OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

August 8, 2024

To:

Hon. Karl Hanson
Circuit Court Judge
Electronic Notice

Amanda Nelson
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Kara Lynn Janson
Electronic Notice

Megan Elizabeth Lyneis
Electronic Notice

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

2023AP209-CR State of Wisconsin v. Robert J. Davis, Jr. (L.C. # 2018CF1089)

Before Kloppenburg, P.J., Nashold, and Taylor, 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).

Robert Davis appeals a judgment convicting him of being party to the crime of attempted burglary and an order denying his postconviction motion for a new trial. Based on 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 (2021-22), and affirm the circuit court judgment and order.[1]

[1] All references to the Wisconsin Statutes are to the 2021-22 version.

Davis was charged with being party to the crimes of receiving stolen property and attempted burglary. After Davis pleaded not guilty and requested a jury trial, the circuit court scheduled a jury trial and a final pretrial conference for the week before the trial date. At the final pretrial conference, Davis' attorney advised the court that the parties had reached a resolution and requested a plea and sentencing hearing within sixty days, which would give Davis time to pay up-front restitution as part of the parties' plea agreement. The court inquired of Davis' attorney: "And … you've talked to your client about what to do about a jury trial here[?]" to which the attorney responded that he had. The court was referring to an informal court policy in Rock County ("the Rock County policy"), pursuant to which defendants are generally required to waive the right to a jury trial in order to adjourn a scheduled jury trial, unless there is good cause for the adjournment. The court then asked Davis if he was intending to waive his right to a jury trial, to which Davis replied, "Yes." The court conducted a colloquy and found that Davis made the jury trial waiver freely, knowingly, and intelligently, and a plea and sentencing hearing was scheduled.

At the subsequent plea and sentencing hearing, Davis was represented by a new attorney, who requested a continuance. At the continued hearing, Davis advised the circuit court that he would like to proceed to trial. Consistent with Davis' earlier waiver, Davis was tried before the court over the course of four days. He was found guilty of attempted burglary and not guilty of receiving stolen property.

Represented by a third attorney, Davis moved for postconviction relief, arguing that he was entitled to a new trial because, as a result of the Rock County policy, he was deprived of his Sixth Amendment right to a jury trial. At an evidentiary hearing on Davis' motion, the circuit court heard testimony from Davis and from both of the attorneys who had represented Davis

prior to the filing of his postconviction motion. The court denied Davis' motion for postconviction relief. Davis appeals.

Davis argues that his jury trial waiver pursuant to the Rock County policy was not knowing, voluntary, and intelligent, and that he is thus entitled to a new trial. Specifically, he argues that the Rock County policy is coercive and that he did not "make a deliberate choice" to have a court trial. In response, the State argues, among other things, that Davis forfeited this argument by not moving to withdraw his jury trial waiver until after he was tried before the circuit court and convicted. We agree with the State and affirm on that basis. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground ….").

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. This rule—"the forfeiture rule"[2]—applies to arguments raised for the first time in postconviction proceedings when the arguments could have been addressed prior to or during trial. *See* ***id.***, ¶26 (concluding that the defendant had forfeited his constitutional objection to being tried by a six-person jury by not raising the objection at or before the time of trial); ***id.***, ¶83 (Abrahamson, J., dissenting) ("In this case the defendant did raise his objection before the circuit court, in a motion for post-conviction relief."); *see also* ***State v. Saunders***, 2011 WI App

[2] Although our case law sometimes refers to "the waiver rule," *see, e.g.*, ***State v. Huebner***, 2000 WI 59, ¶11 n.2, 235 Wis. 2d 486, 611 N.W.2d 727, "the forfeiture rule" is a more fitting label, *see* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" (quoting ***United States v. Olano***, 507 U.S. 725, 733 (1993)).

156, ¶¶28-29, 338 Wis. 2d 160, 807 N.W.2d 679 (concluding that a defendant had forfeited his objection to an alleged sleeping juror, even though he raised the objection in a postconviction motion before the circuit court, by failing to object at the time of trial); ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) ("[R]equiring objections at trial allows the trial judge an opportunity to correct or to avoid errors, thereby resulting in efficient judicial administration and eliminating the need for an appeal.").

The forfeiture rule "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." ***Huebner***, 235 Wis. 2d 486, ¶11. It "exists to cultivate timely objections," ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999); it "promotes both efficiency and fairness," ***Huebner***, 235 Wis. 2d 486, ¶11; and it "encourages litigation of all issues at one time, simplifies the appellate task, and discourages a flood of appeals," ***State v. Caban***, 210 Wis. 2d 597, 605, 563 N.W.2d 501 (1997). The forfeiture rule "is essential to the efficient and fair conduct of our adversary system of justice." ***Huebner***, 235 Wis. 2d 486, ¶12.

Here, Davis waived his right to a jury trial in May 2019 pursuant to the Rock County policy so that he could accept a plea deal. Although Davis decided not to accept the plea deal, he did not move to withdraw his jury trial waiver, he did not otherwise renew his request for a jury trial, and he did not challenge the Rock County policy until his postconviction motion. *See* ***State v. Cloud***, 133 Wis. 2d 58, 65, 393 N.W.2d 123 (Ct. App. 1986) (stating that a defendant may withdraw a jury trial waiver "if there is no showing that granting withdrawal would have substantially delayed or impeded the cause of justice"). Instead, at the August 2019 continued plea and sentencing hearing, Davis' attorney simply requested a court trial, stating, "[W]e are asking for a trial date. I understand Mr. Davis has previously waived his right to a jury trial, so

we're asking for a bench trial." Davis did not inform the circuit court that he wished to be tried by a jury, and he did not argue that his jury trial waiver pursuant to the Rock County policy was unconstitutional until his postconviction motion, after a four-day court trial had been held. Given that Davis' trial did not occur until November 2019, Davis had ample time to advance such arguments. As the court explained when denying Davis' motion for postconviction relief:

> At no point did Mr. Davis speak up through counsel or on his own and say, "You know what? I want a jury trial. I've given more thought to this, and I've got something more to say about my right to a jury trial." That certainly would have been something the Court would have had to entertain had it been raised.

The court clearly stated that it would have seriously considered a request for a jury trial had one been requested.

We conclude that, because Davis did not renew his request for a jury trial, move to withdraw his jury trial waiver, or otherwise challenge the Rock County policy until after he was tried and convicted, he forfeited his right to challenge the Rock County policy on appeal.

Davis contends that he did not forfeit the arguments he raises on appeal because "[w]hen Mr. Davis was appointed new counsel … [and] did not enter his plea, and a court trial was scheduled, it was the trial court's responsibility to ensure that Mr. Davis actually wanted a court trial" rather than a jury trial. We disagree.

Davis relies on ***State v. Livingston***, 159 Wis. 2d 561, 464 N.W.2d 839 (1991). There, our supreme court stated that "the responsibility of developing the record of a defendant's waiver of his right to a jury trial is on the trial judge." ***Id.*** at 570. Here, however, the circuit court did just that: at the pretrial hearing, consistent with ***Livingston***, the court engaged in a colloquy with Davis that established that Davis' waiver was knowing, voluntary, and being made affirmatively

by Davis himself. *See* ***id.*** at 569. ***Livingston*** does not support Davis' argument that it was incumbent on the court, after the parties' plea agreement fell through, to invite Davis to withdraw his jury trial waiver or to otherwise solicit the legal arguments that Davis now raises on appeal. *See also* ***Cloud***, 133 Wis. 2d at 63 (concluding that a jury trial waiver "made in anticipation of a plea bargain that never materialized" was "constitutionally adequate"). Davis forfeited the arguments he now raises on appeal because he failed to renew his request for a jury trial after the plea deal did not materialize, to move to withdraw his jury trial waiver, or to otherwise raise these arguments before he was tried and convicted—***Livingston*** does not excuse this failure.

IT IS ORDERED that the circuit court's judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals