COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2288 **Cir. Ct. No. 2004CF5178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL DWAYNE WESTMORELAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: MEL FLANAGAN and PATRICIA D. MCMAHON, Judges. *Affirmed.*

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

¶1 BRENNAN, J. Paul Dwayne Westmoreland appeals *pro se* from the trial court's judgment and orders denying his motions for postconviction relief and reconsideration. Because Westmoreland has not stated a sufficient reason for failing to bring his claims in his first postconviction motion, we conclude his claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Consequently, we affirm.

BACKGROUND

¶2 On October 12, 2004, the State filed a criminal complaint, alleging that on September 18, 2004, Westmoreland shot three people—killing one and injuring the other two. An amended information later charged Westmoreland with a total of four counts:

- Count one: first-degree intentional homicide while armed;
- Counts two and three: first-degree recklessly endangering safety while armed; and
- Count four: possession of a firearm by a felon.

¶3 During Westmoreland's trial, the State called one of the surviving victims to testify. After the State and defense counsel had finished questioning the victim, the trial court permitted the jurors to write down any questions they had for the victim, and the trial court then asked the victim the questions posed by the jurors. Neither the State nor the defense objected, and both parties were permitted

[1] The Honorable Mel Flanagan presided over the trial, entered the judgment, and entered the order denying Westmoreland's first postconviction motion. Due to judicial rotation, the Honorable Patricia D. McMahon presided over and entered the orders with respect to Westmoreland's second, third, and forth postconviction motions, and entered the order denying his motion for reconsideration.

to ask the victim follow-up questions after the victim answered the questions posed by the jurors.

¶4 On October 6, 2004, after both parties had rested, the trial court read the jury instructions. Among other things, the trial court informed the jury, with respect to count one, that it could find Westmoreland guilty of either first-degree intentional homicide while armed, or the lesser-included offense of first-degree reckless homicide while armed.

¶5 When the jury returned its verdicts, it found Westmoreland guilty with respect to all four of the charges in the complaint: one count of first-degree intentional homicide while armed, two counts of first-degree recklessly endangering safety while armed, and one count of possession of a firearm by a felon. However, there was some minor confusion over the jury's verdict regarding count one.

¶6 The trial judge was initially handed the count one verdicts for both first-degree intentional homicide and first-degree reckless homicide, both of which stated in preprinted type that the jury found the defendant guilty. But at the bottom of the verdict form for first-degree reckless homicide, the jury was asked to answer the following question: "Did the defendant commit the crime of first degree reckless homicide while using a dangerous weapon?" The jury marked the line that said "NO" and wrote next to the box "(SEE INTENTIONAL)." Because the jury had also clearly found Westmoreland guilty of first-degree intentional homicide while armed, the trial court asked the jury for clarification:

> **THE COURT:** ... Next, we, the jury, find the defendant, Paul D. Westmoreland, guilty of first degree reckless homicide—
>
> Sorry. I'm Sorry. Okay.

> [Y]ou have an—you have a—[“]see intentional[”] on here.
>
> **A JUROR:** Yes.
>
> **THE COURT:** Does that mean that your verdict was returned on the [first-degree intentional homicide while armed] verdict that I read, or is [first-degree reckless homicide while armed] your verdict?
>
> **A JUROR:** On the [first-degree intentional homicide while armed] verdict.
>
> ....
>
> **A JUROR:** *We found [the defendant] guilty of the intentional but not on the reckless.*

(Emphasis added.)

¶7 The trial court then polled the jurors, asking each whether “the verdict that [each] … personally presented to the Court on count one is guilty of first degree intentional homicide while armed and not guilty of first degree reckless homicide while armed.” While the transcript does not reveal each of the jurors’ individual answers, the trial court engaged in the following exchange following the polling:

> **THE COURT:** Okay. Each one of you, all twelve people seated in the box at this moment, have indicated affirmatively that the Court is to accept the verdict as guilty of first degree intentional homicide, as charged in count one of the information, and you’ve each indicated that positively; is that correct?
>
> **THE JURORS:** Yes.
>
> ....
>
> **THE COURT:** So there are no juror[s] sitting in the box who disagree[] with the verdicts that I’ve announced to the court today; is that correct?
>
> **THE JURORS:** Yes.

> **THE COURT:** If so, please raise your hand if I've misinterpreted anything. Thank you very much.

The transcript does not indicate that any juror raised his or her hand. And neither the State nor defense counsel objected to the verdicts as read by the trial judge, nor did either seek clarification of the verdicts.

¶8 Several months after the trial concluded, Westmoreland's appointed appellate counsel filed a motion for postconviction relief, asserting only that Westmoreland's trial counsel provided ineffective assistance of counsel because she argued two inconsistent theories in her closing argument. The trial court denied the motion, and Westmoreland appealed. We affirmed the trial court's decision denying the motion for postconviction relief, and the supreme court denied review. ***State v. Westmoreland***, 2008 WI App 15, 307 Wis. 2d 429, 744 N.W.2d 919, *cert. denied by* ***State v. Westmoreland***, 2008 WI 40, 308 Wis. 2d 612, 749 N.W.2d 663.

¶9 On February 27, 2009, Westmoreland, now proceeding *pro se*, filed a second postconviction motion, in which he asked the trial court to vacate a DNA surcharge imposed during sentencing. The trial court denied the motion on March 3, 2009.

¶10 On April 29, 2009, Westmoreland, proceeding *pro se*, filed a third postconviction motion purportedly based on WIS. STAT. § 973.13 (2007-08), in which he asked the trial court to commute his sentences or amend the judgment of conviction. The trial court partially granted the motion on May 5, 2009.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶11 On June 11, 2009, Westmoreland, again proceeding *pro se*, filed a fourth postconviction motion—this time expressly filed pursuant to WIS. STAT. § 974.06. In the motion, Westmoreland claimed for the first time that: (1) the jury's first-degree intentional homicide verdict was not unanimous; (2) the trial court committed plain error when it allowed the jurors to pose questions to a witness; and (3) trial counsel was ineffective for failing to raise the issues. On June 15, 2009, the trial court, without addressing the merits of Westmoreland's claims, denied the fourth motion for postconviction relief, stating that the motion was barred by ***Escalona-Naranjo***.

¶12 On July 7, 2009, Westmoreland filed a *pro se* motion, asking the trial court to reconsider its denial of his fourth postconviction motion on ***Escalona-Naranjo*** grounds. The trial court denied Westmoreland's motion to reconsider. Westmoreland now appeals the trial court's denials of his fourth motion for postconviction relief and subsequent motion for reconsideration.

DISCUSSION

¶13 Westmoreland argues that ***Escalona-Naranjo*** does not act to procedurally bar his claims because his previous *pro se* postconviction motions were filed pursuant to WIS. STAT. § 973.13, and he claims that ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), held that motions filed under § 973.13 are not subject to the ***Escalona-Naranjo*** bar. Moreover, Westmoreland argues that, even if ***Escalona-Naranjo*** applies, he has established a sufficient reason to overcome the bar with respect to his prior *pro se* postconviction motions.

¶14 ***Escalona-Naranjo*** requires that a defendant raise all grounds for postconviction relief in his or her first postconviction motion or in the defendant's direct appeal. *See* ***id.***, 185 Wis. 2d at 185. A defendant may not pursue claims in

a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "'sufficient reason'" for not raising the claims previously. ***Id.*** at 181-82 (citation omitted). Whether a defendant's successive appeal is procedurally barred is a question of law that we review *de novo*. ***State v. Fortier***, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893.

¶15 Here, while Westmoreland spends a great deal of time and energy arguing why his previous *pro se* postconviction motions, which he claims were both filed under WIS. STAT. § 973.13, do not bar his current claims, he fails to address why he could not have raised these claims in his first postconviction motion filed by his appellate counsel. Westmoreland was present for the questioning of the witnesses at trial and when the jury's verdicts were read. He sets forth no facts now that were not available to him at the time he filed his first postconviction motion. That fact alone leads us to conclude that his claims are now barred by ***Escalona-Naranjo***.

¶16 In his reply brief before this court, Westmoreland criticizes, for the first time, his appellate counsel for failing to raise these issues. However, we do not address issues raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). And regardless, Westmoreland does not go so far in his reply brief as to allege that his postconviction counsel acted ineffectively in failing to raise these issues, and we will not construct his arguments for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *see also* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996) (A claim that postconviction counsel was ineffective may be "sufficient reason" to avoid the procedural bar of ***Escalona-Naranjo***.).

Consequently, Westmoreland's claims are indeed procedurally barred, and we need not address the substance of his claims.

By the Court.—Judgment and orders affirmed.

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