**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

November 12, 1996

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

**NOTICE**

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

**No. 95-2860-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**LAMONT WILLIAMS,**

**Defendant-Appellant.**

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

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

PER CURIAM. Lamont Williams appeals from judgments of conviction for four counts of armed robbery and one count of carrying a concealed weapon. He also appeals from an order denying his motion for postconviction relief. He raises several constitutional challenges to the jury selection procedure. He also challenges the trial court's ruling that excluded a statement allegedly implicating another person as the robber. Finally, he argues

that he was deprived of the right to present a defense because he was not allowed to counter State testimony that his gait matched that of the alleged robber. Because Williams did not request that voir dire be recorded, thereby depriving this court of the ability to review his constitutional challenge to the jury selection procedure; because the trial court properly exercised its discretion in excluding the proffered statement as hearsay; and because Williams's offer of proof was insufficient for asserting evidence to counter testimony that his gait matched the alleged armed robber; we affirm.

## I. BACKGROUND.

Police arrested Williams for a series of armed robberies at fast-food restaurants throughout Milwaukee County. In each case, the robber acted alone, used a handgun, and ordered employees to empty the cash register. In some of the robberies, the robber inquired about a safe and attempted to have employees turn over the restaurants' surveillance video tapes.

Williams was arrested after a victim of one of the robberies spotted him at a movie theater and called the police. The police arrested Williams, uncovering a concealed handgun. The State charged him in the robberies and with carrying a concealed weapon.

Williams's trial began before the Hon. Victor Manian; however, two mistrials were declared during jury selection. These aborted jury selections were held on the record. The selection of the actual jury that sat in Williams's trial before the Hon. Jeffrey A. Kremers was not placed on the record because Williams's counsel did not request it. *See* SCR 71.01(2)(f) (providing that reporting of procedures, such as jury selection, is within trial court's discretion). Thus, there is no transcript of these proceedings in the appellate record.

During his trial, Williams attempted to introduce the testimony of Saleena Wilkerson, one of the robbery victims, in an effort to show that someone other than he had committed the robberies. Allegedly, Wilkerson had received a telephone call at her restaurant and the caller admitted to being the robber. Defense counsel established that police had traced this call to Wilkerson's boyfriend's home. When Williams attempted to introduce the

caller's alleged statement, first through another restaurant employee and then through Wilkerson, the State successfully objected on hearsay grounds.

Finally, one of the robbery victims, a former dance instructor, testified that Williams was the robber and that he was certain because of Williams's gait; that is, Williams's way of walking matched that of the robber. Williams sought to counter this testimony by introducing the testimony of his mother and sister who he now argues would have stated that they were familiar with his gait and that they had seen the videotape of the robbery and the robber's gait did not match his. The trial court excluded this testimony as irrelevant.

The jury convicted Williams of four counts of armed robbery and the one count of carrying a concealed weapon. Williams filed postconviction motions seeking a new trial. After evidentiary hearings, the trial court denied these motions. This appeal follows.

## II. ANALYSIS.

Williams first argues that he was denied equal protection and his state constitutional right to appeal because his jury selection was not recorded. Essentially, his underlying argument is that the State violated his rights by removing potential jurors based on race in contravention of ***Batson v. Kentucky***, 476 U.S. 79 (1986), and its progeny. At the postconviction motion, the trial court ruled that because *voir dire* was not reported, it was impossible to reconstruct the procedure used to strike the potential jurors.

We first note that nothing in the statutes or case law mandates that *voir dire* be recorded; although in most cases it is advisable to do so to prevent problems such as those presented in this case. In ***State v. Perry***, 136 Wis.2d 92, 401 N.W.2d 748 (1987), the Wisconsin Supreme Court set forth the procedure used to determine whether a defendant should be granted a new trial based on an inadequate trial transcript. Using a methodology presented by this court in ***State v. DeLeon***, 127 Wis.2d 74, 377 N.W.2d 635 (Ct. App. 1985), the supreme court held that a defendant must first allege a facially valid claim of error; the trial court must then attempt to reconstruct the missing portions of the record;

and if reconstruction is impossible, a new trial is warranted. ***Perry***, 136 Wis.2d at 101, 401 N.W.2d at 752; ***DeLeon***, 127 Wis.2d at 80-82, 377 N.W.2d at 638-39.

The State argues that the above procedure and remedy is inapplicable here because, unlike in ***Perry*** and ***DeLeon***, the lack of a transcript of *voir dire* was Williams's "fault." In both ***DeLeon*** and ***Perry***, the portions of the trial were recorded, but the court reporter's notes were lost. ***Perry***, 136 Wis.2d at 95-96, 401 N.W.2d at 750; ***DeLeon***, 127 Wis.2d at 76, 377 N.W.2d at 636. As a result, in those cases, the defendant was not responsible for the lack of an adequate trial transcript.

Here, Williams's counsel never requested that voir dire be recorded. *See* SCR 71.01(2)(f) (discussing discretionary nature of reporting jury selection). Thus, he was responsible for the lack of a transcript on which his ***Batson*** challenge could be based. We agree with the State that the ***Perry-DeLeon*** remedy mandating a new trial is inapplicable here.

Further, any claim that Williams was denied effective assistance of counsel has been abandoned on appeal. Although Williams raised this issue in his postconviction motions, he has neither specifically raised nor adequately argued this issue in his appellate brief. Accordingly, we deem this issue waived. ***State v. Whitaker***, 167 Wis.2d 247, 259 n.5, 481 N.W.2d 649, 654 n.5 (Ct. App. 1992) (stating issue not briefed on appeal is waived).

Williams next argues that a new trial is required on two of the counts of armed robbery because the trial court erroneously exercised its discretion by excluding testimony allegedly showing that someone other than Williams admitted to being the robber.

Williams attempted to introduce the testimony of robbery victim Saleena Wilkerson, who received a phone call at her restaurant shortly after her restaurant was robbed. The call was from a male who stated, "This is the mother fucker who just robbed you." The police traced this call to Wilkerson's boyfriend's house; Wilkerson's boyfriend had a male roommate. Wilkerson's boyfriend told police that he had called Wilkerson's restaurant several times the night the call was received. Also, Wilkerson initially thought that the robber

was her boyfriend's roommate and the jury heard evidence to that effect. The trial court ruled that Wilkerson could not testify as to what she heard in the telephone call because, among other things, it was impermissible hearsay evidence.

"A trial court possesses wide discretion in determining whether to admit or exclude evidence, and we will reverse such determinations only upon an erroneous exercise of that discretion." ***State v. Evans,*** 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). "The trial court properly exercises its discretion if its determination is made according to accepted legal standards and if it is in accordance with the facts on the record." ***Id.***

The trial court properly excluded this testimony. First, if the declarant in the telephone call was Wilkerson's boyfriend's roommate, there has been no showing that he was unavailable, a prerequisite for the admission of his hearsay statement under RULE 908.045, STATS.[1]

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[1] RULE 908.045, STATS., provides:

**Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**(1)** FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

**(2)** STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

**(3)** STATEMENT UNDER BELIEF OF IMPENDING DEATH. A statement made by a

Second, if the declarant was not the boyfriend's roommate, sufficient corroboration must be shown before the statement could be admitted as a statement against interest. *See* RULE 908.045(4), STATS. The standard under RULE 908.045(4), STATS., is that there must be "corroboration sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true." ***State v. Anderson***, 141 Wis.2d 653, 660, 416 N.W.2d 276, 279 (1987).

Here, Williams has provided nothing that shows an unnamed, unknown person, other than her boyfriend's roommate, was responsible for the robbery. There is nothing that corroborates the truthfulness of the declarant's

(..continued)

> declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.
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> **(4)** STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.
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> **(5)** STATEMENT OF PERSONAL OR FAMILY HISTORY. (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
>
> **(6)** OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

statement on the phone. Given the foregoing, the trial court properly excluded this testimony. There was no erroneous exercise of discretion.

Finally, Williams argues that the trial court improperly excluded the testimony of his mother and sister offered to refute the testimony of a State witness who stated that Williams's gait, that is, the way that he walked, was the same as the man who robbed the restaurant. The witness in question was one of the robbery victims. He testified that he had managed a dance studio and was very attentive to the way people moved. He testified that he had observed the way Williams walked at the preliminary hearing and that he concluded his gait was the same as that of the robber of his restaurant.

Williams argues on appeal that he attempted to introduce the testimony of his mother and sister who would have stated that "the gait of the robbery as reproduced on videotape was different than that of [Williams]."

The State argues that Williams "did not make a sufficient offer of proof to show that the witnesses would testify in the manner he now suggests on appeal." (Underline omitted.) The State points to the following argument by Williams's counsel at trial to suggest the insufficient offer of proof:

> You have an individual who has known him for a number of years, who has seen him, who has lived with him who can give -- comment on specific particulars about how this person moves, the particular construction of the face, the things that she sees or didn't see. Clothing for example. And we're not talking about a stranger who doesn't know him who's asked to compare. We're talking about somebody who knows him intimately, who has a rare opportunity to view that footage as many times as she wants to tell them why she doesn't believe it's him. And I think -- I think that's the same as if somebody were in the store and said I'm not sure if it's him or I don't think it's him. But it goes a step further because she knows who this person is. She

> knows the particular she's looking for on this particular individual.

We agree with the State that the above was not sufficient offer of proof to admit his mother's or sister's testimony.

> To review an alleged trial court error of exclusion of evidence it is necessary that error be self-evident from the nature of the evidence excluded ... or an offer of proof by statement of counsel or in question and answer form must be recorded out of the hearing of the jury whenever practicable.
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> The offer of proof need not be stated with complete precision or in unnecessary detail but it should state evidentiary hypotheses underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt.

***Milenkovic v. State***, 86 Wis.2d 272, 284, 272 N.W.2d 320, 326 (Ct. App. 1978) (citations and footnote omitted).

Here, Williams's counsel did not meet this minimum standard. First, the relevancy of the testimony was not self-evident. Second, in his offer of proof, Williams's counsel never specifically stated that his mother or sister were prepared to testify that Williams's walk was different than that of the person shown on the surveillance videotape. As such, the trial court's exclusion of this evidence is irrelevant and was not an erroneous exercise of discretion.

In sum, we reject all of Williams's arguments raised on appeal. Accordingly, the judgments of conviction and order denying postconviction relief are affirmed.

*By the Court.*—Judgments and order affirmed.

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