**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 29, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP92-CR** **Cir. Ct. No. 2008CF216**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CARL W. BENNETT,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Juneau County: GUY D. REYNOLDS, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Carl Bennett appeals a judgment of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 A jury found Bennett guilty of one count of attempted first-degree intentional homicide. The circuit court denied his postconviction motion without

an evidentiary hearing. On appeal, the State aptly explains why Bennett's arguments fail. Generally, in the following paragraphs, we adopt the reasoning in the State's brief.

¶3 Bennett first argues that the circuit court erred by denying his postconviction motion without an evidentiary hearing. Bennett appears to believe such a hearing is required in every case. However, the court need not hold an evidentiary hearing unless the motion alleges facts which, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). This is a question of law we review independently of the circuit court. ***Id***.

¶4 Bennett next argues that the court erred by denying his motion to appoint counsel for the postconviction hearing. Bennett earlier waived his right to appointed counsel when he discharged counsel before filing the postconviction motion. Bennett has not shown that any specific circumstances existed at the time of the postconviction hearing that would have required the court to appoint counsel. Accordingly, he has not shown that the court erred.

¶5 Bennett next argues that the court improperly denied his request for a substitution of judge after the first appeal in this case, in which we reversed the court's order denying the postconviction motion. The court's denial of substitution was proper because Bennett did not have a right to substitution after appeal unless we ordered a new trial or sentencing, which we did not. *See* WIS. STAT. § 971.20(7) (2011-12).

¶6 Bennett next argues that his second statement should not have been admitted at trial because it was involuntary. This issue does not appear to have been preserved for appellate review. Bennett does not cite to any pretrial suppression motion requesting that relief, or to any circuit court decision

addressing the admission of this statement. Nor does Bennett argue that his trial counsel was ineffective by failing to move for suppression. We do not address this issue further.

¶7 Bennett next argues that police did not sufficiently test certain evidence for DNA. His legal theory appears to be that this was exculpatory evidence that the State was required to disclose to the defense. However, Bennett cites no precedential authority requiring police to test evidence to determine whether it might be exculpatory.

¶8 Bennett next argues that the prosecutor committed misconduct in several ways. He argues that the prosecutor knowingly presented the testimony of a witness who lied. Bennett may disagree with that witness's testimony, and that witness may have earlier given different versions of events, but that does not establish that the prosecutor believed the witness was lying at trial.

¶9 Bennett argues that the prosecutor made several improper statements during closing argument. However, it does not appear that there were objections to these statements at the time, and therefore they are not preserved for appeal. Bennett also argues that the State abused its use of immunity and improperly asked for a "party to the crime" instruction even though the potential person who directly committed the crime was not a defendant. These arguments have no legal merit.

¶10 Bennett argues that his trial counsel was ineffective in various ways. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not

address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697.

¶11 Bennett argues that his counsel was ineffective by not obtaining DNA testing on certain evidence. This argument fails because Bennett has not established what the result of such testing would be, and therefore he has not shown that the lack of such testing caused him prejudice. His argument is nothing more than speculation. Bennett argues that his counsel was ineffective by not objecting to testimony by the State's expert. However, we are unable to determine from the brief precisely which testimony he objects to.

¶12 Bennett argues that his counsel was ineffective by failing to object to the "nature of the charge." Here Bennett appears to be arguing that his attorney did not adequately argue at trial that the evidence was insufficient. However, we are unable to determine exactly what Bennett claims his attorney should have done differently. Bennett also argues that his counsel was ineffective by not objecting to the prosecutor's references to Bennett having been dating two white women at the time of the crime. These references were too minor, in the context of a full trial, to be considered prejudicial.

¶13 Finally, Bennett argues that the court erroneously exercised its discretion by not granting a new trial on the ground of insufficient evidence. He does not assert that any such request was made at trial. To the extent Bennett is arguing sufficiency of the evidence, we affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. ***Id***. at 504.

Without attempting to recount the evidence here, the expert and eyewitness testimony was not inherently incredible and, if believed, was sufficient to establish the elements of the crime.

¶14 Bennett has also made other arguments and sub-arguments which, although not discussed in this opinion, we have nonetheless considered and rejected.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).