

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 94-0078-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARNELL JACKSON,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Darnell Jackson appeals from a judgment convicting him of four felonies, and from orders denying him postconviction relief. He raises numerous issues, all of which we resolve against him. We therefore affirm.

At Jackson's trial, the State introduced evidence that he used a handgun to fire shots at two men he had earlier argued with, narrowly missing them while wounding a bystander. Jackson defended with evidence that he

was not the shooter, and was not even present at the crime scene. The jury found him guilty on all four charges against him, attempted first-degree homicide, first-degree reckless injury, and two counts of recklessly endangering safety. The trial court sentenced Jackson to prison terms totaling thirty years.

This appeal comes after Jackson failed to obtain postconviction relief from the trial court in two separate proceedings. He raises issues concerning trial counsel's alleged ineffectiveness, the trial court's alleged evidentiary errors, its alleged improper rulings at the second postconviction motion hearing, the insufficiency of the evidence, and the allegedly unconstitutional jury selection process.

COUNSEL'S ALLEGED INEFFECTIVENESS

Jackson's postconviction motion alleged that counsel ineffectively failed (1) to properly investigate the crime and obtain exculpatory photos; (2) to establish Jackson's 5'8" height; (3) to impeach defense witness Dennis Hassel with evidence of the prosecutor's concessions in exchange for his testimony; (4) to request instructions for lesser-included offenses; (5) to oppose the State's request to withdraw jury instructions WIS JI—CRIMINAL 305 and 330; (6) to object to the State's photos of the crime scene taken under different visibility conditions; (7) to properly prepare for sentencing; and (8) to point out the State's failure to prove that the bullets fired at the scene matched the gun linked to Jackson.

To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Counsel's performance is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *Id.* at 636-37, 369 N.W.2d at 716. Prejudice results when there is a reasonable probability that but for counsel's errors the result of the proceeding would have differed. *Id.* at 642, 369 N.W.2d at 719. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 637, 369 N.W.2d at 716. Whether counsel's performance was deficient and whether it

was prejudicial to the defendant are questions of law. *Id.* at 634, 369 N.W.2d at 715.

Jackson has not proved that counsel inadequately investigated the case. Counsel's investigator spent 112 hours on the case. Jackson has not identified what exculpatory facts could have been discovered with additional investigation. As for the failure to obtain exculpatory photos and/or charts of the crime scene, counsel reasonably explained that such items were unnecessary because the theory of defense was Jackson's absence from the scene. Charts and maps only pertained to where the shots originated.

Counsel reasonably chose not to introduce evidence of Jackson's height at trial. The shooter was described as between 5'11" and 6'2". Jackson asserts that counsel could have proved that he was only 5'8". However, that assertion is not supported by any evidence produced at trial or at Jackson's postconviction motion hearing. In fact, a police booking photograph with measuring bars in the background showed Jackson to be 5'11".

Counsel also reasonably chose not to impeach witness Hassel. Hassel testified that he saw a man with a gun near the crime scene, shortly before the shootings. He did not, however, identify Jackson as that man and the physical description did not particularly fit Jackson. Counsel reasonably decided that he wanted the jury to believe Hassel's testimony.

Counsel reasonably chose not to request lesser-included offense instructions, and not to challenge the State's use of crime scene photographs. Jackson denied any involvement with the crime. Requesting lesser-included offense instructions would have conflicted with that defense and may have substantially reduced its effectiveness.

WISCONSIN JI—CRIMINAL 305 instructs the jury that it may disregard all the testimony of a witness who falsely testifies as to any material fact. Jackson suggests that counsel should have insisted on this instruction because there were more prosecution witnesses than defense witnesses. His assertion that the instruction was therefore vital to the defense is merely speculation. As for WIS JI—CRIMINAL 330, it instructs the jury that it may

consider evidence regarding a witness's character for truthfulness. Jackson fails to cite any character evidence that was introduced at trial. Giving the instruction would have been pointless.

Counsel did not improperly fail to object to the State's crime scene photos, and did not fail to address the State's absence of proof that Jackson's gun was used in the crime. A witness testified that the photos fairly and accurately showed the crime scene. In any event, they were introduced to show the physical layout, not the conditions that existed at the time of the crime. There is no reasonable chance that Jackson could have successfully objected. As for the State's weak ballistics evidence, counsel fully litigated the issue. The jury was well aware of evidence that a different gun may have been involved in the shooting.

Counsel's alleged lack of preparation at sentencing was not prejudicial to Jackson. Shortly before sentencing, Jackson discharged his trial counsel and new counsel was appointed. The latter's only alleged failing was having the defendant refute statements in the presentence report, rather than doing so himself. The court declared that it understood and considered Jackson's presentation, and Jackson has presented no evidence to the contrary.

THE COURT'S ALLEGED EVIDENTIARY ERRORS

Jackson attributes the following errors to the trial court: (1) failure to allow Jackson access to juvenile records of prosecution witness Kelly Murphy; (2) refusal to grant a mistrial after the shooting victim's hearsay testimony that Jackson shot her; (3) refusal to strike as prejudicial hearsay another witness's testimony that Jackson threatened one of the victim's before the shooting; (4) refusal to grant a mistrial based on Murphy's testimony that she feared Jackson; (5) refusal to grant a mistrial because a witness referred to Jackson's probation officer; (6) refusal to exclude diagrams of the crime scene; and (7) refusal to grant a continuance so that Jackson's counsel could interview a surprise witness. We address each alleged error in turn.

The trial court had no basis to allow access to Murphy's juvenile records. There is no proof that such records exist. Even if there were, such

records are not admissible to attack a witness's credibility. See § 906.09(4), STATS.

The trial court properly refused a mistrial based on the shooting victim's testimony. That testimony was inadmissible because the victim's statement that Jackson shot her was based on what somebody else told her, rather than any personal knowledge. However, the trial court promptly instructed the jury to disregard her statement. The jury presumptively followed that instruction. See *Pitsch*, 124 Wis.2d at 644 n.8, 369 N.W.2d at 720. A mistrial was therefore unnecessary.

Testimony concerning Jackson's threat to a victim was admissible. The witness was present when Jackson uttered the threat. It was therefore not hearsay and was admissible under § 908.01(4)(b)1, STATS. Additionally, it was not unfairly prejudicial.

The trial court properly refused a mistrial when Murphy testified that she feared Jackson. Murphy gave that reason for initially lying to police about her knowledge of the shooting. The testimony was necessarily offered and admitted to explain why her subsequent testimony differed from that initial statement.

The trial court also properly denied a mistrial based on the reference to Jackson's probation officer. Jackson has not persuasively shown how that one brief reference unduly prejudiced the jury. The jury likely would have inferred that Jackson had committed a minor crime rather than a serious felony in order to be on probation.

The trial court had no basis to exclude the State's diagrams of the crime scene. Trial counsel did not object to those diagrams. On appeal, Jackson has not explained why they would be inadmissible. There is no showing, for example, that they inaccurately described the scene.

The trial court properly denied a continuance. The surprise witness was Murphy who had previously been identified as unavailable, but

who appeared to testify on the first day of the trial. Jackson requested a continuance to allow counsel to interview her. The trial court denied one upon concluding that Murphy probably would not speak to him. Counsel confirmed that fact the next day. The continuance would have been pointless given Murphy's refusal to cooperate with the defense.

JACKSON'S REMAINING ISSUES

Jackson raises several issues concerning the trial court's handling of his second postconviction hearing on remand from this court. Those issues have been addressed and decided adversely to Jackson in another opinion of this court issued on his petition for a writ of *mandamus*. Jackson also contends that the evidence was not sufficient to support his conviction. The issue is raised but not adequately developed, and we therefore decline to address it. *State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). In any event, we agree with the trial court's characterization of the evidence against Jackson as overwhelming.

Finally, Jackson contends that the process used to select his jury systematically excluded African-Americans. The issue was not raised at trial and is therefore waived. *Brown v. State*, 58 Wis.2d 158, 164, 205 N.W.2d 566, 570 (1973).

By the Court.— Judgment and orders affirmed.

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