COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2800 **Cir. Ct. No. 2006CF6613**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARNEST JEAN JACKSON,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Earnest Jean Jackson appeals from the order of the circuit court that denied his motion for postconviction relief. Jackson argues that: (1) the circuit court erred when it denied his motion without a hearing; (2) the jury selection was racially discriminatory; (3) the court erred when it allowed the State

to introduce photos of the mutilated corpse of the victim; (4) the State engaged in prosecutorial misconduct; (5) the State tampered with witnesses; (6) Jackson was denied his due process right to confront witnesses; (7) the evidence was insufficient to support the verdict; and (8) Jackson's prosecution violated his right to be free from double jeopardy. We conclude that the issues are either procedurally barred or lack merit, and we affirm the circuit court's order.

¶2 Jackson was convicted after a jury trial of first-degree intentional homicide and mutilating a corpse, both as a party to a crime.[1] Jackson filed a postconviction motion alleging ineffective assistance of trial counsel, which was denied. We affirmed his conviction on appeal. *See* ***State v. Jackson***, No. 2009AP1449-CR, unpublished slip op. (Wis. Ct. App. April 27, 2010). In 2010, Jackson filed a motion under WIS. STAT. § 974.06 (2009-10).[2] The circuit court denied the motion without holding a hearing, and Jackson appeals.

¶3 The State argues that all of Jackson's claims are procedurally barred because he has not offered a sufficient reason for failing to raise them in his previous postconviction motion and appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994) (a defendant must raise all grounds of relief in his original, supplemental, or amended motion for postconviction relief). If a defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a new postconviction motion, unless there is a sufficient reason for the failure to allege or

[1] An earlier trial ended in a mistrial because the State had failed to disclose that a witness wore a wire when she visited Jackson in prison.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

adequately raise the issue in the original motion. ***Id.*** at 181-82. The State asserts that Jackson has not offered a sufficient reason for failing to raise these issues in his previous postconviction motion and appeal. Although it is not clear from the record whether Jackson asserted a sufficient reason for failing to raise these issues earlier, we will, nonetheless, address the issues.

¶4 Jackson first argues that the circuit court erred when it denied his motion without holding a hearing because he had presented the court with newly discovered evidence in the form of affidavits. Jackson's motion to the circuit court raises a number of issues, but newly discovered evidence is not among them. While Jackson may have been relying on evidence he now claims is newly discovered to support his other arguments, he did not identify the issue of newly discovered evidence nor address the standards for a claim of newly discovered evidence. We recognize that Jackson represented himself, but, while some leniency may be allowed to a pro se litigant, Jackson had the responsibility of identifying in his motion the issues he wished the court to address and presenting argument on them. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Because Jackson did not raise the issue of newly discovered evidence in the motion from which he appeals, he cannot now raise the issue before this court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (the party raising an issue on appeal bears the burden of showing that the issue was raised before the circuit court).

¶5 To the extent that Jackson is arguing more generally that the circuit court erred when it denied his motion without holding a hearing, we conclude that the circuit court did not err. Whether a postconviction motion alleges sufficient facts to warrant an evidentiary hearing is a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

> First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, 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, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

Id. (citations omitted). The facts that allow a court to meaningfully assess a defendant's claim are facts that are material to the issue presented. ***Id.***, ¶22. "A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'" ***Id.*** (citation omitted). The motion should allege "who, what, where, when, why, and how … within the four corners of the document itself." ***Id.***, ¶23. For the reasons we will explain, we conclude that the claims Jackson raised in the circuit court and in this court are either procedurally barred, consist of conclusory allegations, or the record conclusively demonstrates he is not entitled to relief. Consequently, he was not entitled to a hearing in the circuit court.

¶6 Jackson argues that the jury selection for both of his trials was discriminatory under ***Batson v. Kentucky***, 476 U.S. 79 (1986). The first trial ended in a mistrial, and any errors in the jury selection there did not affect the outcome of the second trial. As for the second trial, Jackson argues that the State improperly used a preemptory strike against an African-American male. Jackson has not made a prima facie showing that there was a ***Batson*** violation.

¶7 When considering whether there has been a ***Batson*** violation, the court applies a three-step analysis. ***State v. Lamon***, 2003 WI 78, ¶27, 262 Wis. 2d

747, 664 N.W.2d 607. First, a defendant who alleges that the State had a discriminatory intent in exercising a peremptory strike must show that: "(1) he or she is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant's race from the venire, and (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race." ***Id.***, ¶28 (footnote omitted). If the court finds that the defendant has made a prima facie case on this basis, the second step of the analysis shifts the burden to the State to offer a neutral reason for exercising the peremptory strike. ***Id.***, ¶29. "The prosecutor's explanation must be clear, reasonably specific, and related to the case at hand." ***Id.*** The explanation need not "rise to the level of justifying exercise of a strike for cause." ***Id.*** The reason does not have to be persuasive or even plausible. ***Id.***, ¶31. "[E]ven a 'silly or superstitious' reason, if facially nondiscriminatory, satisfies the second step." ***Id.*** The third step of the analysis requires the court to evaluate the credibility of the prosecutor's explanation and determine whether there was purposeful discrimination. ***Id.***, ¶32. At this point, the burden shifts back to the defendant to persuade the court that the prosecutor's explanations "were a pretext for intentional discrimination." ***Id.***

¶8 Jackson's argument is not sufficiently developed or detailed to make a prima facie case that the prosecutor excluded a juror on the basis of race. Jackson has made only general arguments about prosecutors in Milwaukee striking African-American jurors, and he has provided only minimal information about the strike he believes was improper. Further, even if we assumed that Jackson made a prima facie case, the State offered a race neutral reason for striking the juror, which the court accepted. Jackson is not entitled to a hearing on this issue.

¶9 Jackson argues that the circuit court erred when it admitted photos of the mutilated corpse because the photos were unfairly prejudicial. Jackson moved to exclude the photos prior to his first trial. The circuit court denied the motion finding that the photos were relevant. The court made the same ruling at the start of the second trial.

¶10 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). Nearly all evidence is, to some extent, prejudicial to the party against whom it is offered. ***State v. Alexander***, 214 Wis. 2d 628, 642, 571 N.W.2d 662 (1997). Unfair prejudice results when "the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (citations omitted).

¶11 Jackson was charged with homicide and mutilating a corpse. Photos of the mutilated corpse of the victim were relevant to the jury's consideration of these crimes. We conclude that the circuit court properly exercised its discretion when it allowed the State to introduce these photos. The record conclusively demonstrates that Jackson is not entitled to a hearing on this basis.

¶12 Jackson also argues that the State engaged in prosecutorial misconduct by lying several times and by failing to correct falsehoods in other

instances. One of his claims is based on the testimony of a witness who was wearing a wire when she visited Jackson in prison. Jackson asserts that the tape of that conversation shows that the witness lied to the police and did so out of fear that she would have her children taken from her. Jackson does not give citations to the record to identify the statements that would support this claim. Further, Jackson's main concern seems to be that the witness received concessions for cooperating with the police. Generally, a defendant's right to a fair trial is not violated by the admission of testimony by a defendant's accomplice even when the State has expressly granted concessions to the witness in exchange for testimony. ***State v. Samuel***, 2002 WI 34, ¶24, 252 Wis. 2d 26, 643 N.W.2d 423. Cross-examination is the proper tool for challenging such testimony. ***Id.*** The record shows that Jackson's counsel cross-examined the witness at trial about the concessions she received from the police. Thus, the issue of her credibility was put before the jury. The record conclusively demonstrates that Jackson is not entitled to a hearing on this basis.

¶13 Jackson also argues that the prosecutor misled the jury in his opening statement. There is nothing to suggest that the statement that Jackson claims was a lie was made intentionally by the prosecutor to mislead the jury. Further, the court instructed the jury that the lawyers' statements were not fact. If there was any error here, it was harmless. Jackson is not entitled to a hearing on this basis.

¶14 Jackson also argues that the State knew that another witness had lied to the police. The record shows that the witness admitted at trial that his prior statements to the police were false. The State knew that the witness had made false statements to the police and presented this information to the jury. It was then the jury's role to decide whether the witness was credible. There is nothing

in the record to support Jackson's claim that the State knowingly presented false testimony.

¶15 Jackson claims that the State tampered with certain witnesses. He argues that the State discouraged certain witnesses from testifying and coerced others into testifying against him. We have already considered his claim that the State engaged in misconduct when it granted concessions to certain witnesses. Jackson argues that one witness, Jimale Williams, testified that the State attempted to convince him not to testify, and another witness, Jennifer Garcia, was a suspicious "no show."

¶16 The State did not keep Williams from testifying on Jackson's behalf at trial: Williams testified and told the jury that the State had told him not to testify. The State rebutted this evidence. Again, it was the jury's role to determine which witness was more credible. As to Garcia, Jackson does not explain who she is, what her testimony would have been, or whether he called her to testify at trial. The argument is not developed and we will not consider it any further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may decline to address issues that are inadequately briefed).

¶17 Jackson argues that he was deprived of his due process rights when he was denied his right to confront witnesses. Jackson did not raise this argument in the circuit court and therefore we will not consider it here. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶18 Jackson argues that the evidence at trial was insufficient to allow the jury to convict him.

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most

> favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). In light of this standard, Jackson's argument has no merit. As we stated in our decision in Jackson's direct appeal when addressing another issue, the evidence against Jackson was compelling. There was certainly sufficient evidence to support the jury's verdict.

¶19 Jackson also argues that his prosecution violated his right to be free from double jeopardy. We addressed double jeopardy in Jackson's direct appeal. We do not revisit an issue we previously rejected. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶20 For the reasons stated, we affirm the circuit court's order denying Jackson's WIS. STAT. § 974.06 motion.

By the Court.—Order affirmed.

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