COURT OF APPEALS
DECISION
DATED AND RELEASED

September 6, 1995

NOTICE

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, STATS.

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

No. 94-2439-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONNELL WALLACE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Ronnell Wallace appeals from a judgment of conviction for attempted first-degree intentional homicide while armed with a dangerous weapon, following a jury trial. He argues that the trial court's failure to have the voir dire and opening statements reported denied him the right to bring a "writ of error" and thus requires a new trial. Wallace also claims he was denied his right to appeal because the record contains a note from the jury to the trial judge, but neither the docket sheet nor the trial transcript indicates

whether the trial judge saw the note or showed the note to counsel, or whether the trial judge responded to the jury's question. We reject Wallace's arguments and affirm.

Wallace was found guilty of attempted first-degree intentional homicide while armed with a dangerous weapon, for the shooting of Tracey Jackson. When jury selection was about to begin, defense counsel requested that the voir dire and opening and closing statements be recorded by the court reporter. The following exchange occurred:

> [Defense Counsel]: I'm asking that voir dire, openings, and closings be reported, Your Honor.
>
> THE COURT: That may be a problem. Anything on voir dire that becomes a problem can be subsequently reconstructed and put back on the record.
>
> [Defense Counsel]: Okay.
>
> THE COURT: I don't think it's necessary for my court reporter to go through—
>
> [Defense Counsel]: I have no problem with that qualification, Your Honor.
>
> THE COURT: And I don't really—as to the openings, I don't know if it's necessary either. If it becomes—if it becomes a problem, or if there is a problem, we can always reconstruct it, also.
>
> Is there a problem with that?
>
> [Defense Counsel]: I prefer that it be recorded, Your Honor, but I—I'm not going to give the court—if the Court so chooses, and that's its policy, I will live with it.

Voir dire and opening statements were not reported.

Wallace argues on appeal that SCR 71.01(2)(a) required the trial court to record the voir dire. SCR 71.01(2)(a) states that "[a]ll testimony" "shall be reported." Wallace claims that voir dire falls under this rule by virtue of the oath taken by jurors. *See* § 805.08(1), STATS. We disagree.

Contrary to Wallace's assertions, SCR 71.01(2)(a) does not require the trial court to record the voir dire. Jury selection proceedings are not "testimony" within the meaning of the rule. An oath does not automatically make any and all statements, oral or written, testimony. "Testimony" is "*[e]vidence* given by a competent *witness* under oath or affirmation." BLACK'S LAW DICTIONARY 1746 (6th ed. 1980) (emphasis added). Clearly, potential jurors are not witnesses and do not present evidence while under oath. *See* § 906.06(1), STATS. (a juror "may not testify as a witness" in the same trial).

Wallace alternatively argues that voir dire should have been recorded under SCR 71.01(2)(f), which states that "[a]ny part or all of any court activity or proceeding" shall be reported "as is necessary in the discretion of the trial court to ensure an adequate record." As the exchange between counsel and the trial court indicates, however, counsel agreed to voir dire not being recorded by his statements "Okay," and "I have no problem with that qualification, Your Honor." Therefore, this issue was waived.

Wallace also argues that the trial court improperly refused to record opening statements and that the trial judge failed to make a complete record regarding a note the jury sent to the trial judge during deliberations. The note states: "We're having difficulty w/ the 3rd element for a 1st degree guilty verdict & need some explanation on parts 1 & 2." No record exists of whether the judge saw the note or responded to the note if he did receive it.

A defendant claiming that inadequacy of the record denies the opportunity for meaningful appellate review must bring a motion before the trial court alleging "an error which, were there evidence of it revealed in the transcript, might lend color to a claim of prejudicial error." ***State v. Perry***, 136 Wis.2d 92, 101, 401 N.W.2d at 748, 753 (1987). If "there is some likelihood that the missing portion would have shown an error that was arguably prejudicial," the trial court then must determine whether the missing portion of the transcripts can be reconstructed. ***Id.*** at 103, 401 N.W.2d at 753. Only if the

record cannot be reconstructed is the trial court obligated to order a new trial. ***Id.*** at 101, 401 N.W.2d at 752. Wallace, however, failed to file postconviction motions in the trial court regarding these issues, and, therefore, we will not address them. *See* § 974.20, STATS.; ***State v. Monje***, 109 Wis.2d 138, 151, 325 N.W.2d 695, 702 (1982) (postconviction motions to the trial court required except in challenges to the sufficiency of the evidence for issues to be considered as a matter of right).[1]

Therefore, we affirm Wallace's judgment of conviction.

By the Court. – Judgment affirmed.

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

[1] We do, however, direct the trial court's attention to SCR 71.01(2)(d), which states that opening statements shall be reported "upon request of a party."