

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 6, 2009

David R. Schanker
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. 2009AP700-CR

Cir. Ct. No. 2007CF533

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONTA JACKSON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Donta Jackson appeals a judgment of conviction, entered upon a jury's verdict, for one count of first-degree intentional homicide while armed. Jackson also appeals an order denying his postconviction motion. He alleges there was insufficient evidence to support the jury's verdict and that

counsel was ineffective for failing to pursue an interlocutory appeal of the bindover decision. We reject Jackson's arguments and affirm.

¶2 The criminal complaint alleged that, on January 24, 2007, witness Amber Works and her boyfriend, Regis Trammell, were walking to Angel Food Mart on the corner of 26th and Nash Streets in Milwaukee. As Jackson drove past them, Trammell pointed him out to Works. Jackson then made a U-turn. As Works and Trammell entered the store, Jackson shouted something at Trammell, Trammell stood at the door and argued back before entering the store completely. At the preliminary hearing, Works testified the men were swearing at each other. Jackson entered the store shortly after Trammell. He approached Trammell, and they argued further before leaving the store.

¶3 After Jackson left, Trammell and Works exited the store. When Trammell spotted Jackson a block away, he and Works went back inside the store. Jackson, along with another individual, returned to the store, and Jackson again argued with Trammell. Jackson then displayed a gun, but told Trammell everything was okay and it was safe to go outside.¹ After Jackson left the store the second time, Trammell told Works to stay inside the store while he went out to see if Jackson had left. Approximately twenty seconds later, Works heard gunshots. She found Trammell on the ground, bleeding from the head, and she called for help. The medical examiner confirmed that Trammell died from a gunshot wound to the head.

¹ When Works testified at the preliminary hearing, she testified that Jackson showed off the gun and told Trammell it was safe to go outside the first time he was in the store as well.

¶4 At the preliminary hearing, the State presented testimony from Works and one of the responding officers. Jackson moved to dismiss the charge, arguing there was insufficient evidence to support a bindover. The court commissioner denied the motion, found probable cause, and bound Jackson over for trial. Jackson later filed a pretrial motion to dismiss with the circuit court, again challenging the probable cause determination. The court denied the motion.

¶5 Jackson was convicted following a jury trial and sentenced to life imprisonment, with the possibility of extended supervision after thirty years. Jackson appealed, but voluntarily dismissed the appeal to pursue a postconviction motion in which he alleged trial counsel was ineffective for failing to pursue an interlocutory appeal of the denials of the motions to dismiss. The circuit court denied this motion. It concluded sufficient evidence had been elicited at the preliminary hearing, so an appeal would have been meritless. Therefore, the court concluded, there had been no prejudice, so counsel was not ineffective. Jackson appeals.

¶6 Jackson first challenges the sufficiency of the evidence to support the jury's verdict. This court may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶7 Here, the evidence against Jackson was circumstantial, but it is well-established that a determination of guilt "may rest upon evidence that is entirely circumstantial[.]" *See id.* Often, circumstantial evidence is stronger and more satisfactory than direct evidence. *See id.* at 501. The standard of review is the

same, regardless of whether the evidence supporting the conviction is direct or circumstantial. *See id.* at 503.

¶8 Jackson details all of the evidence the State did not present against him—there was no eyewitness to the actual shooting, no gun, no fingerprints, and no DNA evidence. Our standard of review, however, is unconcerned with evidence that was not submitted for the fact-finder’s consideration. Instead, we examine only whether the evidence actually presented at trial supports the verdict. *See generally id.*

¶9 The jury heard testimony from Works, which established a long-standing, acrimonious relationship between Jackson and Trammell. Works told the jury about Jackson driving past them, executing a U-turn and following them into the store. She testified about how Jackson argued with Trammell, showing off a firearm at least once, yet reassuring Trammell it was safe to exit the store.

¶10 The jury heard testimony from witness Christian Brooks, who stated that Trammell was concerned Jackson was “riding around looking for him.” Brooks further testified that when he left the store, he observed Jackson between the store and the adjacent house, where someone leaving the store would be unable to see him.

¶11 The jury also heard from one of the detectives, who testified that he took a statement from Jackson’s sister, Aisha Jackson. According to the detective, Aisha reported that Jackson had called and told her he was heading to Illinois because he had “gotten into it on 26th Street” and she should watch the news. Aisha later denied giving police such a statement.

¶12 It is the jury's function to decide which evidence is credible and how conflicts in the evidence are to be resolved. *See id.* at 503. The jury is permitted to take into account "matters of common knowledge and experience in the affairs of life." *Id.* at 508-09. While evidence may, in fact, support multiple inferences of what actually happened, we are bound to "accept and follow the inference drawn by the trier of fact" unless the evidence upon which the inference is based is incredible as a matter of law. *Id.* at 506-07.

¶13 Here, the evidence adequately supports an inference that Jackson killed Trammell. There was a history of conflict between Jackson and Trammell. The men had no interaction that night until Jackson turned his vehicle around and followed Trammell into the store. Jackson argued with Trammell and displayed a firearm. Although Jackson also assured Trammell's safety, a reasonable jury could infer that an individual sincere in those reassurances does not also brandish a gun and, therefore, the gun was a threat and the reassurances nothing more than a lure.

¶14 Works had also testified about how she and Trammell had exited the store once, but had gone back inside when Trammell saw Jackson on a nearby corner. It is reasonable to infer Jackson saw them re-enter upon noticing him on the corner, given that he followed Trammell back into the store. Works' testimony, the inference that Jackson saw Trammell balk upon seeing him, and Brooks' testimony about Jackson's hidden location, permit the jury to infer that Jackson took up the hidden position to draw Trammell outside.

¶15 Given that Jackson was the only individual in an altercation with Trammell that evening, and the only one who had displayed a firearm prior to the shooting, a jury could infer that Jackson was the individual who killed Trammell.

A jury, choosing to believe the detective's testimony over Aisha's denial, could infer that Jackson did, in fact, tell his sister he had "gotten into it" with Trammell, accepting this as a confession. These inferences are not incredible as a matter of law; the verdict is adequately supported.

¶16 Jackson's challenge to trial counsel's performance likewise fails. He attempted to get the charge against him dismissed by arguing there was insufficient evidence to support bindover. The court commissioner, and later the circuit court, rejected this challenge. However, a defendant claiming error at a preliminary hearing can only obtain relief before the trial; a fair and errorless trial essentially cures any defect in the preliminary hearing. *See State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Jackson's postconviction motion therefore claimed counsel was ineffective for failing to seek an interlocutory review of the orders rejecting his challenge to the bindover.

¶17 To prove ineffective assistance of counsel, a defendant must show deficient performance and prejudice as a result of the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failing to adequately prove either of the prongs defeats the entire claim. *See id.* at 697.

¶18 A preliminary examination is "intended to be a summary proceeding for the purpose of determining whether there is a reasonable probability that the defendant committed a felony and thus 'a substantial basis for bringing the prosecution and further denying the accused his right to liberty.'" *See State v. Hooper*, 101 Wis. 2d 517, 544-45, 305 N.W.2d 110 (1981) (quoting *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 606, 267 N.W.2d 285 (1978)).

¶19 A preliminary hearing is not a preliminary trial or a full evidentiary trial on guilt beyond a reasonable doubt. *See State v. Dunn*, 121 Wis. 2d 389,

396, 359 N.W.2d 151 (1984). The hearing's focus is "whether the facts and the reasonable inferences drawn therefrom support the conclusion that the defendant probably committed a felony." *Id.* at 397-98. The hearing is not the forum for choosing between competing facts or inferences, nor is it the forum for weighing the State's evidence against evidence favorable to the defendant. *Id.* at 398. All that must be established to support the bindover is a believable account of the defendant's commission of a felony. See *State v. Cotton*, 2003 WI App 154, ¶12, 266 Wis. 2d 308, 668 N.W.2d 346.

¶20 Here, the State relied primarily on Works' testimony at the preliminary hearing. Her testimony was essentially the same as what she told police and what she testified to at trial. She and Trammell walked to the store, saw Jackson driving the car, and observed the car make a U-turn. As she and Trammell went into the store, Trammell argued with Jackson. Trammell told her he had argued with Jackson in the past. Jackson came into the store, showed off his gun, and told Trammell he was "all right." Jackson left the store, and when Trammell and Works exited, they saw Jackson a block away. Trammell and Works returned to the store, as did Jackson, who again mentioned his gun and told Trammell it was okay to come outside. About ten seconds after Jackson left, Trammell went out to see if Jackson was still outside. Works then heard gunshots and saw Trammell fall to the ground.

¶21 This testimony adequately supports, for purposes of a bindover, a believable inference that Jackson probably committed a felony. Any appellate challenge by counsel would have been meritless. Counsel is not ineffective for failing to bring a meritless challenge. See *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

