COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2366-CR **Cir. Ct. No. 2009CF2467**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE ONEAL HILLS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and REBECCA F. DALLET, Judges. *Affirmed.*

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

¶1 PER CURIAM. Terrence Oneal Hills appeals from judgments of conviction, entered upon a jury's verdicts, convicting him of second-degree recklessly endangering safety, endangering safety by use of a dangerous weapon, possessing a firearm while a felon, and bail jumping. He also appeals from an

order denying postconviction relief.[1] He claims that the circuit court erred during *voir dire* by referring to the prospective jurors by number instead of by name and erred again by inadequately instructing the jury in regard to the use of juror numbers. Relatedly, he claims that his trial counsel was ineffective by not objecting to the jury selection procedure or to the circuit court's explanatory instructions, and he seeks an evidentiary hearing to explore these allegations. As additional grounds for relief, he claims that his trial counsel was ineffective by not objecting to allegedly improper expert testimony and that the circuit court wrongly denied this claim after an evidentiary hearing. Because we conclude that Hills forfeited his direct challenges to the alleged circuit court errors and that he failed to demonstrate any ineffective assistance by trial counsel, we affirm.

BACKGROUND

¶2 Regina Spicer alleged that Hills shot at the car in which she was riding as a passenger. The State charged him with second-degree recklessly endangering safety, endangering safety by use of a dangerous weapon, possessing a firearm while a felon, and misdemeanor bail jumping. Hills demanded a jury trial. We review here only those portions of the proceedings relevant to the issues that Hills raises on appeal.

[1] The Honorable Kevin E. Martens presided over the trial and entered the judgments of conviction in this matter. The Honorable Rebecca F. Dallet presided over the postconviction proceedings.

a. Jury selection and instructions.

¶3 At the outset of *voir dire*, the circuit court told the prospective jurors:

> [u]se of numbers, this is something that I'm a stickler I guess, and I'm going to instruct the lawyers to do the same. Each of you ha[s] been assigned a number. You should be seated 1 to 30. One hopefully is in the back row, the first row of the jury box. We have you row-by-row until 30 in the front. That's how you identify yourself in court, so every time your hand is raised and you're called upon, state your number before you say anything. That's, again, how the reporter can also identify you later, so we have to know who is speaking, so state your number.
>
> It is not an issue of, you know, anonymity. We're not trying to keep peoples' identities a secret. We all have your names. There's a list. It helps with the numbers for us to find you easier on the list. Okay.
>
> And, again, with the attorneys, if you're calling on a specific individual in the panel, you just identify them by number when you're calling them – No. 23, or No. 15, or whatever it might be. Again, we got your names. It's not also a matter of not being polite. It's just easier to move things along.

¶4 After the parties selected the jury, the circuit court called the last names and the numbers of the chosen jurors and dismissed the other members of the panel. Too many people remained in the jury box, however, and the circuit court again called the names and numbers of the jurors selected and directed each juror to respond upon hearing his or her name. The circuit court then dismissed the person in the jury box who had not been selected to serve on the jury.

¶5 At the close of the evidence, the circuit court again instructed the jury about the use of juror numbers, stating: "[n]ow, I've made the decision that for the convenience of the Court and counsel, we've referred to jurors by numbers. This should not influence your verdict in any manner."

b. Trial testimony and verdict.

¶6 Spicer testified for the State. She said that on April 28, 2009, she was a passenger in a car travelling south on North 38th Street in Milwaukee, Wisconsin. As she rode, she noticed Hills standing to her left in the middle of a city block. When she neared Hills, he ran around to the back of a house, reemerged with a gun, and crossed the street. After she passed Hills, he began shooting, and bullets struck the car on the passenger side. She reported the incident to police a few weeks later.

¶7 Milwaukee Police Detective Michael Sykes also testified for the State. He told the jury that he had twenty-four years of law enforcement experience and sixteen years of experience as a detective. He said that he received academic and in-service training related to his job and that identifying bullet holes was "a significant part" of his work.

¶8 Sykes testified that in mid-May 2009, he investigated a shooting that reportedly occurred in the 2500 block of North 38th Street. Sykes testified that he examined the Pontiac Grand Am that Spicer said was hit during the shooting, and he described his observations and conclusions. He said that he observed three holes that he thought were bullet holes on the passenger side of the car and that one of the shots "originate[d] from left to right." He also found an object lodged in the Pontiac that he said was "consistent with" a bullet fragment, and he testified that "an unknown reddish substance embedded in" the fragment was "consistent with" the lens of the car's taillight. Based upon the size of the bullet holes, he believed that the shooter used a medium-to-large caliber gun. He opined that the shooter fired "along the passenger side of the vehicle" and that "if this car was, in

fact, shot at on 38th Street," the bullets would "have had to have come [from] ... the west side of 38th Street."

¶9 Sykes testified that in the course of his work in law enforcement, he had learned about circumstances in which an investigation might uncover DNA at a crime scene, and he said that he was "very familiar with the resources available [to police] through ... the crime laboratory and other forensic facilities." He told the jury that, in this case, he recovered no fingerprints and no DNA from the car, and he agreed with the State that to retrieve DNA from an object, "someone must have touched it or expelled some bodily fluid at it." He said that he had "never heard in [his] life of DNA being extracted off of a spent bullet that never hit anybody."

¶10 During cross-examination, Sykes testified that "there [wa]s no way that [he] could tell who would have, in fact, fired the shots to cause those bullet holes." He testified that he did not know the caliber of the gun that made the holes and that he never matched the holes to a gun. He also said that he could not give a specific date that "bullets were put into that car."

¶11 Hills testified on his own behalf, and he presented witnesses in support of an alibi defense. The jury, however, found him guilty on all counts.

c. Postconviction proceedings.

¶12 Hills moved for postconviction relief. He claimed that the circuit court erred when it referred to the prospective jurors by number and when it instructed the jury about this procedure. He further claimed that his trial counsel was ineffective for failing to object to these alleged errors. The circuit court denied all of these interrelated claims without an evidentiary hearing. Hills also

alleged that his trial counsel was ineffective by failing to object that Sykes gave expert testimony without an adequate foundation. The circuit court explored this issue in a postconviction hearing at which Sykes and Hills's trial counsel testified. The circuit court concluded that trial counsel had strategic reasons not to challenge Sykes's testimony and that Sykes was qualified to testify as he did. The circuit court therefore denied Hills any postconviction relief, and this appeal followed.

DISCUSSION

¶13 On appeal, Hills claims that the circuit court erred by referring to the prospective jurors by number rather than by name and erred again when instructing the jurors about those references. Hills, however, did not make a contemporaneous objection to either the jury selection process or to the jury instructions. A defendant forfeits the right to appellate review of alleged errors in the jury selection process absent a contemporaneous objection in the circuit court. *See* ***State v. Erickson***, 227 Wis. 2d 758, 765-67, 596 N.W.2d 749 (1999). Similarly, a defendant must object to a proposed jury instruction at trial to preserve the right to appellate review of any alleged error in that instruction. *See* ***State v. Pask***, 2010 WI App 53, ¶9, 324 Wis. 2d 555, 781 N.W.2d 751.[2] Accordingly, we address these alleged errors solely within the framework of an

[2] The supreme court used the word "waiver" to describe a litigant's failure to raise an issue in circuit court in ***State v. Erickson***, 227 Wis. 2d 758, 765-67, 596 N.W.2d 749 (1999). We similarly used the word "waiver" to describe such a failure in ***State v. Pask***, 2010 WI App 53, ¶9, 324 Wis. 2d 555, 781 N.W.2d 751. Here, we use the word "forfeiture," in light of the decision in ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. The ***Ndina*** court explained that, while courts sometimes use "forfeiture" and "waiver" interchangeably, the terms represent distinct concepts. ***Id.***, ¶29. When the right to make an objection or assert a right on appeal is lost because a party failed to raise the issue in the circuit court, the proper term is "forfeiture." *See* ***id.***, ¶¶29-31.

ineffective assistance of counsel claim. *See* ***Erickson***, 227 Wis. 2d at 768; ***Pask***, 324 Wis. 2d 555, ¶9.

¶14 To prevail on a claim that trial counsel was ineffective, a defendant must demonstrate both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we consider *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). To demonstrate deficient performance, the defendant must identify specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We may start our analysis by considering either prong of the ***Strickland*** test, and we need not consider both prongs if a defendant fails to make a sufficient showing on either one. *See* ***id.*** at 697.

¶15 Hills asserts that he is entitled to an evidentiary hearing to develop his claim that trial counsel was ineffective by failing to object both when the circuit court referred to the prospective jurors by number and when the circuit court instructed the jury about the references. A circuit court must grant a postconviction hearing only if the defendant's postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the defendant satisfied this standard presents a question of law that we review independently. ***Id.*** The circuit court has discretion to deny a postconviction

motion without a hearing if the defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief. ***Id.*** We review a circuit court's discretionary decisions with deference. ***Id.***

¶16 According to Hills, his trial counsel should have objected when the circuit court referred to the prospective jurors by number because, in his view, the procedure restricted disclosure of juror information. "[I]f restrictions are placed on juror identification or information, due process concerns are raised regarding a defendant's rights to an impartial jury and a presumption of innocence." ***State v. Tucker***, 2003 WI 12, ¶11, 259 Wis. 2d 484, 657 N.W.2d 374.

¶17 We question whether Hills's trial counsel had any basis for contending that the circuit court restricted juror information. Hills equates his circumstances to those in ***Tucker***, where, as here, the parties knew the names of the prospective jurors, and, as here, the circuit court referred to jurors by number. *See* ***id.***, ¶2. The supreme court concluded in ***Tucker*** that juror information was restricted. *See* ***id.***, ¶4. In ***Tucker***, however, the circuit court withheld the jurors' names from the record. ***Id.***, ¶¶2, 4. Here, by contrast, when jury selection ended, the circuit court twice announced the last names and juror numbers of the people selected to serve as jurors, and the circuit court directed each juror to raise his or her hand when the juror's name and number were called. Thus, the jurors' names were disclosed to the other jurors, to the parties, and on the record in open court.

¶18 Regardless of whether the procedure here constituted an inadequate disclosure of juror information, however, Hills shows no prejudice arising from trial counsel's decision not to object. When the circuit court restricts juror information, the circuit court must "take reasonable precautions to avoid prejudice

to the defendant." *See* ***id.***, ¶17. At the outset of *voir dire* in this case, the circuit court told the prospective jurors that it relied on numbers rather than names solely as a matter of convenience, explaining that numerical identification simplified finding the jurors on the jury list. At the conclusion of the trial, the circuit court instructed the jury: "[n]ow, I have made the decision that for the convenience of the Court and counsel, we've referred to jurors by numbers. This should not influence your verdict in any manner." Thus, the circuit court took "reasonable precautions to avoid prejudice to the defendant." ***Id.***

¶19 Hills disagrees and asserts that the precautionary jury instruction itself was objectionable. In his view, the circuit court's explanations and instructions were insufficient to comply with ***Tucker***, which provides: "[w]hen jurors' names are withheld ... the circuit court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead of names should in no way be interpreted as a reflection of the defendant's guilt or innocence." *See* ***id.***, ¶23. He suggests that the circuit court's precautionary statement must echo to the letter the words used by the supreme court in ***Tucker***. We need not consider here whether ***Tucker*** creates an inflexible script that the circuit court must follow.[3] Instead, we consider Hills's challenge to his trial counsel's effectiveness in light of the presumption that jurors follow the circuit

[3] We note that the circuit court instructed the jury using language virtually identical to that in Wisconsin pattern jury instruction WIS JI—CRIMINAL 146. That instruction provides: "I have decided that for the convenience of court and counsel, we will refer to jurors by numbers. This should not influence your verdict in any manner." *See* ***id.*** The Wisconsin criminal jury instruction committee developed the instruction for use as a model after the release of ***State v. Tucker***, 2003 WI 12, 259 Wis. 2d 484, 657 N.W.2d 374. *See* WIS JI—CRIMINAL 146, comment. "[T]he committee's assessment of a proper jury instruction is 'persuasive.'" ***State v. Ellington***, 2005 WI App 243, ¶8, 288 Wis. 2d 264, 707 N.W.2d 907 (citation and one set of quotation marks omitted).

court's instructions. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. Hills offers nothing to overcome that presumption here, and so we presume that references to the prospective jurors by number had no influence on the verdicts. We therefore conclude that Hills fails to demonstrate that he suffered prejudice when his trial counsel did not object either to the jury identification mechanism used during *voir dire* or to the jury instruction explaining the process.

¶20 In sum, the record conclusively shows that Hills was not entitled to relief based on trial counsel's failure to object to the allegedly inadequate disclosure of juror information or to the cautionary jury instruction. Accordingly, the circuit court properly denied these claims without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶21 Hills also rests an allegation of trial counsel's ineffectiveness on a complaint that Sykes improperly gave expert opinions. In Hills's view, "the [S]tate did not establish a foundation to show that Sykes was qualified to give expert opinions," and therefore Sykes should not have testified "regarding the bullet holes, the direction of the shots, the caliber of the gun[,] and the inability to examine evidence for DNA." Hills alleges that his trial counsel afforded him prejudicially deficient representation by failing to object to this testimony.

¶22 At the time of trial, the statute governing admission of expert testimony provided:

> **[t]estimony by experts**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

See WIS. STAT. § 907.02 (2009-10).[4] The circuit court held a postconviction hearing to explore whether Hills's trial counsel should have objected to Sykes's testimony in light of the facts and the governing statute.

¶23 Trial counsel testified at the postconviction hearing that he did not object to Sykes's testimony for strategic reasons. Counsel explained that any objection to Sykes's qualifications was, in counsel's opinion, unlikely to prove successful in light of Sykes's decades of law enforcement experience. Thus, counsel believed that an objection would have done no more than risk hurting Hills by allowing the State an opportunity to emphasize Sykes's credentials and highlight Sykes's testimony. Trial counsel considered such a risk unnecessary because, in counsel's view, Sykes's testimony did not undermine Hills's alibi defense. Sykes did not connect Hills to the crime or weaken his position that the State lacked any physical evidence tying him to the shooting. Moreover, counsel relied on Sykes to show that, in the opinion of the State's own witness, no physical evidence tied Hills to the offense.

¶24 "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Here, the circuit court found that trial counsel chose not to object to Sykes's testimony for sound strategic reasons. A circuit court's determination that counsel undertook a reasonable trial strategy is "virtually unassailable." ***State v. Maloney***, 2004 WI

[4] Effective February 1, 2011, the legislature amended WIS. STAT. § 907.02. *See* 2011 Wis. Act 2, §§ 34m-37; WIS. STAT. § 991.11. Hills does not suggest that the amended statute governed at his trial, which ended in July 2009. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. On this record, we cannot agree with Hills that his trial counsel performed deficiently by foregoing an objection to Sykes's testimony. *See* ***Elm***, 201 Wis. 2d at 464-65.

¶25 For the sake of completeness, we also consider the allegation that Hills suffered prejudice from counsel's strategic choice. We reject the claim.

¶26 The State presented testimony at the postconviction hearing that included more extensive information about Sykes's background and qualifications than that offered at trial. The testimony demonstrated Sykes's substantial knowledge and experience in regard to investigating crimes involving guns and gunshots. Sykes estimated that he had investigated one thousand shootings, and he said that he received "quite detailed" in-service training three or four times a year on topics that included investigations of shootings and examining firearms and ballistics evidence. He also testified that he consulted with experts from the Wisconsin Crime Lab, that he viewed those consultations as a component of his training, and that his consultations included the issue of locating DNA on evidentiary fragments.

¶27 A witness may give an expert opinion if the witness '"has superior knowledge in the area in which the precise question lies.'" ***State v. Swope***, 2008 WI App 175, ¶24, 315 Wis. 2d 120, 762 N.W.2d 725 (citation and one set of quotation marks omitted). Further, "a witness called upon to provide expert testimony may establish his or her qualifications by means of his or her own testimony." ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶94, 245 Wis. 2d 772, 629 N.W.2d 727.

¶28 At the conclusion of the postconviction hearing, the circuit court found that Sykes's wealth of experience, knowledge, and training was sufficient foundation for expert testimony, "at least as to the opinions that he gave [at trial]." Whether a witness is qualified to testify as an expert and whether the witness's opinions should be admitted into evidence are matters within the sound discretion of the circuit court. ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 70, 443 N.W.2d 50 (Ct. App. 1989). "On review, we will sustain the circuit court's discretionary determination so long as the circuit court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." ***Green***, 245 Wis. 2d 772, ¶89.

¶29 The circuit court in this case reasonably assessed the evidence pursuant to the correct legal standard and concluded that an objection to Sykes's opinion testimony at trial would ultimately have failed. Given our deferential standard of review, we will not disturb the circuit court's conclusion that Sykes was qualified to give his testimony. Accordingly, Hills suffered no prejudice when his trial counsel did not object to Sykes's qualifications. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (no lawyer is ineffective for failing to pursue futile motions).

¶30 Last, we briefly consider the allegation that Hills's trial counsel was ineffective by failing to object to Sykes's testimony on the ground that it violated the rule barring a witness from testifying that another witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). We are not persuaded by the contention that Sykes's assessment of the evidence constituted an opinion that Spicer told the truth. Assuming, however, that Sykes's testimony did constitute such an opinion, Hills fails to demonstrate that it prejudiced him. The circuit court thoroughly instructed the jurors that they were

the sole judges of the credibility of the witnesses. As we have already explained, we presume that jurors follow instructions. *See* ***Delgado***, 250 Wis. 2d 689, ¶17. We have no basis to disregard that presumption.

By the Court.—Judgments and order affirmed.

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