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DISTRICT IV

December 17, 2020

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

2019AP1040-CR State of Wisconsin v. Jack John C. Hamann (L.C. # 2017CF1046)

Before Blanchard, Kloppenburg, and Nashold, 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).

Jack John Hamann appeals a judgment of conviction for first-degree intentional homicide. 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(1) (2017-18).¹ We affirm.

Hamann first argues that we should overturn his conviction because of remarks made by the prosecutor during rebuttal closing argument. Specifically, Hamann points to the following remarks, commenting on the absence of witnesses or evidence offered by the defense:

The defense had no explanation and they still don't know what happened. They have no evidence. There was nothing. They chose—and that's a choice—to put on that stand to explain any of the evidence you have heard about all week. You have not heard a single person tell you there is some rash of unexplained home invasions in this area of Middleton.

You have not heard a single person tell you that [the defense's claimed alternative suspect] was violently upset.

Hamann argues that the prosecutor's remarks so infected the trial with unfairness as to violate his right to due process, and that the remarks also violated his right against self-incrimination.

We agree with the State that Hamann forfeited this argument by failing to raise it in the circuit court. And, based on Hamann's forfeiture, we decline to address the argument's merits. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (“Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.”).

We acknowledge that Hamann requested a curative instruction addressing the prosecutor's remarks, and that Hamann supported this request with arguments regarding burden shifting. In particular, Hamann's counsel argued that the prosecutor's rebuttal argument “clearly

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

had a lot of burden shifting that I do believe needs to be brought up,” and that “I want that jury to go back there understanding that we don’t have to prove anything.” However, we disagree with Hamann that this request for a curative instruction apprised the circuit court of the argument Hamann now makes on appeal regarding the prosecutor’s remarks.

Hamann next argues that his right to be present at trial was violated because he was not present when the circuit court addressed two notes from the jury in which the jury requested that evidence be sent to the jury room. Hamann contends that, although the circuit court’s minutes show that the court telephoned counsel, there is no record of Hamann being present or having the opportunity to consult with counsel regarding the notes.

The State counters that Hamann is procedurally barred from raising his right to be present claim on appeal because Hamann neither brought a postconviction motion raising this claim nor raised it previously. Under the rules governing direct criminal appeals, a defendant “shall file a motion for postconviction ... relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.” *See* WIS. STAT. RULE 809.30(2)(h); *see also* WIS. STAT. § 974.02(2) (appellant “is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised”).

Hamann does not contend that he brought his right to be present claim by postconviction motion or raised it previously. He thereby in effect concedes the procedural bar. He argues instead that we should review the claim under the plain error doctrine. We decline to address Hamann’s plain error argument because Hamann raises this argument for the first time in his reply brief. *See Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981)

(“We will not, as a general rule, consider issues raised by appellants for the first time in a reply brief.”).

Therefore,

IT IS ORDERED that the circuit court’s judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals