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**DISTRICT IV**

October 29, 2013

To:

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Reserve Judge

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You are hereby notified that the Court has entered the following opinion and order:

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2012AP1065-CR                      State of Wisconsin v. William T. McCoy, Jr. (L.C. # 2006CF881)

Before Lundsten, Higginbotham and Sherman, JJ.

William McCoy appeals a judgment convicting him of first-degree intentional homicide, contrary to WIS. STAT. § 940.01(1)(a) (2011-12).<sup>1</sup> On appeal, McCoy challenges the sufficiency of the evidence to support the conviction and argues that he was denied his right to a public trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

We turn first to McCoy's challenge to the sufficiency of the evidence. When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990); *see also* WIS. STAT. § 805.15(1).

McCoy was convicted, after a jury trial, of first-degree intentional homicide for the beating and fatal shooting of Adrian Bowdry, who had attempted to rob McCoy's brother. McCoy concedes on appeal that there was enough evidence to permit the jury to conclude that the pistol was in McCoy's hand at the time it fired, but he argues that there was insufficient evidence for the jury to find that McCoy acted with the intent to kill Bowdry. Specifically, McCoy asserts that there was no evidence that, at the instant the shot was fired, McCoy was aiming the pistol at Bowdry's chest. This argument does not hold up under *State v. Webster*, 196 Wis. 2d 308, 315, 538 N.W.2d 810 (Ct. App. 1995).

In *Webster*, the defendant was convicted of attempted first-degree intentional homicide and first-degree reckless injury for a close-range shooting that caused the victim to suffer serious injuries. *Id.* at 314-15. Pertinent to this case, on appeal, Webster argued that he aimed the shotgun at his victim's armpit and that the armpit is not a vital area of the body and, thus, there was insufficient evidence of an intent to kill. *Id.* at 322-23. The court rejected that argument, concluding that the jury could determine that Webster intended to kill his victim when Webster fired a gun at the victim's upper torso from close range. *Id.* at 322.

McCoy attempts to distinguish *Webster* by arguing that, in that case, the aiming of the weapon was the essential fact from which intent could be inferred. McCoy asserts that there is

no evidence that he aimed the gun at Bowdry and that, therefore, the jury could not reasonably conclude that McCoy formed the intent to kill. We are not persuaded. In *Webster*, the jury heard defense evidence of aiming at an armpit, but necessarily rejected this non-lethal aiming testimony. *Id.* at 323-34. Thus, what the jury was left with was evidence that the defendant was involved in a close-range shooting that resulted in injury to a vital area of the victim's body, from which the jury was able to infer intent to kill. *Id.* In the instant case, we have those same facts: a gun shot in close proximity to a vital area of the victim's body, resulting in gunshot wounds to the chest. The jury could reasonably find from these facts that McCoy had the requisite intent to kill. No direct evidence of whether the gun was aimed directly at or near Bowdry's chest is necessary to uphold the jury's finding.

We turn next to McCoy's argument that he was denied the right to a public trial. McCoy asserts that critical parts of his trial took place outside the time frame of the courthouse's normal business hours of 7:00 a.m. to 4:30 p.m. The State correctly argues in its brief that this issue is forfeited because McCoy did not object in the trial court at the time the alleged violation occurred. See *State v. Ndina*, 2007 WI App 268, ¶11, 306 Wis. 2d 706, 743 N.W.2d 722, *aff'd on other grounds*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. McCoy also did not file a motion for a new trial based on an alleged violation of the right to a public trial. Only insufficiency of the evidence or issues previously raised may be pursued on appeal as of right without first filing a postconviction motion in the circuit court. See WIS. STAT. §§ 809.30(2)(h), 974.02(2). McCoy did not raise, through a timely objection or postconviction motion in the circuit court, the issue of whether his right to a public trial was violated and, thus, we will not review the issue for the first time on appeal.

Finally, we will address McCoy's assertion, made in a footnote in his brief, that pursuing a postconviction motion for a new trial would have waived the double jeopardy protection that attaches when an appellate court finds that the State's evidence was insufficient to support a conviction. The notion that McCoy was somehow forced to pursue the sufficiency issue first, on its own, is misguided. Nothing prevented McCoy from pursuing both the sufficiency of the evidence issue and the public trial issue at the same time. If both issues had been pursued, the circuit court would have been required to decide the sufficiency issue first. If McCoy prevailed on the sufficiency of the evidence issue, then the circuit court would have reversed the conviction and dismissed the case with prejudice, even though there may have been other grounds for reversal.

For the reasons set forth above,

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*