COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3443-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS E. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Dennis E. Jones appeals pro se from a judgment convicting him as a repeat offender of armed robbery, felon in possession of a firearm and possession of a short-barreled shotgun. He also appeals from an order denying his postconviction motion. We reject Jones' multiple claims, which will be identified and discussed in this opinion. We affirm the judgment and the order.

Jones was convicted of robbing a delicatessen. On the same afternoon of the robbery, Jones had entered the store twice before to purchase a small item. After the robbery, he was observed leaving in a car that was later found to belong to Jumard Brooks. After giving a false statement about the whereabouts of his car on the day of the robbery, Brooks admitted that he had loaned his gold Buick LeSabre to Jones. Brooks said that after using the car, Jones called him three times to ask about retrieving something from the car. Under the passenger seat of the car used by Brooks' wife, a white Buick Regal, Brooks discovered a bag with a sawed-off rifle in it. Three store employees identified Jones as the robber in lineup and photo array identifications.

With this preliminary statement of facts, we summarily reject Jones' claim that there was insufficient evidence to support his conviction of felon in possession of a firearm and possession of a short-barreled shotgun. The cash register attendant whom Jones confronted identified the rifle recovered from Brooks as the gun used in the robbery. Even if the witness was equivocal on cross-examination about whether it was the same gun, it only affected the weight of her testimony. Regardless of whether the witness could identify the actual gun used, she indicated that Jones was in possession of a firearm during the robbery.

This was sufficient evidence.[1] *See* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992) (our review of the sufficiency of the evidence is to determine whether 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).

Jones also contends that there was inadequate proof to permit him to be sentenced as a repeat offender because he did not admit to his prior convictions and the prosecution failed to offer proof of those convictions. At sentencing, Jones was not personally questioned about the prior convictions, no admission of the prior convictions was obtained, and the prosecution did not offer formal proof of the repeater allegation. However, the presentence report recites the case numbers in which Jones was convicted on February 3, 1991, of party to the crime of armed robbery and armed robbery. A presentence report satisfies the proof requirements of § 973.12(1), STATS. *See* ***State v. Goldstein,*** 182 Wis.2d 251, 259, 513 N.W.2d 631, 635 (Ct. App. 1994). The offenses here were committed on September 3, 1993, within the five-year window subjecting Jones to sentencing as

[1] Jones claims that by allowing his prior criminal convictions to be submitted to the jury, the trial court permitted an unacceptable and prejudicial method of proof that Jones was a convicted felon. Jones cites ***State v. McAllister***, 153 Wis.2d 523, 525, 451 N.W.2d 764, 765 (Ct. App. 1989), which holds that the jury should not be informed of the nature of a prior conviction when a defendant is willing to stipulate that he or she was a convicted felon. However, "it is not reversible error for the trial court to permit the revelation to the jury of the defendant's felon status. Reversible error would only arise when the nature of that felony were revealed to the jury despite the offer to stipulate." ***State v. Nicholson***, 160 Wis.2d 803, 807-08, 467 N.W.2d 139, 141 (Ct. App. 1991). Jones does not give a record citation indicating that he offered to stipulate that he was a convicted felon or that the nature of his prior convictions was revealed to the jury. We are not obligated to search the record to determine the nature of Jones' claim and therefore do not review the claim of error. *See* ***State v. Boshcka,*** 178 Wis.2d 628, 637, 496 N.W.2d 627, 629 (Ct. App. 1993).

a repeat offender. *See* § 939.62(2), STATS. There is no merit to Jones' claim that he was not properly sentenced as a repeat offender.

Jones argues that he was subject to prosecutorial misconduct because the prosecutor withheld evidence that none of the fingerprints found on the car used in the robbery could be identified. Jones speculates that the evidence that other unidentified adult prints were found on the car was exculpatory because it supports his theory that Brooks' cousin borrowed the car and committed the robbery.

A violation of the duty to disclose exculpatory evidence applies only when the evidence is both favorable to the accused and material to guilt or innocence. *See* ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 850, 469 N.W.2d at 222 (quoting ***United States v. Bagley***, 473 U.S. 667, 682 (1985)).

The lack of fingerprint evidence was neutral and not exculpatory to Jones. Because the car did not belong to Jones, it is not remarkable that his prints were not found in the vehicle. This is particularly true because the owner's fingerprints were not found either. The lack of identifiable fingerprints cannot be equated with evidence that some other person was at the scene of the crime. The evidence does not meet the materiality test.

Jones also suggests that the prosecutor attempted to intimidate three alibi witnesses by threatening them with arrest. This claim lacks merit because two of the three witnesses Jones names testified at trial as alibi witnesses. *See*

State v. Gibas, 184 Wis.2d 355, 364, 516 N.W.2d 785, 788 (Ct. App. 1994) (no prejudice where witnesses were not prevented from testifying at trial). One of these two witnesses, Aaron Lewis, was subject to arrest on an outstanding warrant, but the trial court did not allow any mention of the potential arrest in front of the jury. The third witness, Shawn Muhammad, could not be located by the defense or the police. The police had been told that Muhammad had moved. There was no evidence of any threats of arrest causing Muhammad's unavailability. Moreover, Muhammad's alibi testimony would have been cumulative to that of the other alibi witnesses. Jones' right to present evidence was not impaired by prosecutorial misconduct.

Jones argues that the trial court was biased against him and exhibited such bias during the trial by making erroneous and prejudicial rulings against him.[2] Whether the trial judge's partiality, if any, violated Jones' right to due process presents a legal question subject to de novo review. *See* ***State v. Hollingsworth***, 160 Wis.2d 883, 893, 467 N.W.2d 555, 559 (Ct. App. 1991). There is a presumption that a judge is free of bias and prejudice. *See* ***State v. McBride***, 187 Wis.2d 409, 414, 523 N.W.2d 106, 109 (Ct. App. 1994). To overcome the presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is prejudiced or biased. *See* ***id.*** at

[2] Jones' case was handled by three different trial court judges. After judicial substitution, Racine County Circuit Court Judge Emmanuel J. Vuvunas was assigned to the case. Judge Vuvunas was ill on the day set to hear Jones' suppression motion and the prosecution's motion to join a charge against Jones for solicitation of perjury. Racine County Circuit Court Judge Stephen A. Simanek heard the motions. Kenosha County Circuit Court Judge David M. Bastianelli presided over the jury trial and sentenced Jones. Jones complains that Judges Vuvunas and Bastianelli exhibited bias.

415, 523 N.W.2d at 109. We look to whether there are objective facts demonstrating actual bias.[3] *See* ***id.*** at 416, 523 N.W.2d at 110.

Jones attempts to show objective bias by arguing that the trial courts made improper rulings. His first contention is that Judge Vuvunas demonstrated bias when he reconsidered an earlier ruling denying the prosecution's motion to join at trial a complaint against Jones for solicitation of perjury involving Brooks. Judge Vuvunas' inquiry regarding whether there was any dispute about Jones having written the letter Brooks received about giving false testimony was proper in light of the determination to be made about whether evidence of the letter would be admissible in the robbery trial. *See* ***State v. Hall***, 103 Wis.2d 125, 141, 307 N.W.2d 289, 296 (1981) (when evidence of the separate counts is admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant). Judge Vuvunas' inquiry did not mean that he had prejudged the solicitation case.[4] Nor did he demonstrate personal bias against Jones simply by his willingness to entertain the prosecution's motion for reconsideration of the ruling made by another trial court judge.[5] *See* ***Dietrich v.***

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[3] The question of judicial bias has a subjective and objective component. *See* ***State v. McBride***, 187 Wis.2d 409, 415, 523 N.W.2d 106, 110 (Ct. App. 1994). The subjective component is based on the judge's own determination that he or she can act impartially. *See* ***id.*** We presume that the trial court judges in Jones' case believed that they could act impartially because neither judge disqualified himself. *See* ***id.***

[4] Any prejudgment Jones perceives was not prejudicial. Ultimately the solicitation of perjury charge was not tried with the armed robbery and firearm possession charges. It was not handled by Judge Vuvunas. Jones entered a guilty plea to the solicitation charge and his conviction was affirmed on appeal. *See* ***State v. Jones***, No. 95-3083-CR, unpublished per curiam (Wis. Ct. App. Oct. 23, 1996).

[5] We reject Jones' attempt to show bias by a claim that joinder was improper. Evidence of an attempt to suborn perjury would have been admissible to show a consciousness of guilt of the principal criminal charge. *See* ***State v. Amos***, 153 Wis.2d 257, 274, 450 N.W.2d 503, 509 (Ct. App. 1989). Joinder was permissible.

Elliott, 190 Wis.2d 816, 822, 528 N.W.2d 17, 20 (Ct. App. 1995) (a successor judge in a circuit court proceeding has the authority to modify or reverse decisions, judgments or rulings of a predecessor judge).

Jones faults Judge Bastianelli for stating that he would not reconsider Judge Vuvunas' denial of Jones' motion to suppress evidence. Reconsideration was a matter of discretion for the trial court. Judge Bastianelli's expression that he would not reconsider was reasonable in light of his concern over delay in the prosecution and his acknowledgment that the issue was preserved for appellate review. This did not exhibit bias.

Jones absolutely misrepresents the record when he contends that Judge Bastianelli informed the jury of his friendship with the prosecutor or vouched for the prosecutor's reputation. The comments Jones attributes to Judge Bastianelli were actually made by trial counsel. No bias was exhibited by the trial judge.

As Jones points out, during the trial Judge Bastianelli intervened to limit questioning when no objection was made, told the jury that Jones was not entitled to counsel at the lineup identification, required Jones to read the letter soliciting perjury, interrupted the testimony of an alibi witness to determine, outside the presence of the jury, whether the witness had been previously convicted of a crime, refused to produce in court a prisoner who had been identified in a lineup by one of the witnesses,[6] and spoke, outside the presence of the parties, with a juror who reported that an unidentified individual had appeared at the juror's house asking about the trial. The trial judge was acting within his

[6] A picture of the prisoner who had been misidentified in the lineup was presented.

discretion to limit evidence and control the trial in the interests of judicial economy. *See* ***State v. Speese***, 199 Wis.2d 597, 605, 545 N.W.2d 510, 514 (1996) (trial court has discretion to limit evidence which is duplicative and cumulative in character). With respect to the judge's contact with the juror, no request was made to voir dire the juror and there is no suggestion that the judge's comments to the juror created prejudice. None of these actions by Judge Bastianelli during the course of the trial exhibited objective bias. We reject Jones' claim of judicial partiality.

We turn to Jones' postconviction motion in which he raised his claim that he was denied the effective assistance of trial counsel. The motion was denied without a hearing. Jones claims that it was error not to conduct an evidentiary hearing.

A trial court's decision not to hold an evidentiary hearing on a postconviction motion has a discretionary component. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Jones argues that the trial court erroneously exercised its discretion in not conducting a hearing because the trial court proceeded under an erroneous view of the law—that Jones' postconviction motion was brought under § 974.06, STATS., rather than in a direct appeal under RULE 809.30, STATS. It is of no consequence that the trial court remarked that Jones' motion was brought under § 974.06. The test for determining whether a hearing on a postconviction motion is required is the same whether the motion is a collateral postconviction motion under § 974.06 or a direct challenge under RULE

809.30.[7] *See* ***Bentley***, 201 Wis.2d at 310 n.6, 548 N.W.2d at 53. Moreover, whether the motion alleges facts which, if true, entitle the defendant to relief is a question of law that we review de novo. *See* ***id.*** at 310, 548 N.W.2d at 53.

Before an evidentiary hearing on a claim of ineffective counsel must be granted, the defendant must raise factual allegations in the motion or affidavits that raise a question of fact for the court. *See* ***State v. Washington***, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993). "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). The information provided in the motion must be "factual-objective" as opposed to "opinion-subjective." *See* ***State v. Saunders***, 196 Wis.2d 45, 51, 538 N.W.2d 546, 549 (Ct. App. 1995).

In his postconviction motion, Jones alleged that he was denied a full and fair hearing on his motion to suppress the identifications because trial counsel was ineffective in arguing the motion and by "simultaneously denying defendant[']s right to have motion heard in place where crime was allegedly committed by waiving such right outside of defendant[']s presence." He also alleged that trial counsel "posed a conflict of interest, and was ineffective … forcing defendant … to be a witness against himself during alibi testimony." These bare allegations are not sufficient to suggest that facts exist which would

[7] In addition to his claim of ineffective assistance of trial counsel, Jones raised in his postconviction motion the other issues which have been considered in this appeal. Thus, Jones was not prejudiced by the trial court's expression that only constitutional or jurisdictional issues are cognizable under § 974.06, STATS.

have entitled Jones to relief under a claim of ineffective assistance of counsel.[8] The trial court properly denied Jones an evidentiary hearing on his motion.

We need not address Jones' specific claims of ineffective assistance of counsel because a ***Machner***[9] hearing was not held. *See* ***State v. Curtis***, No. 96-2884-CR, slip op. at 3 (Wis. Ct. App. Apr. 8, 1998, ordered published May 27, 1998) (a ***Machner*** hearing is required in every case as a prerequisite to review of trial counsel's performance). We do, however, summarily reject Jones' claims on the prejudice prong of the two-step ineffective assistance analysis.[10] *See* ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

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[8] After the trial court denied his postconviction motion without a hearing, Jones filed a motion for reconsideration and a lengthy brief in support of reconsideration. Although the supporting brief flushed out Jones' ineffective assistance claims, it did not state objective facts entitling Jones to relief.

[9] A ***Machner*** hearing is the evidentiary hearing held on a defendant's ineffective assistance of counsel claim during which trial counsel's testimony is preserved. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[10] Jones contends that trial counsel improperly waived "venue" in his absence by permitting the motion to suppress to be heard in the Racine County courthouse rather than the Kenosha County courthouse. No waiver of venue occurred. The hearing was held in Racine County as a convenience to the parties because a Racine County circuit court judge had been assigned to the case and Jones was held in the Racine County jail. No prejudice evolved from the hearing location.

The claims that trial counsel failed to argue that the identifications were the product of an illegal arrest and failed to call witnesses regarding suggestiveness in the identification procedures lack merit. Even in light of contradictory statements by Brooks, there was a lawful basis for Jones' arrest. Based on the findings of fact made by the trial court, we are able to determine that the lineup and photo array identification procedures were not unduly suggestive. *See* ***State v. Wilson***, 179 Wis.2d 660, 682, 508 N.W.2d 44, 52 (Ct. App. 1993).

(continued)

The final argument in Jones' appellate brief is that this court erred in denying his motion to supplement the record on appeal with unspecified discovery materials. We have already explained to Jones that the documents produced by the prosecution in response to discovery demands do not become a part of the record unless offered as an evidentiary exhibit. Jones does not indicate how the documents are relevant to any of the issues raised on appeal. We need not reconsider our prior ruling. *See* RULE 809.24, STATS.

Jones claims that trial counsel had a conflict of interest because counsel had represented Jones in the solicitation of perjury case in which, at the time of trial, Jones was seeking to withdraw his guilty plea due to ineffective counsel. The claim is novel in that Jones suggests that he constitutes two separate defendants who cannot be represented by the same attorney. It does not matter that trial counsel urged Jones to admit to the solicitation charge because the trial court had already ruled that the evidence of the solicitation would be admissible at trial. Further, the trial court considered trial counsel's motion to withdraw and found that despite counsel's assertion that he had irreconcilable differences with Jones about how to proceed, no actual conflict existed.

Finally, Jones contends that trial counsel was ineffective for failing to object to the proceedings and evidentiary rulings Jones raises elsewhere in his appellant's brief. We have addressed those claims and found no error which would suggest that Jones was prejudiced by counsel's failure to object.

By the Court.—Judgment and order affirmed.

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