

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2295

Cir. Ct. No. 1992CF91

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES W. KNIPFER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County:
JAMES O. MILLER, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. James Knipfer appeals an order denying his WIS. STAT. § 974.06 (2003-04)¹ motion for relief from a criminal conviction. Knipfer challenges numerous aspects of the trial court proceeding. We affirm.

¶2 The State charged Knipfer with two counts of first-degree intentional homicide with a dangerous weapon enhancer and one count of armed burglary for shooting and killing his estranged wife, Geraldine Knipfer, and her boyfriend, Michael Walker. Both were shot by an armed intruder into Geraldine’s home. The State’s evidence included physical evidence linking Knipfer to the type of bullet and firearm used in the murders. Witnesses testified to threats Knipfer made to kill or harm the victims, and a witness testified that Knipfer admitted the shootings to her several days after they occurred. Knipfer’s daughter, Amy, testified that she was present in the home when the killings occurred, heard the gun shots, and heard her mother pleading with “Jim” for her life.

¶3 Knipfer was convicted in 1993 and is currently serving two consecutive life terms plus a consecutive twenty-year term for armed burglary. This is Knipfer’s first postconviction proceeding on the merits, as he voluntarily withdrew a prior appeal. He divides the issues he raises into categories of trial court error, ineffective assistance of trial counsel and prosecutorial misconduct. We address the issues in turn.

TRIAL COURT ERROR

¶4 The trial court dismissed the jury at the end of the trial, but reconvened it at sentencing for the purpose of polling it on its verdict on the

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

dangerous weapon enhancers to the homicide counts. Knipfer contends that it was unlawful to reconvene the jury after its dismissal. He waived the issue because he did not object at the time. *See State v. Konrath*, 218 Wis. 2d 290, 296 n.8, 577 N.W.2d 601 (1998). Additionally, because the court reconvened the jury only to poll it for unanimity on its previously rendered guilty verdict on the weapon enhancers, Knipfer suffered no prejudice. The polling could only have benefited him.

¶5 Knipfer next identifies instances in which the trial court allowed testimony that Knipfer characterizes as inadmissible hearsay. However, the witnesses testified to statements Knipfer and Geraldine made. His statements are not hearsay. *See* WIS. STAT. § 908.01(4)(b)1. Although testimony about Geraldine's statements was hearsay, Knipfer lost the right to challenge its admissibility when he murdered her. *See Crawford v. Washington*, 541 U.S. 36, 62 (2004).

¶6 Knipfer also asserts that the trial court allowed and encouraged the prosecutor to lead one of the State's witnesses during her testimony. However, there is no per se rule barring leading questions, *see Jordan v. State*, 93 Wis. 2d 449, 471, 287 N.W.2d 509 (1980), and Knipfer fails to show that it was error in the particular instance he notes. In any event, he did not object to the leading questions, and does not claim that his counsel was ineffective for failing to object. He has therefore waived the issue. *See Konrath*, 218 Wis. 2d at 296 n.8.

¶7 Knipfer next alleges that the presiding judge, and at least three jurors, slept or failed to pay attention during parts of the trial. Knipfer cites no facts of record in support of his conclusory argument. On review of Knipfer's WIS. STAT. § 974.06 motion, the trial court reviewed the record, and found no support for Knipfer's allegation. Because Knipfer's claim is without record

support and conclusory, the trial court properly rejected it. *See State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

¶8 Knipfer also alleges, without citations to record, that the court failed to sequester police witnesses. The record appears to contradict that allegation. Additionally, he alleges that, on several occasions, the trial court answered questions for a witness. Again, his argument is conclusory. He cites no specific examples. Also lacking merit and inadequately supported are his allegations of judicial bias and mistreatment of defense counsel and defense witnesses.

COUNSEL'S REPRESENTATION

¶9 Knipfer contends that trial counsel was emotionally upset and unable to perform competently due to his wife's illness and a recent death in his family. Although the record indicates that counsel's wife was ill during the trial, nothing of record substantiates Knipfer's claim that this interfered with counsel's performance. He also alleges, without supporting facts of record, that counsel failed to cooperate with a private investigator working for the defense, and that he failed to adequately investigate potential defense witnesses and an allegation that the prosecution had offered a witness money to testify falsely. Knipfer also claims his counsel allegedly failed to interview Knipfer's daughter before the trial. Not only does Knipfer not present facts to support these allegations, he has also failed to explain how counsel's alleged omissions prejudiced him. Finally, as the trial court noted, the record indicates that Knipfer conceded his counsel did, in fact, interview his daughter.

PROSECUTORIAL MISCONDUCT

¶10 Knipfer asserts that the prosecution coerced his daughter into falsely testifying against him. The record establishes, at most, that the prosecutor

interviewed his daughter and gave her some advice on what to expect when she testified. The facts of record therefore fall short of proving prosecutorial misconduct involving this witness.

¶11 Knipfer's claim that the prosecutor bribed a witness fails, not only because nothing of record supports the allegation, but because the witness in question never testified against him. Knipfer also alleges that the prosecutor made an improper argument during closing by relating a story from the Civil War, improperly suggesting that Knipfer was guilty because he did not testify. The State argues that a reasonable jury could not possibly have interpreted the story as a comment on Knipfer's failure to testify. We agree.

¶12 Finally, Knipfer contends that the prosecutor improperly disclosed a prior conviction in his comments at Knipfer's sentencing hearing. Nothing bars discussion of a defendant's prior conviction at a sentencing hearing. *See* WIS. STAT. § 911.01(4)(c). It is a proper sentencing consideration. *See State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

By the Court.—Order affirmed.

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

