted, Perez also claims that the trial court’s failure to do so violated his due-process rights. Perez has not shown prejudice.

¶11 Whether jury instructions violate due process is a question of law that we review *de novo*. *Pettit*, 171 Wis. 2d at 639, 492 N.W.2d at 639. As we have explained:

Relief is not warranted unless the appellate court is “persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury” in the manner asserted by the challenger. Where a criminal defendant claims that the jury instructions violated constitutional due process, the issue is whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the defendant’s rights. In making that assessment, we consider the challenged portion of the instructions in context with all other instructions provided by the trial court.

State v. Foster, 191 Wis. 2d 14, 28, 528 N.W.2d 22, 28 (Ct. App. 1995) (quoted source and citations omitted).

⁴ WISCONSIN JI—CRIMINAL 6001 provides:

If you find the defendant guilty, you must answer the following question(s) “yes” or “no”:

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which determines the penalty)?

Before you may answer this question “yes,” you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

(Footnotes omitted; underlining in original.)

¶12 The jury instructions and the verdict forms fully apprised the jury of the law. *See Fischer v. Ganju*, 168 Wis. 2d 834, 850, 485 N.W.2d 10, 16 (1992) (we will not reverse if the overall meaning communicated by the instructions was a correct statement of the law). The trial court told the jury that the information charged Perez with “conspir[ing] with others for the purpose of committing the crime of delivery of a controlled substance-cocaine, more than forty grams.” It further instructed the jury that “[t]he burden of establishing every fact necessary to constitute guilt is upon the State” and “[b]efore you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the particular defendant is guilty.” The trial court also read the verdict forms to the jury. The first form provided:

We, the jury, find the defendant, Manuel Perez, guilty of Conspiracy to Deliver a Controlled Substance - Cocaine, as charged in the Information.

If you find the defendant guilty, you must answer the following question “yes” or “no”:

Was the amount of cocaine, including the weight of any other substance or material mixed or combined with it, more than 40 grams?

(Capitalization in original; emphasis added.) The jury used this form and answered the question “yes.” This information as a whole adequately informed the jury that it had to find beyond a reasonable doubt that the cocaine weighed more than forty grams. Moreover, the evidence at trial showed that the police found more than 2,500 grams of cocaine in a co-conspirator’s house. Accordingly, Perez has not shown prejudice.

¶13 Perez also claims that his trial lawyer did not properly impeach Caraballo. In addition to what he told Stanaszak, Caraballo made two statements to the police shortly after he was arrested. In those statements, Caraballo did not

mention Perez, except to say that Perez owned a local restaurant. Perez claims that his trial lawyer should have introduced those statements at the trial to impeach Caraballo. This claim is also inadequately briefed.

¶14 A witness’s statement that is consistent with his or her trial testimony is admissible if, as material, it is “offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” WIS. STAT. RULE 908.01(4)(a)2.⁵ ““This requirement exists because the prior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value.”” *State v. Mainiero*, 189 Wis. 2d 80, 103, 525 N.W.2d 304, 313 (Ct. App. 1994) (quoted source omitted). Perez does not discuss Caraballo’s motive to lie about his brother-in-law’s involvement before or at the trial, let alone show that that motive changed from when Caraballo first spoke with the police after his arrest to the date of his trial testimony. *See State v. Sharp*, 180 Wis. 2d 640, 650 n.4, 511 N.W.2d 316, 321 n.4 (Ct. App. 1993) (“prior consistent statements are of no probative value to rebut an allegation of recent fabrication when the declarant’s motive in making both statements was the same for the simple reason that mere repetition does not

⁵ WISCONSIN STAT. RULE 908.01(4)(a)2 provides:

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

....

2. Consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

imply veracity”) (internal quotation marks and quoted source omitted). Accordingly, we do not address this issue. *See Pettit*, 171 Wis. 2d at 646, 492 N.W.2d at 642.

¶15 In a related claim, Perez contends that the trial court erred when it denied his postconviction motion without a *Machner* hearing. In light of our ruling that there is no merit to Perez’s ineffective-assistance claims, the trial court properly exercised its discretion when it denied Perez’s motion without a hearing. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437 (“if the motion does not raise facts sufficient to entitle the movant to relief ... the circuit court has the discretion to grant or deny a hearing”).

B. *Plain error/interest of justice.*

¶16 Perez argues that, as an alternative to his ineffective-assistance claims, he is entitled to a new trial under the plain-error doctrine or in the interest of justice. *See* WIS. STAT. §§ 901.03(4) (plain error), 752.35 (discretionary reversal by court of appeals). He does not, however, explain how or why any of the alleged errors meet the plain-error criteria or require a new trial in the interest of justice. Accordingly, we do not address these arguments. *See Pettit*, 171 Wis. 2d at 646, 492 N.W.2d at 642.

C. *Wiretap.*

¶17 Perez also claims that the trial court should have suppressed the evidence from the wiretap because the wiretap order authorized the interception of communications for crimes not specifically enumerated in WIS. STAT. § 968.28,

including money laundering, racketeering, and continuing criminal enterprise.⁶ This issue is controlled by *State v. House*, 2007 WI 79, 302 Wis. 2d 1, 734 N.W.2d 140, an appeal brought by one of Perez’s co-conspirators, Jeffrey House. *House* analyzed the wiretap order in this case, concluding that while the trial court erred in authorizing a wiretap for offenses not enumerated in § 968.28, suppression was not warranted because:

The order included both enumerated and non-enumerated offenses, and it contained sufficient probable cause for the enumerated offenses. Further, the evidence obtained by wiretap was for enumerated offenses, and charges were brought only for enumerated offenses. Thus, the failure does not conflict with the statutory objectives of protecting privacy and limiting wiretapping to situations clearly calling for the use of such an extraordinary device.

House, 2007 WI 79, ¶61, 302 Wis. 2d at 29–30, 734 N.W.2d at 153–154. Perez concedes that *House* applies.

¶18 We affirm.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

⁶ WISCONSIN STAT. § 968.28 provides, as material:

The authorization [for a wiretap] shall be permitted only if the interception may provide or has provided evidence of the commission of the offense of homicide, felony murder, kidnapping, commercial gambling, bribery, extortion, dealing in controlled substances or controlled substance analogs, a computer crime that is a felony under s. 943.70, or any conspiracy to commit any of the foregoing offenses.

