

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2012

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. 2010AP3063-CR

Cir. Ct. No. 2007CF5540

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Jermaine Turner appeals a judgment of conviction and an order denying his postconviction motion. We affirm.

¶2 Turner first argues that the circuit court erred by denying his motion to suppress statements he made to police. Turner argues that, due to his low intelligence, his waiver of his right to remain silent was not knowing and intelligent. Turner relies on the testimony of his expert witness, and in particular on her testimony that his IQ is in the mild-to-moderate retardation range, and that this would impair his ability to understand abstract concepts like rights.

¶3 It is not clear whether Turner made this argument to the circuit court, because the record does not appear to contain a suppression motion or brief from Turner, nor a transcript of any oral argument. The circuit court's decision addresses mainly voluntariness, that is, whether the statements were coerced. However, the court also concluded that Turner voluntarily waived his *Miranda*¹ rights. In reaching that conclusion, the court noted that Turner's own expert stated, based on her interviews with him, that Turner had a basic understanding of the rights that were given. Whether Turner had the intellectual ability to understand the rights is a question of historical fact on which we will accept the trial court's finding unless it is clearly erroneous. *State v. Hambly*, 2008 WI 10, ¶92, 307 Wis. 2d 98, 745 N.W.2d 48 (historical facts reviewed using "clearly erroneous" test). In light of the expert's testimony, the finding was not clearly erroneous.

¶4 Turner next argues that the court erred by not interviewing jurors for potential bias when certain information was brought to its attention. We consider this argument forfeited due to the lack of contemporaneous objection. *See State v. Huebner*, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727. Turner does

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

not dispute that he did not ask the court to conduct *voir dire* of other jurors. None of the case law he cites requires the court to conduct such an inquiry on its own initiative.

¶5 Finally, Turner argues that the circuit court erred by denying his motion to admit evidence that a third party may have committed the crime. The issue is whether the proposed evidence satisfied the “legitimate tendency” test of *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984) (as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible).

¶6 Turner argues that he sought to introduce evidence that the victim was having an extramarital affair with a certain person, and that this person had a motive of jealousy. However, as the State points out, Turner’s request to admit this evidence contained no evidence that the person was indeed jealous. Turner also does not clearly explain what opportunity the person had to commit the crime. We conclude that the request to admit this evidence was properly denied.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

