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July 14, 2020

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

2019AP1349-CR State of Wisconsin v. Kendrich L. Jackson (L.C. # 2017CF1176)

Before Brash, P.J., Blanchard and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kendrich L. Jackson appeals from a judgment, entered on a jury's verdicts, convicting him on three of four charges. Jackson also appeals from an order denying his postconviction motion. 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 (2017-18).[1] Therefore, the judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

BACKGROUND

Jackson was charged with misdemeanor battery, endangering safety by intentionally pointing a gun, possession of a short-barreled rifle, and felony bail jumping after getting into an argument with his mother, N.J., and her fiancé, R.W., at his mother's home.[2] The complaint alleged that Jackson punched R.W. in the face, pointed a gun at him, and threatened to kill him. N.J., fearful of what might happen, called 911. Jackson's girlfriend, A.L., who was with Jackson at his mother's, told responding officers that Jackson had given her the gun to hide; she turned the gun over to police at the scene. At the time, Jackson had been released on bail in another felony case where R.W. was the victim.

On the first trial date, the State informed the court that Jackson had called N.J. and A.L. from jail and made it clear to them that he did not want people to come to court or to cooperate with the State. For example, when N.J. mentioned having been served with a subpoena, Jackson told her it was a "scare tactic" and she did not actually have to come to court. Jackson also asked his mother to "say that y'all was just intoxicated." When A.L. asked Jackson during a call whether his mother could "go to court for [him]," Jackson replied, "I mean, yeah, she can go to court and say that she was just under the influence and she didn't … mean none of that."

[2] Appellate counsel has failed to use appropriate victim identifiers in the briefs. *See* WIS. STAT. RULE 809.86(4) (Appellate briefs in criminal cases "shall not, without good cause, identify a victim by any part of his or her name[.]").

The trial was adjourned, and the State filed a motion to admit the out-of-court statements given by R.W., N.J., and A.L. to police in the event that they did not appear for trial.[3] Following a hearing, the trial court concluded that "these were efforts by Mr. Jackson specifically trying to dissuade [the witnesses] from coming to court" and made a preliminary ruling that the witnesses' statements would be admissible at trial in their absence.[4] On the next trial date, the witnesses did not appear, but the trial was adjourned for reasons unrelated to the witnesses' nonappearance.

Relevant Trial Proceedings

When the trial began, all three witnesses were present. R.W. testified that he and N.J. arrived home to find Jackson and A.L. laying on the couch, and Jackson and N.J. started arguing about Jackson not washing the dishes. Jackson then started "coming at" R.W. and hit him in the jaw, knocking him over. R.W. further testified that he thought Jackson got a weapon—he remembered telling police it looked like a handgun—but when asked whether Jackson had pointed a gun at him, R.W. answered, "No, I wouldn't say specifically." He said that Jackson took the gun out but did not point it at him. R.W. also testified that N.J. had not been drinking.

N.J. testified that she remembered "some things" about the incident. She recalled that she "really got mad" that Jackson was still on the couch, but did not recall telling police there had been an argument. When asked whether she had ever seen Jackson get physically violent

[3] The State's motion was based on the "forfeiture by wrongdoing" doctrine. Under this doctrine, "a defendant forfeits his Sixth Amendment right to confront a witness when the defendant wrongly procures that witness's unavailability by conduct designed to prevent the witness from testifying." *See* ***State v. Reinwand***, 2019 WI 25, ¶14, 385 Wis. 2d 700, 924 N.W.2d 184.

[4] Based on the jail calls, Jackson was charged with victim and witness intimidation in a separate case. Those charges were joined with this case for trial. Jackson was convicted on the two intimidation charges, but he does not challenge those convictions on appeal.

with R.W., she answered, "Not that day." When asked whether she remembered telling police that she saw Jackson throw the punch at R.W., she answered, "I might have. I'm going to be honest, I was intoxicated that day."

A.L. admitted that Jackson told her to "tell the [c]ourt and to tell everyone that his mom was intoxicated[.]" A.L. testified that she did not recall telling police that Jackson had a gun. She further denied telling police she had the gun or that Jackson had asked her to hide it for him. Instead, she testified that the gun was in her possession the entire time and said that Jackson never possessed it or used it to threaten R.W.

Officer Robert Crawley, to whom A.L. had given her statement, was called to testify next. On cross-examination by Jackson's attorney, Crawley testified that he did not recall A.L. saying that she had seen Jackson point a firearm at R.W. The following exchange then occurred:

> [Defense counsel:] Did she ever tell you that she [sic] would not do that to his family?
>
> [The State:] I'm going to object.
>
> [The Court:] Basis?
>
> [The State:] That's speculative.
>
> [Defense counsel:] Let me again refresh the witness—
>
> [The State:] That's not the issue.
>
> [Defense counsel:] Yes, it is. Well—

The State requested a sidebar conference, after which the trial court sustained the objection.

At the conclusion of Crawley's testimony, the trial court sent the jury to lunch and a made a record of the sidebar:

> [Defense counsel], you were asking Officer Crawley about statements [A.L.] made indicating that … Officer Crawley asked, [A.L.], "Did you see him point the firearm?"
>
> And her statement, apparently, "He would never do that to his family." And he went on to say that she went on to say that, no, she did not see him point the gun today. [The State] objected that that was speculative and a propensity evidence, and I agree the part of the statement that was relevant was that she did not see it today.
>
> Anything that happened on other days either previously, it would be other acts, and in the future, it would be speculative. So that portion of the statement was not allowable. I sustained the objection[.]

Later, the State recalled Officer Justino Rodriguez to testify about the statement N.J. had given to him. The State asked Rodriguez, "[W]hat did [N.J.] tell you happened on that day when you interviewed her[?]" He answered:

> She stated that her and [R.W.] came into the house around noon; stated that she observed Mr. Jackson and his girlfriend sleeping on the couch; she observed the kitchen to be a mess, and that's when she woke up Mr. Jackson and asked him why the kitchen was a mess, in which she told me that's when Mr. Jackson … got up in her face ….
>
> ….
>
> … That's when [R.W.] was walking upstairs. That's when he called him down. That's when [R.W.'s] testimony was when Mr. Jackson came up and struck him in the face, causing him pain and causing him to fall on the stairwell.
>
> ….
>
> Q So she told you she saw her son punch [R.W.]?
>
> A Yes, she did.
>
> Q And she saw [R.W.] fall backwards on the stairs?
>
> A Yes, she did.
>
> Q What did she tell you she saw after that?

> A She stated that she observed Mr. Jackson following [R.W.] up the stairs and back down the stairs, and she observed Mr. Jackson come out the kitchen area with the black handgun, as she described to me, and pointed it at [R.W.].
>
> ….
>
> Q Isn't it true you wrote in your report she said that he pointed the gun in [R.W.'s] face and threatened to shoot him?
>
> A Yes, that would be correct.

The jury acquitted Jackson on the charge of endangering safety by intentionally pointing a gun and convicted him on the other three offenses. Jackson received concurrent sentences totaling two years of initial confinement and two years of extended supervision, to be served consecutive to other sentences.

Jackson filed a postconviction motion in which he alleged that: (1) trial counsel was ineffective for failing to object to Rodriguez's testimony about N.J.'s statement and (2) the trial court had erred when it excluded Crawley's testimony about A.L.'s statement that Jackson "did not possess a gun on that day because he 'would not do this to his family.'" The trial court denied the motion without a hearing. It concluded that Jackson had failed to establish any prejudice from trial counsel's lack of objection to Rodriguez's testimony because Jackson was acquitted on the gun pointing charge and, further, the trial court would have admitted Rodriguez's testimony over any objection. The trial court also upheld its exclusion of Crawley's testimony about A.L.'s statement, standing by its explanation at trial. Jackson appeals.

DISCUSSION

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts is a

question of law we review *de novo*. *See* ***id.***, ¶9. If the motion does not raise sufficient facts, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the decision whether to grant a hearing is committed to the trial court's discretion. *See* ***id.*** We review such a decision for an erroneous exercise of discretion. *See* ***id.***

Failure to Object to Rodriguez's Testimony Regarding N.J.'s Statement

To demonstrate ineffective assistance of counsel, "the defendant must prove (1) that trial counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant." *See* ***State v. Dillard***, 2014 WI 123, ¶85, 358 Wis. 2d 543, 859 N.W.2d 44. An attorney is deficient if he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***Allen***, 274 Wis. 2d 568, ¶26 (citations omitted). Prejudice is "defined as a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *See* ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted). The movant must prevail on both prongs to secure relief. *See* ***Allen***, 274 Wis. 2d 568, ¶26.

Jackson first argues that trial counsel was ineffective for not objecting to Rodriguez's hearsay testimony about N.J.'s statement because without an objection, the trial court was not asked to "reasonably determine that [N.J.'s] lack of recollection was false" pursuant to ***State v. Lenarchick***, 74 Wis. 2d 425, 247 N.W.2d 80 (1976). Failure to make a timely objection to the admission of evidence forfeits a challenge to that evidence. *See* WIS. STAT. § 901.03(1)(a); *see also* ***State v. Davis***, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996).

Hearsay is generally not admissible at trial. *See* WIS. STAT. § 908.02. A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination and the statement is inconsistent with the declarant's testimony. *See* WIS. STAT. § 908.01(4)(a)1. "[W]here a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." ***Lenarchick***, 74 Wis. 2d at 436.

The admission of evidence is a matter of trial court discretion. *See* ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). "We will not disturb the [trial] court's decision to admit evidence unless the court erroneously exercised its discretion." ***State v. Ringer***, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448. An appropriate exercise of discretion requires the trial court apply the facts of record to accepted legal standards. *See* ***Jackson***, 216 Wis. 2d at 655.

We are not persuaded that Jackson has shown trial counsel was deficient for failing to object to Rodriguez's testimony. For one thing, he asserts that because trial counsel did not make an objection, the trial court failed to make a "finding of falsity" about N.J.'s memory failure. However, ***Lenarchick*** does not require such a finding; rather, it requires only that the trial judge have "reason to doubt the good faith" of the witness's claim of a lack of memory. *See* ***Lenarchick***, 74 Wis. 2d at 436.

Further, though the trial court did not explicitly make a record on its doubt about N.J.'s lack of memory at trial before admitting Rodriguez's testimony, we may "independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983); *see also* ***State v. Nantelle***,

2000 WI App 110, ¶12, 235 Wis. 2d 91, 612 N.W.2d 356. Here, the record amply supports a discretionary application of ***Lenarchick*** to permit Rodriguez to testify about N.J.'s statement.[5]

In making its preliminary ruling to admit the three out-of-court statements, the trial court took express note of the jail call in which Jackson "discussed the possibility of his mother communicating in court regarding this matter that she was intoxicated" and found that Jackson had attempted to dissuade her testimony. Then, at trial, N.J. testified in a manner consistent with Jackson's coaching, even though R.W. testified that N.J. had not been drinking. This is adequate reason to doubt the good faith of N.J.'s memory lapse.

Further, the trial court noted in its postconviction order that it would have overruled any objection made by trial counsel. *Cf., e.g.*, ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (explaining that appellate review of sentencing discretion may consider a postconviction order because it is an additional opportunity for the trial court to explain its decision). This decision would be supported for the reasons stated above. Trial counsel is not deficient for failing to raise a meritless objection. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

Jackson has also failed to adequately allege prejudice from trial counsel's failure to object. The entirety of the prejudice claim in the postconviction motion is:

> The issues of admissibility raised by [N.J.'s] lack of recollection were never even raised by defense counsel at trial. Had he done so there is a substantial[] likelihood that significant portions of

[5] We observe that the State does not discuss whether the forfeiture by wrongdoing doctrine might provide an alternate basis on which to affirm the trial court's decision, and Jackson does not contest the trial court's preliminary findings that the State met its burden under that doctrine.

> Officer Rodriguez's inculpatory testimony would have been excluded. If this had occurred the[r]e is a reasonable probability that the outcome of the proceeding would have been different[.]

This, however, is a textbook example of a conclusory allegation and it is insufficient to garner a hearing on the postconviction motion.

Exclusion of Crawley's Testimony Regarding A.L.'s Statement

Jackson also contends that the trial court erred when it sustained the State's objection to Crawley's testimony about whether A.L. said that Jackson "would never do this to his family." He asserts that "the feelings of [d]efendant as to what harm his illegal actions would cause his family is relevant to his motive and intent to commit the offense." Jackson further contends that "[t]he fact that defendant did not wish to harm his family was relevant to his motive (or lack thereof) to threaten his family with a loaded weapon. His reasons for committing the offense or not committing the offense are relevant to whether or not he actually committed the offense."

Like the decision to admit evidence, the decision to exclude evidence is subject to the trial court's direction. *See* ***State v. Sarfraz***, 2014 WI 78, ¶35, 356 Wis. 2d 460, 851 N.W.2d 235. Jackson has made no attempt to show that the trial court erroneously exercised its discretion. Further, we are not convinced that A.L.'s opinion testimony about what Jackson would or would not do is "motive" evidence instead of inadmissible propensity evidence. *See* WIS. STAT. § 904.04(1); ***State v. Hanson***, 2012 WI 4, ¶33, 338 Wis. 2d 243, 808 N.W.2d 390. Finally, Jackson argues that A.L.'s testimony goes to "whether or not he actually committed the offense" of endangering safety by intentionally pointing a firearm—the charge on which Jackson was acquitted. Thus, even if the trial court erroneously excluded Crawley's testimony of A.L.'s

statement, it is clearly harmless, as "there is no reasonable possibility that it contributed to [a] conviction." *See* ***State v. Tulley***, 2001 WI App 236, ¶7, 248 Wis. 2d 505, 635 N.W.2d 807.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals