COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3183-CR **Cir. Ct. No. 2005CF2384**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMONTE ANTOINE JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 FINE, J. Amonte Antoine Jackson appeals the judgment entered after a jury convicted him of first-degree reckless homicide while armed, *see* WIS. STAT. §§ 940.02(1) & 939.63; armed robbery, *see* WIS. STAT. § 943.32(2); attempted armed robbery, *see* WIS. STAT. §§ 943.32(2) & 939.32; and being a

felon in possession of a firearm, *see* WIS. STAT. § 941.29(2)(a). The homicide and robberies were "as party to a crime," *see* WIS. STAT. § 939.05, and all four crimes were as an "habitual criminal," *see* WIS. STAT § 939.62. He also appeals the order denying his postconviction motion. Jackson claims: (1) his trial lawyer gave him ineffective assistance; (2) the trial court was biased against him, which he says required its recusal; and (3) his sentence was excessive. We affirm.

I.

¶2 Kathy Johnson was sitting in her car and Preston Blackmer was in the front passenger seat. Jackson and an accomplice, Lorenzo Harris, walked over to the car. Jackson pointed a gun at Blackmer through the open passenger-side window; Harris went to the driver's side to rob Johnson. Harris took Johnson's cash and coat, and then Jackson shot Blackmer, who died as a result.

¶3 The trial court sentenced Jackson to thirty years of initial confinement followed by ten years' extended supervision for the homicide; fifteen years of initial confinement followed by five years' extended supervision for the armed robbery; three years of initial confinement followed by two years' extended supervision for his being a felon in the possession of a firearm; and five years of initial confinement followed by two years' extended supervision for the attempted armed robbery—all sentences were made consecutive to each other. We look at Jackson's contentions in turn.

II.

A. *Ineffective Assistance.*

¶4 Jackson was questioned by the police and he implicated himself in the crimes. Before the police may question a suspect in custody, they must warn that person that he or she does not have to say anything and that the person may have a free lawyer. *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). Additionally, any confession must be voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 258, 133 N.W.2d 753, 760 (1965). The trial court held a hearing and determined that Jackson's statements to the police were admissible because the police gave him the warnings required by ***Miranda***, and, additionally, that Jackson's statements to the police were voluntary. Jackson claims, however, that his trial lawyer was ineffective because he did not get medical evidence to use at the hearing; he asserts that his mental condition made his statements to police involuntary and unreliable. He argues that the trial court erred in denying his claim without a hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979) (normally, the trial court must hold an evidentiary hearing to decide whether a trial lawyer gave his or her client constitutionally ineffective representation). We reject Jackson's claim.

¶5 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687.

Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he 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.***, 466 U.S. at 694. We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶6 To be entitled to a ***Machner*** hearing, a defendant must show facts that, if true, would entitle him to the relief he seeks. *See* ***State v. Allen***, 2004 WI 106, ¶¶9–10, 274 Wis. 2d 568, 576–577, 682 N.W.2d 433, 437–438 (The trial court has the discretion to deny a postconviction motion for a ***Machner*** hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief."). When a defendant claims that his lawyer did not present evidence, and therefore gave him ineffective representation, the defendant must allege with specificity what that evidence would have been and how it would have affected the proceedings. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994). Whether a motion was sufficiently supported to warrant an evidentiary hearing is a legal issue that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996).

¶7 Jackson's claim that his lawyer gave him ineffective representation at the hearing on whether his statements to the police were admissible fails. As we have seen, he contends that his lawyer should have gotten a medical expert to testify about his mental condition. Jackson did not, however, submit any offer of proof as to what medical expert his trial lawyer could have called and what effect

Jackson's alleged mental health problems might have had on the trial court's decision to admit Jackson's statements to the police. The trial court properly denied Jackson's claim that his lawyer gave him ineffective representation.[1]

B. *Trial Court's Recusal.*

¶8 Jackson argues that the trial court was biased against him and that this required its recusal. He contends the following statements by the trial court showed prejudice:

- When Jackson sought the appointment of a new lawyer because of what he contended was the lawyer's inattentiveness, the trial court said: "Tell me again how he hasn't been your attorney September through January. Don't lie to me Mr. Jackson, I need the truth from you."

- When Jackson responded, "I'm trying to give it to you[,]" the trial court said: "I haven't heard it yet so go ahead."

- When Jackson told the trial court he felt that he was being forced by his lawyer to plead guilty, the trial court said: "And I can't believe [the lawyer] could intimidate you with anything. I have seen you in court before. I have seen you here. I don't think [the lawyer] could intimidate you to do anything."

[1] Jackson also argues, without further specification, that what he calls the "interests of justice" require a do-over of the ***Miranda-Goodchild*** hearing. This contention, for the reasons explained in the main body of this opinion, is also without merit because Jackson is seeking, in essence, a mere fishing expedition without showing that there are *any* fish in the pond.

- The trial court later said: "Well, Mr. Jackson, I'm telling you I don't believe you…. Well, Mr. Jackson I think you must have misunderstood what [the lawyer] had been saying."

¶9 Whether a judge was impartial is a question of law that we review independently. ***Murray v. Murray***, 128 Wis. 2d 458, 463, 383 N.W.2d 904, 907 (Ct. App. 1986). All negative comments by a trial court do not automatically equal bias:

> *Not* establishing bias or partiality … are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

Liteky v. United States, 510 U.S. 540, 555–556 (1994) (emphasis by ***Liteky***). None of the comments challenged by Jackson establish bias or animosity. Rather, the comments reflect the trial court's attempts to have Jackson tell the truth in connection with the problems Jackson said he was having with his lawyer. Further, the trial court's reference to having seen Jackson in court is also not proof of bias:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id. at 555. The trial court was not required to recuse itself from Jackson's case.

C. *Sentencing.*

¶10 As we have seen, Jackson claims that his sentence was excessive.[2] We disagree.

¶11 Sentencing is within the trial court's discretion, and our review is limited to determining whether it erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d 535, 569, 678 N.W.2d 197, 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). A trial court erroneously exercises its discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶12 The three primary factors a sentencing court must consider are the gravity of the offense, the defendant's character, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The sentencing court may also consider a variety of secondary factors listed in ***Harris***. *See* ***id.***, 119 Wis. 2d at 623–624, 350 N.W.2d at 639.

¶13 The trial court properly exercised its discretion in sentencing Jackson. It analyzed each of the primary factors—noting that the crimes were very serious, that Jackson had a long criminal record even though he was only

[2] Jackson makes a conclusory assertion that the trial "court's animosity constitutes a new sentencing factor." This argument is not developed and we reject the claim of trial-court animosity in the body of this opinion.

twenty-seven years old, and that long-term incarceration was needed to protect the community. Further, although Jackson contends that his sentences should have been concurrent instead of consecutive, the trial court did not erroneously exercise its discretion in refusing to give him a pass for any of his serious crimes. *See* ***State v. Stenzel***, 2004 WI App 181, ¶22, 276 Wis. 2d 224, 241, 688 N.W.2d 20, 28 (when the crimes involve more than one victim, consecutive sentences are appropriate).

¶14 Finally, Jackson's sentence was not excessive. Jackson faced more than one-hundred and fifty years of imprisonment. The sentence was much less than that. He also challenges the sentences because, as he puts it, "the witness who testified against [him] did not appear at sentencing." He does not explain, however, how this makes the sentence erroneous or excessive. He also does not explain how or why his alleged mental-health issues made his sentence an erroneous exercise of the trial court's discretion. *See* ***Vesely v. Security First National Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985) (we will not address arguments that are not developed). Finally, Jackson's conclusory assertion that the trial "court's animosity constitutes a new sentencing factor" rests on the same contention of alleged trial-court bias that we have already rejected.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.