COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP361 **Cir. Ct. No. 1996CF940**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORENZO JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Lorenzo Johnson appeals pro se from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion without an evidentiary

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

hearing. We conclude that the circuit court properly denied Johnson's motion and affirm.

¶2 In 1998, Johnson was convicted following a jury trial of one count of first-degree intentional homicide and four counts of first-degree recklessly endangering safety, all as a party to a crime and with the use of a dangerous weapon. The charges stemmed from Johnson's role in a shooting that resulted in the death of Dezrez Pierce.

¶3 Johnson did not pursue a direct appeal of his convictions. However, in 2007, he filed a pro se motion for postconviction relief under WIS. STAT. § 974.06. The circuit court denied Johnson's motion, concluding that it was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Johnson appealed.

¶4 On appeal, this court reversed, concluding that the procedural bar of ***Escalona*** was misapplied and that the circuit court failed to adequately address whether Johnson was entitled to an evidentiary hearing on his postconviction motion. ***State v. Johnson***, No. 2008AP1950, unpublished slip op. and order (WI App July 28, 2010). Accordingly, we remanded the matter for further proceedings.

¶5 On remand, the circuit court addressed the issues raised in Johnson's postconviction motion and denied them without an evidentiary hearing. This appeal follows.

¶6 In this latest appeal, Johnson first contends that the circuit court erred when it denied his WIS. STAT. § 974.06 motion without an evidentiary hearing.

¶7 Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to 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 alleges sufficient facts that, if true, would entitle the defendant to relief. ***Id.*** This is a question of law that we review de novo. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** However, if the motion does not raise facts sufficient to entitle the defendant to relief, "or presents 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." ***Allen***, 274 Wis. 2d 568, ¶9. We review the court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.***

¶8 As we acknowledged in our earlier decision, "Johnson's lengthy postconviction motion is difficult to read with its proliferation of constitutional platitudes." ***State v. Johnson***, No. 2008AP1950, unpublished slip op. and order (WI App July 28, 2010) at 2 n.3. Stripped to its core, we construed the motion to raise the following issues:

> (1) because Johnson's NGI plea was withdrawn before the filing of the doctor's supplemental report, the court never had evidence that would have suggested Johnson was not competent to stand trial and Johnson was entitled to a competency hearing; (2) the evidence was insufficient to support the conviction as demonstrated by the co-defendant's post-trial affidavit stating Johnson was not involved and a new trial should be granted because the co-defendant's testimony was not heard by the jury; (3) the prosecutor used knowingly false testimony when a witness testified contrary to his statement to police and preliminary hearing testimony; (4) it was error to admit other acts evidence of Johnson's previous self-inflicted gunshot wound; (5) the jury should have been reinstructed to decide

> the case on the evidence of record when it asked for police interviews not offered into evidence and when the court refused to read back the testimony of three witnesses; (6) one juror should have been struck for cause because of manifest bias and the court and counsel coerced the juror to acknowledge that she could set aside any bias; (7) jury voir dire was ineffective when one juror failed to correctly respond that the juror knew two of the State's witnesses and later reported that knowledge to the court after the witnesses testified; (8) the prosecutor made a misstatement of fact during opening argument; and (9) trial counsel was ineffective for failing to investigate and develop an alibi defense, for not presenting Johnson's testimony at the ***Goodchild***[2] hearing and thereby exposing the police officer's misstatement of what Johnson said, for not moving to strike the biased juror for cause, for failing to object to other acts evidence presented by a witness when the witness explained that Johnson had been involved in robbing the witness days before the charged crime, and for failing to move for a mistrial or curative jury instruction when the prosecutor attacked the presumption of innocence by a line of questioning revealing that Johnson had been subject to pretrial incarceration.

Id. (footnote added).

¶9 Johnson first complains that because his plea of not guilty by reason of mental disease or defect ("NGI") was withdrawn before the filing of a supplemental report, the circuit court never had evidence to suggest that he was not competent to stand trial and that he was entitled to a competency hearing.

¶10 Prior to trial, Johnson equivocated on his ability to understand what was going on. The circuit court subsequently ordered him to be evaluated for a potential NGI plea. The doctor who performed the evaluation concluded that Johnson did not meet criteria for such a plea. Because he was not provided with all of Johnson's medical records, however, the court indicated that the doctor

[2] *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

could file a supplemental report. No supplemental report was ever filed. Ultimately, Johnson withdrew his NGI plea on the first day of trial. His attorney informed the court that there was nothing wrong with him.

¶11 We agree with the circuit court that Johnson's first issue could be denied without an evidentiary hearing. At the time of Johnson's plea withdrawal, there was no credible evidence to suggest that he was not competent to stand trial or that he was entitled to a competency hearing. Moreover, Johnson's motion does not explain why he believes the supplemental report would have shown otherwise. Accordingly, we are satisfied that that the court properly denied Johnson's claim.

¶12 Johnson next complains that the evidence was insufficient to support his convictions as demonstrated by his codefendant's posttrial affidavit.

¶13 As noted by the State, Johnson's second issue is not actually one challenging the sufficiency of the evidence presented at trial. Rather, his claim is that if his codefendant Derrick Howard had testified at trial, the jury would have had reasonable doubt as to Johnson's involvement and might have acquitted him of the charges.

¶14 We agree with the circuit court that Johnson's second issue could be denied without an evidentiary hearing. At trial, the State attempted to call Howard as a witness, but he refused to testify. Then, almost nine years after trial, he executed an affidavit indicating that Johnson was not involved in the shooting. Like the circuit court, we are not persuaded that this late affidavit, by itself, provides an adequate basis for overturning the determination of the jury.

¶15 Johnson next complains that the prosecutor knowingly used false testimony when a witness testified contrary to his statement to police and preliminary hearing testimony.

¶16 This particular issue involves an eyewitness named Avery Thomas. Thomas provided a statement to police and testimony at a preliminary hearing implicating Johnson in the shooting. However, at trial, Thomas reversed course, testifying that he did not see Johnson at the scene of the crime and had implicated Johnson only because they had had a problem a couple of days earlier.

¶17 We agree with the circuit court that Johnson's third issue could be denied without an evidentiary hearing. The mere fact that Thomas's trial testimony contradicted his earlier statements does not mean that the State knowingly used false testimony. In any event, the State impeached Thomas with his prior inconsistent statements. Thus, the jury, as fact finder, had the information it needed to assess Thomas's credibility as a witness.

¶18 Johnson next complains that it was error to admit evidence of his previous self-inflicted gunshot wound. Johnson appears to argue that such evidence was irrelevant.

¶19 During trial, the State called Officer Robert Heckel to testify. Heckel had interviewed Thomas who told him that someone he knew as "Reno" had participated in the shooting. Thomas told Heckel that Reno had previously shot himself by accident. When defense counsel objected to this information, the State explained that police had used the event of the accidental shooting to discover that Reno was Johnson. The circuit court ultimately allowed the information to come in because it was relevant to show how police identified Johnson as a participant in the shooting.

¶20 We agree with the circuit court that Johnson's fourth issue could be denied without an evidentiary hearing. The admissibility of evidence rests within the circuit court's discretion and will not be reversed absent an erroneous exercise of discretion. *See* ***State v. Jackson***, 188 Wis. 2d 187, 194, 525 N.W.2d 739 (Ct. App. 1994). Here, the court properly exercised its discretion in admitting the evidence for the purpose of identification.

¶21 Johnson next complains that the jury should have been reinstructed to decide the case based on the evidence of record when it asked to have certain testimony read back to it.

¶22 During deliberations, the jury asked to have the testimony of several witnesses read back to it. In response, the circuit court asked if the jury could refine its request because it would amount to two or three hours of re-reading testimony. The jury agreed and returned to deliberate. However, it did not make any further requests of the court.

¶23 We agree with the circuit court that Johnson's fifth issue could be denied without an evidentiary hearing. "When a jury has questions regarding testimony, 'the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading.'" ***State v. Anderson***, 2006 WI 77, ¶83, 291 Wis. 2d 673, 717 N.W.2d 74 (quoting ***Kohlhoff v. State***, 85 Wis. 2d 148, 159, 270 N.W.2d 63 (1978)). Here, the circuit court properly exercised that discretion in asking the jury to refine its request so that it would not otherwise waste the court's time or the jury's time. Thus, there is no basis for relief on this claim.

¶24 Johnson next complains that one of the jurors should have been struck for cause because of bias. He also accuses the circuit court and defense counsel of coercing the juror to acknowledge that she could set aside her bias.

¶25 The juror in question told the court that she would be influenced by the fact that her brother-in-law's sister was killed in a drive-by shooting about fifteen years before Johnson's trial. The juror believed it would influence her thinking because she understood the impact these crimes have on families. In response to these statements, the court and defense counsel conducted the following voir dire:

> THE COURT: Sister. All right. Do you understand the tragedy that that is, it has nothing to do with this particular case?
>
> JUROR: Exactly.
>
> THE COURT: And have you formed an opinion as to whether Mr. Johnson is guilty or not guilty in this case?
>
> JUROR: No, I can't do that.
>
> THE COURT: And would you be—would you listen to the evidence in this case and listen to the instructions that I give you as to what the law is and apply that law to those instructions and make a determination as to whether certain things happened or didn't happen?
>
> JUROR: I would listen to what you have to say.
>
> THE COURT: All right. Would you listen to the evidence?
>
> JUROR: I would listen to the evidence.
>
> THE COURT: And would you decide what your verdict is according to the evidence and according to the law that I give you?
>
> JUROR: I would, but I would be influenced by past history.
>
> THE COURT: How are you influenced, ma'am?

JUROR: I've seen what violence can do to a family.

THE COURT: Do you understand the reason we're here is because the Legislature—everybody is against violence?

JUROR: Exactly.

THE COURT: That's not the question. It's against the law. That's why we have criminal trials.

JUROR: Right.

THE COURT: What a juror's job is a juror is to make a determination of fact whether certain things happened or didn't happen.

JUROR: Uh-huh.

THE COURT: Can you do that based on what's presented here in court, ma'am?

JUROR: I would hope to be able to.

THE COURT: All right. Any questions, Ms. Blackwood?

[PROSECUTOR]: No.

THE COURT: Counsel?

[DEFENSE COUNSEL]: You know the emotional impact it's going to have on the deceased[']s family.

JUROR: Uh-huh.

[DEFENSE COUNSEL]: Would you hold the State to a lesser burden just because they think they have the right person, because you know the emotional impact?

JUROR: I don't think so.

[DEFENSE COUNSEL]: You can listen to the judge, and when he says listen to all the evidence disregarding your personal feelings about violence, disregarding how he knows the family must feel and come to a conclusion as to whether or not this is actually the person that caused it?

JUROR: I could do that.

THE COURT: Okay.

> [DEFENSE COUNSEL]: That's what we need. Thank you.

¶26 We agree with the circuit court that Johnson's sixth issue could be denied without an evidentiary hearing. As demonstrated by the above excerpt, there was no basis to strike the juror for cause once she confirmed that she could do a juror's job and disregard her personal feelings about the impact of these crimes. Likewise, there is no evidence to suggest that the juror was coerced by either the circuit court or defense counsel. Accordingly, we are satisfied that the court properly denied Johnson's claim.

¶27 Johnson next complains that voir dire was ineffective because one juror failed to correctly respond that she knew two of the State's witnesses.

¶28 On the second day of trial, the bailiff told the court that one juror recognized a witness. The circuit court subsequently conducted an individual voir dire of the juror. The juror told the court that she recognized one witness but did not know him well. The juror also told the court that she recognized another witness as an acquaintance from when she was a little girl. Finally, the juror confirmed that her knowledge of the two witnesses would not play any role in the matter. Defense counsel did not ask any further questions of the juror and did not move to strike her.

¶29 We agree with the circuit court that Johnson's seventh issue could be denied without an evidentiary hearing. Here, the circuit court's voir dire revealed no substantial relationship between the juror and the witnesses. Absent any indication of juror bias, the fact that the juror failed to correctly respond in pretrial voir dire that she knew two of the State's witnesses is inconsequential.

¶30 Johnson next complains that the prosecution made a misstatement of fact during "opening argument."

¶31 In her opening statement, the prosecutor said that Johnson "admits being in the area at the time of the shooting and admits being associated with that car that was used in the shooting." According to Johnson, this statement was incorrect because during the State's case-in-chief, Detective Steven Mich testified that Johnson said "he had driven the car the evening prior to the shooting."

¶32 We agree with the circuit court that Johnson's eighth issue could be denied without an evidentiary hearing. The alleged misstatement of fact in this case is insignificant because (1) opening statements are not evidence and (2) the jury was aware of this fact. As the circuit court told the jury in its closing instructions, "Remarks of the attorneys are not evidence. If the remarks implied the existence of certain facts not [in] this evidence, disregard any such implication and draw no inference from the remarks." We presume jurors follow the instructions given to them. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). As a result, there is no basis for relief on this issue.

¶33 Johnson's WIS. STAT. § 974.06 motion also alleged ineffective assistance of trial counsel on several grounds. To establish a claim of 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). To prove deficient performance, a defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove prejudice, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶34 Johnson first argues that he was denied effective assistance of counsel when his trial counsel failed to investigate and develop an alibi defense.

¶35 We agree with the circuit court that Johnson's first allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. When Johnson was interviewed by police, he claimed that he was alone at his mother's house at the time of the shooting. Johnson's motion does not articulate whether he wanted to change this alibi. Likewise, it does not explain how such an alibi could have been supported at trial. As a result, we conclude that Johnson has failed to allege sufficient facts to entitle him to relief.

¶36 Johnson next argues that he was denied effective assistance of counsel when his trial counsel failed to present his testimony at the ***Goodchild*** hearing.

¶37 We agree with the circuit court that Johnson's second allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. The purpose of a ***Goodchild*** hearing is to determine whether a statement given as a result of custodial interrogation is voluntary. ***Krebs v. State***, 64 Wis. 2d 407, 417, 219 N.W.2d 355 (1974). Johnson's motion does not explain why his statement to police was not voluntary. Moreover, it does not explain how his testimony would have changed the circuit court's decision to admit the statement. Consequently, we conclude that he has failed to allege sufficient facts to entitle him to relief.

¶38 Johnson next argues that he was denied effective assistance of counsel when his trial counsel failed to move to strike the allegedly biased juror for cause. This argument is related to his sixth issue discussed above.

¶39 We agree with the circuit court that Johnson's third allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. As noted, there was no basis to strike the juror for cause once she confirmed that she could do a juror's job and disregard her personal feelings about the impact of these crimes. Accordingly, there is no basis to support Johnson's claim of ineffective assistance of counsel on this issue.

¶40 Johnson next argues that he was denied effective assistance of counsel when his trial counsel failed to object to other-acts evidence presented by a witness when the witness explained that Johnson had been involved in robbing him days before the charged crime.

¶41 We agree with the circuit court that Johnson's fourth allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. Not only did counsel object to the admission of the other-acts evidence, but he also moved for a mistrial. Both requests were denied by the court after a hearing on the matter outside the presence of the jury. Given counsel's response, there is no basis to support Johnson's claim of ineffective assistance of counsel on this issue.

¶42 Finally, Johnson argues that he was denied effective assistance of counsel when his trial counsel failed to move for a mistrial or a curative instruction when the State revealed that Johnson had been subject to pretrial incarceration.

¶43 We agree with the circuit court that Johnson's fifth allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. It is clear from the record that defense counsel objected strenuously to the line of questioning revealing that Johnson had been subject to pretrial incarceration. In addition, counsel moved for a mistrial. Again, given counsel's response, there is no basis to support Johnson's claim of ineffective assistance of counsel on this issue. Furthermore, as noted by the circuit court, the fact that counsel did not ask for a curative instruction can be reasonably viewed as trial strategy.

¶44 In addition to the issues discussed above, Johnson also contends that the circuit court committed plain error when it ordered his codefendant, Howard, to testify in front of the jury. As noted, the State attempted to call Howard as a witness. It granted him immunity, and the court ordered him to testify under the penalty of contempt. Despite this, Howard refused to testify.

¶45 We are not persuaded that the circuit court committed plain error when it ordered Howard to testify. Contrary to Johnson's suggestion in his brief, Howard did not invoke his Fifth Amendment right not to testify in front of the jury. Rather, he simply refused to testify under the threat of contempt. Because we see no "obvious and substantial" error in allowing him to do so in front of the jury, we decline to find a plain error on that basis. *See* ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77.

¶46 Finally, Johnson contends that he is entitled to a new trial in the interests of justice because the real controversy was not fully tried. Again, Johnson notes that the jury was not given the opportunity to hear testimony from Howard due to his refusal to testify.

¶47 As an appellate court, we have the authority under WIS. STAT. § 752.35 (2011-12) to grant a discretionary reversal of a conviction in the interest of justice if the real controversy was not fully tried. ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992). We are to exercise this discretionary power of reversal only in exceptional cases. ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶48 We do not view Johnson's case as an exceptional one warranting discretionary reversal. Although it is true that the jury was not given the opportunity to hear Howard's testimony, this was not due to the fault of the State, defense counsel, or the circuit court. Rather, it was the result of Howard's own refusal to testify. The fact that Howard is now willing to make a statement is not, by itself, an adequate basis for concluding that the real controversy was not fully tried.

¶49 For the reasons stated, we affirm the order of the circuit court.[3]

By the Court.—Order affirmed.

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

[3] To the extent we have not addressed an argument raised by Johnson on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").