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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1575 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CLIFTON ROBINSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS P. MORONEY PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP1575 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CLIFTON ROBINSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS P. MORONEY PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did the trial court err when it rejected Robinson's *Batson*[1] challenge to the prosecutor's use of a peremptory strike to remove the only African-American juror from the panel?

Circuit court answered: No (51:2).

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

2. Did the State present sufficient evidence to convict Robinson of both armed robbery, as a party to the crime, and criminal damage to property?

Circuit court answered: Yes (51:2).

3. Should the circuit court have severed the counts of armed robbery and criminal damage to property?

Circuit court answered: No (51:2).

4. Should the circuit court have instructed the jury as to lesser-included offenses with respect to the armed robbery charge?

Circuit court answered: No (51:3).

5. Did the circuit court err when it admitted a photograph of the defendant extending his hand forward and raising his middle finger (68:Ex. 10), but covered the hand gesture so the jury would not see the hand gesture at the time it was published to the jury?

Circuit court answered: No (51:3).

6. Did trial counsel provide ineffective representation to Robinson?

Circuit court answered: No (51:2-3).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE FACTS

For ten years, W.H.[2] served as the apartment manager in a Milwaukee apartment building (64:67-68). W.H. also resided in unit 101 with D.S., whom W.H. described variously as his fiancé and wife (64:68, 84). The building had a video surveillance system that allowed W.H. to monitor activities in the apartment building from W.H.'s and D.S.'s apartment (64:73; 65:6-7).

On August 26, 2012, at approximately 11:00 p.m., W.H. observed through the monitor three women and one man in the first-floor hallway (64:69-70). W.H. described the man as wearing a white shirt and having braids (64:71). W.H. stated that these people banged and kicked on the door to apartment 107, making all kinds of noise (64:70-71). W.H. apparently exited his apartment and told the group that he would call the police (64:70-71). The man with the white shirt and braids replied that W.H. did not need to call the police (64:71-72). While two of the women continued to kick the door, the man with the white shirt and braids walked up and down the hallway (64:72).

W.H. stated that he then heard a gunshot near apartment 107 (64:72-73). After hearing the gunshot, W.H. saw through the monitor that the group was coming toward his apartment (64:73). The man with the white shirt and braids snatched the camera off the wall (64:73-75). While W.H. was in the apartment calling the police, D.S. stood in their apartment doorway (64:91). Based upon his review of the security video, W.H. described his "wife" as being present at the door with the woman with the gun and the "dude in the dreadlocks" nearby (65:30). The group then forced itself into W.H.'s and D.S.'s apartment (64:73, 94). W.H. testified that the woman with the gun then pointed it toward the back of W.H.'s head as she entered his apartment (64:74). The man with the white shirt and braids also entered W.H.'s and D.S.'s apartment with the woman with the gun (64:77) W.H.

[2] For privacy purposes, the State will use abbreviations to identify the citizens referred to in the record.

stated that a second man joined the group. The second man wore a black hooded sweatshirt without braids in his hair (64:75). Both the woman with the gun and the man with the white shirt and braids demanded money and the surveillance tape (64:75, 77, 79, 93; 65:17). W.H. complied by providing the man with the white shirt and braids a plain tape rather than the actual surveillance tape (64:80).

When the police arrived, W.H. ran outside to let the police inside, telling them that the people in his apartment were robbing "us" (64:81-82). While W.H. was outside with the police, W.H. stated that the three women and two men were still in his apartment (65:39). D.S. was also inside the apartment at that time (65:40). W.H. further testified that his "wife" saw everything going on and would be able to testify "exactly" to those observations (65:36-37).

As W.H. returned to his apartment with the police, he observed the man with the white shirt and braids in front of his door with W.H.'s video games, the tape, and "my wife['s] purse" (64:81, 83; 65:15). W.H. later described the purse or pouch as belonging to his "fiancé" (64:83). W.H. stated that the man threw everything down and ran when he saw the police (64:81, 84; 65:34-35).

Officer Thomas Marcus responded and met W.H. outside the apartment building. W.H. opened the door and let the officers inside. Marcus observed a man with a white shirt outside apartment 101 run. Marcus pursued him and caught him (65:49-51, 59). Marcus identified Robinson as the man who ran (65:57-58), and stated that he saw Robinson when the chase began inside the building and was never more than 20 feet away from him (65:51). Marcus also testified that the person depicted in the photograph marked Exhibit 10 is Robinson as he appeared on the night of his arrest (65:51-52; 68:Ex. 10). Robinson is wearing a white shirt and has braided hair (68:Ex. 10).

W.H. stated that the camera no longer worked and it had to be replaced (64:76; 65:11-12). W.H. stated that neither he nor anyone else consented to anyone damaging the camera (64:76). W.H. also did not consent to anyone entering his apartment to take his property (64:85).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY REJECTED ROBINSON'S *BATSON* CHALLENGE.

Robinson claims that the circuit court erred when it denied his *Batson* challenge after the State struck the last remaining African-American juror on the panel. Robinson's brief at 5-7. The circuit court denied Robinson's *Batson* challenge both at trial and during postconviction proceedings, finding that the prosecutor provided a race-neutral reason for striking the juror (64:63-65; 51:2).

A. General legal principles related to *Batson* challenges.

In *Batson*, the United States Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Wisconsin courts apply *Batson's* three-step process for determining if a prosecutor's peremptory strikes violated the Equal Protection Clause. *State v. Lamon*, 2003 WI 78, ¶ 27, 262 Wis. 2d 747, 664 N.W.2d 607.

First, the defendant must establish a prima facie case of discriminatory intent. The defendant must show that (1) he is a member of a cognizable group and that the prosecutor has exercised peremptory challenges to remove

members of the defendant's race from the venire; and (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons due to their race. *Id*. ¶ 28. In determining whether a defendant has made the requisite showing, the circuit court must consider all relevant circumstances, including any pattern of strikes against jurors of the defendant's race and the prosecutor's voir dire questions and statements. *Id*.

Second, if the defendant has established a prima facie *Batson* violation, the State bears the burden of providing a neutral explanation for striking the excused juror. *Id*. ¶ 29. The prosecutor must provide a clear and reasonably specific explanation related to the case at hand. The prosecutor's explanation need not rise to the level necessary to justify a strike for cause. *Id*. ¶ 29. A "neutral explanation" means a reason based on a factor other than the juror's race. *Id*. ¶ 30. Unless discriminatory intent is inherent in the prosecutor's explanation, a court should deem the reason the prosecutor offered as race-neutral. *Id*. ¶ 30. The proffered explanation need not be persuasive or merely plausible. But a prosecutor's mere denial of a discriminatory motive or assertion that he or she acted in good faith does not constitute an adequate explanation for the strike. *Id*. ¶ 31.

Third, if the prosecutor provides a race-neutral explanation, the defendant bears the burden of persuading the court that "the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination." *Id*. ¶ 32. At this stage, the circuit court may assess the persuasiveness and plausibility of the prosecutor's reasons for the strike and determine whether the prosecutor engaged in purposeful discrimination. *Id*. ¶ 32. Merely establishing that a prosecutor's strikes had a disparate impact is insufficient to establish a violation of the Equal Protection Clause. *Id*. ¶ 34.

A defendant must make a timely *Batson* objection before the jury is sworn. *State v. Jones*, 218 Wis. 2d 599, 601-02, 581 N.W.2d 561 (Ct. App. 1998).

Standard of review: Whether a peremptory strike had discriminatory intent is a question of fact decided by the circuit court. *Lamon*, 262 Wis. 2d 747, ¶ 41. The circuit court is best positioned to determine the credibility of the state's race-neutral reason. *Id.* ¶ 42. As such, this court should give great deference to the circuit court's finding on discriminatory intent. *Id.* ¶ 41. On appeal, this court will only overturn a circuit court's finding on the issue of discriminatory intent if it was clearly erroneous. *Id.* ¶ 43. This standard applies to each step of the *Batson* analysis. *Id.* ¶ 45. *De novo* review is only available if the circuit court did not have an opportunity to evaluate credibility. *Id.* ¶ 46.

B. Robinson has not demonstrated that the trial court erred when it found that the prosecutor did not act with a racially discriminatory intent.

Robinson timely objected to the prosecutor's exercise of his peremptory challenge (64:36). After the circuit court excused the jury, Robinson objected to the prosecutor's strike of Juror 26, the only remaining African-American on the jury panel (64:61). Robinson dismissed the prosecutor's explanation for striking Juror 26 and asserted that the prosecutor more likely struck Juror 26 because of her race (64:62). On appeal, Robinson asserts that the State has not demonstrated a race-neutral reason for striking her. Robinson's brief at 6. Robinson's *Batson* challenge does not survive application of *Batson's* three-part test.

First, Robinson must make a prima facie case of discriminatory intent. The State does not dispute that

Robinson is an African-American and that the prosecutor exercised a peremptory challenge against Juror 26, an African-American juror (64:61-62). But Robinson does not identify any other relevant facts or circumstances that raise an inference that the prosecutor exercised his peremptory challenge on account of the juror's race. Robinson simply did not make a prima facie showing of discriminatory intent.

But this court need not decide whether Robinson actually made a preliminary showing of intentional discrimination. This preliminary question becomes moot if the prosecutor has offered a race-neutral explanation and the trial court has decided the ultimate issue of intentional discrimination. *State v. King*, 215 Wis. 2d 295, 303, 572 N.W.2d 530 (Ct. App. 1997).

Second, the prosecutor offered a race-neutral explanation for his strike against Juror 26. The prosecutor explained that he did not even realize that Juror 26 "was the last remaining African-American on the panel" (64:62). Before the noon break, the prosecutor observed that when the circuit court was providing directions to the jury, Juror 26

> didn't seem to be following what you were saying and she was laughing and gesturing to the juror next to her, and it struck me at the time that she wasn't following what you were saying or that it was inappropriate what her response was; and I made a note on my card about it that she just didn't seem to be with it about what was happening in the courtroom.

(64:63.) This is a race-neutral explanation.

Under *Batson's* third step, the circuit court weighed the credibility of the prosecutor's explanation that Juror 26 was not paying attention. The circuit court observed that the prosecutor was only seven or eight feet away from the juror and better positioned than the circuit court to determine whether Juror 26 was paying attention (64:64).

Further, the circuit court also noted that Robinson's trial counsel was not paying attention to what Juror 26 was doing (64:61, 63). Under the circumstances, the circuit court concluded that a *Batson* violation did not occur (64:64-65).

The circuit court's acceptance of the prosecutor's race-neutral explanation constitutes an implicit finding that the explanation was credible and not a pretext for racial discrimination. Robinson has not established that the circuit court's finding was clearly erroneous. As such, this court should reject Robinson's *Batson* claim.

II. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT ROBINSON'S CONVICTIONS.

Robinson contends that he is entitled to a new trial because the evidence presented at trial was insufficient to support his convictions for armed robbery and criminal damage to property.[3] Robinson's brief at 7-8. With respect to the armed robbery charge, Robinson asserts that the State failed to present sufficient evidence that D.S. owned the property or that Robinson took it from D.S.'s presence. With respect to the criminal damage to property charge, Robinson argues that the State did not establish D.S.'s ownership of the damaged property or her nonconsent to its damage. Robinson also challenges the sufficiency of the evidence with respect to the witness' identification of him. As the State will demonstrate, it presented ample evidence to the jury from which it could find Robinson guilty of both offenses.

[3] When the State does not present sufficient evidence to support a conviction, the proper remedy is vacation of the judgment of conviction and entry of a judgment of acquittal. *See, e.g., State v. Ivy*, 119 Wis. 2d 591, 608-10, 350 N.W.2d 622 (1984).

A. General legal principles related to the sufficiency of the evidence claims.

A court reviews a challenge to the sufficiency of the evidence in a light most favorable to the conviction. A reviewing court should not reverse a conviction based upon the insufficiency of the evidence unless the evidence is "so lacking in probative value and force" that no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference may be drawn from the evidence, the reviewing court must adopt the inference that supports the verdict. *Id.* at 503-04. "Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813.

B. Sufficient evidence supports both convictions.

Robinson raises several distinct claims regarding the sufficiency of the evidence in support of his convictions. Robinson's brief at 7-12. The State will address them separately.[4]

[4] Robinson makes a more general assertion that "the record is incomplete to the extent that any reasonable jury could determine that the State met the elements of armed robbery beyond a reasonable doubt." Robinson's brief at 12. But Robinson's specific argument focuses on the sufficiency of the evidence with respect to his identification, ownership of the property taken or damaged, and whether the property was taken from D.S.'s presence. The State will only respond to the specific claims that Robinson makes. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (a court may decline to review issues that a litigant has insufficiently developed or briefed). Further, at the close of the State's case, Robinson moved for a directed verdict (66:11). The circuit court denied the motion, carefully identifying the facts in the record that support the elements for each crime (66:14-21). The circuit court's

1. Sufficient evidence supports the witnesses' identification of Robinson.

Robinson appears to challenge the evidence that supported his identification as the man with the white shirt and braids involved with both the armed robbery and criminal damage to property. Robinson's brief at 8. To be sure, W.H. failed to identify Robinson from the photo array as the man with the white shirt and braids (65:76-77). But the record supports Officer Marcus' identification of Robinson as the person whom W.H. identified as wearing the white shirt and having braids in his hair.

W.H. identified a man with the white shirt and braids participating in the disturbance outside apartment 107 and ripping the camera off the wall (65:17-18). The video surveillance tape corroborates W.H.'s observations and shows a man with a white shirt and braids pulling the camera from the wall (68:Ex 1 at 23:17:00). In addition, W.H. also identified the man with the white shirt and braids as being present when the woman pointed a gun at W.H.'s head (65:18). Both the woman with the gun and the man with the white shirt and braids demanded money and the security tape from W.H. inside W.H.'s apartment (65:18).

After W.H. let Officer Marcus inside the building, W.H. observed the man with the white shirt and braids outside his apartment with the security tape and W.H.'s and D.S.'s property. The man with the white shirt and braids ran when he saw the police (65:18). Officer Marcus gave chase, remaining within twenty feet of the man with the white shirt and braids, never losing sight of him until he was arrested (65:50-51). Officer Marcus identified Robinson as the person whom he arrested (65:57-58).

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reasoning also supports a finding that sufficient evidence supports Robinson's conviction.

Robinson suggests that "there was a discrepancy regarding whether the person wore a black hoodie or a white t-shirt." Robinson's brief at 8. There was no discrepancy. W.H. described two men as being present, with the man wearing a black hoodie arriving later (64:75). W.H. repeatedly identified the man with the white shirt and braids as the person who destroyed the camera, demanded money and the tape, and was observed outside his apartment with W.H.'s and D.S.'s property. Based upon W.H.'s and Officer Marcus' testimony, the jury could reasonably conclude beyond a reasonable doubt that Robinson was the man with the white shirt and braids and that Robinson participated in the armed robbery and criminally damaged property.

2. Sufficient evidence supports Robinson's armed robbery conviction.

With respect to the armed robbery charge, Robinson asserts that the State failed to establish that D.S. owned the property taken or that the property was taken from D.S.'s person or presence. Robinson's brief at 8. Ample evidence exists in the record to support the claim that Robinson took both D.S.'s and W.H.'s property and took it from their presence.

D.S. owned some of the property taken in the armed robbery. While D.S. did not testify, W.H. did. W.H. resided with D.S. in apartment 101 (64:68, 84). W.H. testified that after he let the police inside, he saw the man with the white shirt and braids (Robinson) standing outside the door to his apartment with a videotape, his video games, and "my wife['s] purse" (64:81, 83; 65:15). W.H. later described the purse or pouch that the man with the white shirt and braids was carrying as belonging to his "fiancé" (64:83). Based upon this record, the jury could reasonably infer that one of the items that Robinson took during the armed robbery was D.S.'s purse.

Property taken from D.S.'s presence. Further, the jury could also reasonably conclude that Robinson took the property from D.S.'s presence. W.H. testified that D.S. was present.[5] While reviewing the surveillance video with the jury, W.H. differentiated between D.S. and the man with the white shirt and braids and the woman with the gun. They were outside the door to W.H.'s and D.S.'s apartment as he called the police (64:90-91; 65:30). W.H. also testified that the woman pointed the gun at his head. Both the woman with the gun and the man with the white shirt and braids demanded money and the surveillance tape from inside W.H.'s and D.S.'s apartment (64:75, 77, 79-80). While W.H. went outside to let the police in, W.H. stated that his fiancé was still inside the apartment with the three women and two men (65:39-40). When W.H. reentered the building with the police, Robinson was leaving W.H.'s apartment with W.H.'s and D.S.'s property (64:81, 83; 65:15). Finally, W.H. testified that his "wife" saw everything going on and would be able to testify exactly to it (65:36-37).

Based upon the record, the jury could reasonably infer that D.S. was in the apartment when Robinson and his accomplices entered the apartment and demanded money and the surveillance tape at gunpoint. Further, the jury could reasonably find that D.S. remained in the apartment when Robinson exited, and dropped D.S.'s and W.H.'s property upon seeing the police. Under the circumstances, the jury could reasonably conclude that the property was taken from D.S.'s and W.H.'s presence.

Instructions to the jury: Robinson does not address his sufficiency of the evidence claim in light of the circuit court's actual final jury instructions. Following the close of the evidence, the circuit court conducted an instruction conference, identifying the instructions it

[5] At the close of the State's case, Robinson moved for a directed verdict. Robinson argued "There has been no credible evidence presented to show that my client took those items from the presence of [W.H.]" (66:11). The circuit court rejected his argument (66:14-17).

intended to give (66:25-27). In the final instructions, the circuit court substituted W.H.'s name for D.S.'s name in the substantive instructions for criminal damage to property and armed robbery (66:37-38). Robinson did not object to the substantive instructions at that time, or following closing arguments (66:27-30, 70-71). *See* Wis. Stat. § 805.13(3) (failure to object to jury instructions constitutes a forfeiture to challenges to those instructions on appeal).[6]

In this case, the circuit court informed the jury that it had to find beyond a reasonable doubt that "[W.H.] was the owner of the property. Owner means a person who has the possession of property" (66:38). *See* Wis. JI-Criminal 1480 (2009). This instruction is consistent with Wis. Stat. § 939.22(28), defining "property of another" to

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[6] After Robinson moved to dismiss based on the lack of proof with respect to D.S.'s ownership, the prosecutor noted the property belonged to both. The prosecutor also suggested that any differences could be addressed through an amendment to the charging document (66:13). Further, in discussing the instructions, the prosecutor noted that the names in the armed robbery instruction would change (66:25). Robinson did not object and any objection to the name change would not have been successful.

The name change in the instructions did not prejudice Robinson. Based upon the complaint, Robinson was well aware that D.S. and W.H. both had an interest in the property taken from their apartment, while both were present inside the apartment (2:2-4). W.H.'s testimony supported this. The change in names did not alter the substantive nature of the charges. Wisconsin Stat. § 971.29(2) permits amendments at trial and even after verdict to conform to proof. *See State v. Koeppen*, 195 Wis. 2d 117, 123, 536 N.W.2d 386 (Ct. App. 1995) (prejudice does not occur when the amendment "does not change the crime charged, and when the alleged offense is the same and results from the same transaction, there is no prejudice to the defendant"); and *State v. Duda*, 60 Wis. 2d 431, 440, 210 N.W.2d 763 (1973) (amendments after verdict are "intended to deal with technical variances in the complaint such as names and dates."). Changing D.S.'s name to W.H.'s name is the type of technical variance that would be permitted.

include "property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property."

Based upon W.H.'s testimony, the jury could reasonably find that he possessed the property taken from inside of his apartment, even if he was not the actual legal owner of some of these items, including D.S.'s purse or the tape. Indeed, in denying Robinson's motion to dismiss on this ground, the circuit court noted that the property could be jointly owned and possessed by both W.H. and D.S. (66:14-17).

In addition, the circuit court also instructed the jury that it had to find that Robinson "took and carried away property from the person or from the presence of [W.H.]" (66:38). Thus, the jury could not find Robinson guilty unless it found that the property was taken from the person or presence of W.H., not D.S. The State presented sufficient evidence on this element. W.H. stated that a woman pointed a gun at his head and both the woman and Robinson demanded money and the security tape. W.H. provided a blank tape (64:77, 79-80). That Robinson continued to take other property, including W.H.'s video games and D.S.'s purse, when W.H. slipped out to allow the police inside does not mean that the property could no longer be deemed to have been taken from W.H.'s person or presence. W.H.'s testimony provided a sufficient basis from which the jury could conclude that Robinson took property from the presence of W.H. as well as D.S.

3. Sufficient evidence supports Robinson's conviction for criminal damage to property.

With respect to the criminal damage to property charge, Robinson asserts that the record does not support the claim that D.S. owned the property damaged or that

D.S. did not consent to the damage. Robinson's brief at 7-8. Based upon the evidence, the jury could reasonably find that the State established the elements regarding ownership and nonconsent beyond a reasonable doubt.

In both his opening and closing statement, the prosecutor identified the surveillance camera torn from the wall as the property that formed the basis for the criminal damage to property charge (64:51; 66:46). W.H. testified that the man with the white shirt and braids, later identified as Robinson, was the person who damaged the camera (64:73, 76).

Criminal damage to property occurs when someone damages another person's property. *See* Wis. Stat. § 939.22(28). Said another way, the jury was not required to find that a specific person owned the property that Robinson damaged, but that someone other than Robinson owned it. Indeed, the circuit court instructed the jury it had to find "Third, the property belonged to another person . . . Five, the defendant knew the property belonged to another person and knew that the other person did not consent to the damage" (66:37).

Based upon the record, the jury could reasonably conclude that Robinson did not own the camera he damaged and knew he did not own it. The camera belonged to the building's owner (64:76). As the building manager, W.H. acted as an agent of the owner. As this case demonstrates, W.H. used the camera to fulfill his responsibility to protect the building from damage and enhance tenant safety. As tenants, W.H. and D.S. also had the right to enjoy the use of their living unit and the common area where the camera was located and the right to benefit from the added security the camera provided. Robinson had no legal interest in the camera and no right to destroy this amenity that the owner provided to the tenants, including W.H. and D.S.

Further, the jury was not actually asked to determine whether D.S. consented to the camera's

destruction. In fact, the circuit court instructed the jury it had to find beyond a reasonable doubt that "the defendant caused the damage without the consent of [W.H.]" (66:37). The record demonstrates that neither D.S. nor W.H. consented to the camera's destruction. In this case, W.H. testified that neither he nor anyone else consented to the camera's destruction (64:75-76). As the building manager and agent of the owner, W.H. could certainly testify in this regard. Based upon this record, the jury could reasonably find that no one, including W.H. or D.S., consented to the camera's destruction.

III. THE ARMED ROBBERY AND CRIMINAL DAMAGE TO PROPERTY CHARGES WERE PROPERLY JOINED AND THE CIRCUIT COURT WAS NOT REQUIRED TO SEVER THEM.

On appeal, Robinson contends that the criminal damage to property charge (Count 2) and armed robbery charge (Count 3) were improperly joined and that the circuit court should have severed them. Robinson's brief at 12-16. Robinson never moved for severance in the circuit court. Even if he had, the circuit court would have denied the motion.

A. Robinson forfeited his right to raise the joinder and severance issue on appeal.

In denying Robinson's postconviction claim based on severance (40:7), the circuit court found that Robinson had never moved for severance of the charges before trial (51:2). A defendant forfeits a claim of prejudicial joinder through his or her failure to particularize a reason for severance in the circuit court. *State v. King*, 120 Wis. 2d

285, 293, 354 N.W.2d 742 (Ct. App. 1984).[7] Since Robinson did not file a severance motion this court may deny Robinson's severance claim on forfeiture grounds alone.

B. Joinder was proper and the circuit court would not have severed the charges.

Should this court reach the merits of Robinson's claim, it should find that the State properly joined these offenses and the circuit court would have denied a timely motion for severance.

1. The State properly joined the charges.

Wisconsin Stat. § 971.12(1) authorizes the joinder of two or more crimes in the same information if the charged crimes are (1) of the same or similar character; (2) based on the same act or transaction; or (3) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. *Id.*

Whether the State properly joined charges presents a question of law that this court reviews *de novo*. *State v. Locke*, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). Wisconsin courts broadly construe Wis. Stat. § 971.12(1) in favor of joinder. *Id.* Joinder of charges against the same defendant avoids repetitious litigation and facilitates the speedy, efficient administration of justice. *Francis v. State*, 86 Wis. 2d 554, 558, 273 N.W.2d 310 (1979).

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[7] In *King*, this court used the word "waiver" rather than "forfeiture." In *State v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, the Wisconsin Supreme Court distinguished between the concepts of waiver and forfeiture. "'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" *Id.* ¶ 29 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

The State properly joined the criminal damage to property charge and armed robbery charge. According to the complaint, both crimes occurred at the same time, on August 26, 2012 at 11:00 p.m., and at the same location, the first floor of a Milwaukee apartment building (2:2). The criminal damage and armed robbery related to the same course of conduct. W.H., the apartment manager, heard a disturbance and checked the building's security camera monitors. W.H. confronted several people kicking and pounding on the door to apartment 107 (2:3). D.S., a building manager and partner of W.H., pointed the security camera out to the people and told them she would be calling the police (2:2). W.H. and D.S. both heard a woman state to one of the others to get the gun (2:2-3).

W.H. reported that a woman left the apartment building and returned with a gun. The woman pointed the gun at W.H. and ordered him to return to his apartment and then shot at the door to apartment 107 (2:3). A man with dreadlocks and braids, subsequently identified as Robinson, reached up and ripped the video camera off the wall in the hallway (2:2-3). At trial, the State identified the destruction of the camera as the basis for the criminal damage to property charge (64:51).

The woman with the gun pointed it at W.H. and demanded money. She then handed the gun to the man in the hooded sweatshirt, who then pointed the handgun at W.H., punched him in the face, and demanded the tapes from the security camera (2:3-4). W.H. reported that one of the women struck D.S. on the head several times. Meanwhile, the man identified as Robinson, started grabbing property that belonged to both W.H. and D.S. (2:4). When the police arrived, people fled from W.H.'s and D.S.'s apartment. Robinson dropped the property in the hallway (2:4).

The criminal damage and armed robbery flowed from a single course of conduct occurring at the same time and location involving the same witnesses. As such, the State properly joined these cases for trial.

2. The circuit court would not have severed the charges.

Even when the State has properly joined charges, Wis. Stat. § 971.12(3) permits a defendant to move for severance on the grounds of prejudice.

The decision to grant or deny a severance motion is left to the circuit court's exercise of its discretion. In determining whether to sever charges, the circuit court must weigh the potential prejudice resulting from joinder with the public's interest in conducting a trial on multiple counts. A reviewing court will not find an erroneous exercise of discretion unless a defendant demonstrates that the failure to sever the counts caused "substantial prejudice." *Locke*, 177 Wis. 2d at 597. As a general rule, the risk of joinder is not prejudicial when evidence related to the counts to be severed would be admissible as other acts evidence under Wis. Stat. § 904.04(2). *Locke*, 177 Wis. 2d at 597-98.

In denying Robinson's postconviction motion, the circuit court held that it would not have granted the severance claim. "There was a nexus between the two incidents, and it was basically one continues event with the first event providing context for the second event in [D.S.'s] and [W.H.'s] apartment" (51:2). The record demonstrates that the circuit court's decision was not clearly erroneous.

In Robinson's case, the disturbance at the door to apartment 107, the discharge of the firearm in the hallway, the destruction of the surveillance camera outside apartment 107, and the armed robbery of W.H. and D.S. are inextricably interwoven with one another. The perpetrators, including Robinson, originally directed their conduct at the occupants of apartment 107. When the apartment managers, W.H. and D.S., intervened, the perpetrators destroyed the security camera and demanded the tape from the camera at gunpoint (2:2-3). W.H.'s and

D.S.'s intervention provided a motive to the perpetrators to destroy evidence associated with their violence directed towards apartment 107 and intimidate witnesses to this conduct by robbing them at gun point of a security tape and other personal property. Even if Robinson had asked the circuit court to sever the counts, it would have denied the severance request.

IV. ROBINSON IS NOT ENTITLED TO A NEW TRIAL BECAUSE THE JUDGE DID NOT INSTRUCT THE JURY ON LESSER-INCLUDED OFFENSES.

Robinson argues that the circuit court should have instructed the jury as to lesser-included offenses. "[T]he defendant would have derived a potential benefit from lesser-included offenses available for the juror's [sic] consideration." Robinson's brief at 18. As the State will demonstrate, Robinson was not entitled to a lesser-included jury instruction because he did not ask for one and because the evidence would not have supported such a request.

A. Robinson waived his right to request a lesser-included jury instruction through his failure to timely object to the proposed instructions.

Wisconsin Stat. § 805.13(3) requires the circuit court to conduct a jury instruction conference with the parties at the close of the evidence. A party's failure to object to the proposed instructions or verdict "constitutes a waiver of any proposed instructions or verdict." *Id.* This rule extends to a party's failure to object to a lack of a jury instruction. *State v. Smith*, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992). An appellate court lacks "the power to review this type of waived

error." *State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267.

Robinson does not claim that he requested a jury instruction. Robinson's brief at 16-19. Indeed, in denying Robinson's postconviction claim, the circuit court found that Robinson never requested a lesser-included jury instruction (51:3). Under the circumstances, Robinson waived or forfeited his right to request a lesser-included jury instruction on the armed robbery charge.

B. The circuit court does not have a duty to give a lesser-included instruction.

As a general rule, Wisconsin courts generally leave the decision to request lesser-included offense jury instructions to the parties who are best equipped to assess the risks and benefits of requesting the instructions. Therefore, a circuit court does not commit error when it fails to instruct the jury *sua sponte* on a lesser-included offense. *State v. Myers*, 158 Wis. 2d 356, 364, 461 N.W.2d 777 (1990); *see also Neuenfeldt v. State*, 29 Wis. 2d 20, 30-32, 138 N.W.2d 252 (1965).

Here, the circuit court did not err when it did not provide a lesser-included instruction on its own initiative.

C. Even if Robinson had timely requested a lesser-included instruction, he was not entitled to receive it.

In assessing whether to grant a lesser-included instruction, the circuit court must first consider whether the lesser offense constitutes a lesser-included offense of the charged offense. *State v. Fitzgerald*, 2000 WI App 55, ¶ 8, 233 Wis. 2d 584, 608 N.W.2d 391. Then the circuit court must consider whether the evidence justifies the instruction. *Id.* A lesser-included offense instruction is

proper only if the evidence provides reasonable grounds for both an acquittal on the greater offense and conviction on the lesser offense. *State v. Miller*, 2009 WI App 111, ¶ 48, 320 Wis. 2d 724, 772 N.W.2d 188. "Whether the evidence supports the submission of a lesser-included offense is a question of law, which an appellate court reviews de novo." *Fitzgerald*, 233 Wis. 2d 584, ¶ 7.

Here, Robinson claims the circuit court should have instructed the jury on lesser-included offenses including attempted armed robbery, robbery, theft and attempted theft. Robinson's brief at 17. These offenses may constitute lesser-included offenses to the armed robbery charge as a matter of law. However, this does not end the inquiry. The circuit court was only required to provide a lesser-included instruction if the evidence provided a reasonable ground for an acquittal on the armed robbery charge and a conviction on one of the lesser offenses.

Robinson's argument fails to reference any evidence within the trial record that would have supported a request for a lesser-included jury instruction. This court need not consider an argument that a party does not support without appropriate reference to the record. *State v. Lass*, 194 Wis. 2d 591, 604, 535 N.W.2d 904 (Ct. App. 1995); *see also* Wis. Stat. (Rule) § 809.19(1)(e) (requiring a party to cite parts of the record that support an argument).

The record supports the circuit court's conclusion that there was no reasonable probability that a jury would have acquitted Robinson of armed robbery as a party to a crime (51:3). Robinson never disputed that elements of the armed robbery had been met. Rather, Robinson argued the State did not prove that he participated in the armed robbery. Robinson's defense focused on W.H's and law enforcement's identification of Robinson as a participant in the armed robbery (64:59-60). "There is nothing to substantiate [W.H.'s] statement that he saw my client take the stuff and take it . . . and drop it in the front"

(66:57). The jury was presented with a stark choice: either Robinson committed the armed robbery or W.H. and Officer Marcus misidentified him. The evidence did not present a reasonable basis for an acquittal on the armed robbery and a conviction on a lesser charge.[8]

Based upon the record before it, the circuit court could have reasonably declined to instruct the jury on lesser-included offenses.

V. THE CIRCUIT COURT APPROPRIATELY EXERCISED ITS DISCRETION WHEN IT ALLOWED THE STATE TO PUBLISH A REDACTED PHOTOGRAPH OF ROBINSON TO THE JURY.

Robinson asserts that the circuit court committed error when it permitted the State to publish Exhibit 10, a photograph depicting Robinson "flipping the bird" to the police, over trial counsel's objection. Robinson argued that the circuit court should have excluded the evidence on the grounds that it was unduly prejudicial and cumulative. Robinson's brief at 19-20.

The circuit court denied this postconviction claim, finding that it "did not allow publication of this photo; the

[8] Further, even if Robinson had asserted that he believed that the other coconspirators were merely going to take property from W.H. and D.S. without the use or threat of use of force or a weapon, Robinson would still be guilty of armed robbery. "[O]ne who intentionally aids and abets the commission of a crime is responsible not only for the intended crime, if it is in fact committed, but as well for other crimes which are committed as a natural and probable consequence of the intended criminal acts." *State v. Asfoor*, 75 Wis. 2d 411, 430, 249 N.W.2d 529 (1977). Armed robbery is a natural and probable consequence of the crime of intentional theft. Robinson could not have escaped liability on the basis that he did not know the other persons intended to rob W.H. and D.S. rather than merely take and carry away their property.

photo showed the middle finger covered, and a photocopy was made so the jury could not see it" (51:3). The record supports circuit court's findings.

At trial, the State asked a responding officer, Thomas Marcus, to identify a photograph marked as Exhibit 10 (65:51-52; 68:Ex. 10). This exhibit depicted Robinson wearing the clothing he was wearing on the night of the armed robbery while extending his right hand with his middle finger held up (65:52; 68:Ex. 10). The State asked to publish this photograph to the jury. Trial counsel objected and the circuit court deferred publication (65:53). When the State requested to publish the photograph, trial counsel again objected. After a sidebar, the circuit court sustained the objection but allowed publication (65:60-61). After the circuit court excused the jury from the courtroom, the circuit court explained that it permitted publication with the hand gesture covered.

> I just want to make note that the Court did allow for basically a redaction on Exhibit Number 10 by covering what appeared to be a flip-off to the world in that picture which Mr. Batt felt was prejudicial. It is prejudicial, no question about it. It certainly doesn't speak well for you, sir. I allowed for it to be covered. . . . it's been published with the covered finger gesture and guess maybe we'll just let that stand as and for the record.

(65:62-63.)

The jury never saw Robinson "flipping the bird." Robinson's attorney timely objected to Exhibit 10. The circuit court redacted the offending portion of Exhibit 10 before it was published it to the jury. The prejudice about which Robinson complains never occurred.

In addition, the evidence was not cumulative. Exhibit 10 shows Robinson in the clothing he was wearing following his arrest. This case turned on whether Robinson is the man with the white shirt and braids whom W.H. identified as robbing both him and D.S. The

photograph (68:Ex. 10) that depicted Robinson after Marcus arrested him assisted jurors in assessing whether Robinson was one of the people observed on surveillance videotapes during the crime spree (65:47-51; 66:46-47, 49, 62). The admission of Exhibit 10 was not cumulative and did not violate Wis. Stat. § 904.04.

VI. TRIAL COUNSEL DID NOT RENDER INEFFECITVE ASSISTANCE.

Robinson alleges that his trial counsel provided ineffective representation on a variety of different grounds. Robinson's brief at 20-26. The circuit court denied Robinson's postconviction claims alleging ineffective assistance of counsel without a hearing (51:2-3). As the State will demonstrate, the record supports the circuit court's conclusions.

A. General discussion of legal principles guiding review of ineffective assistance of counsel claims.

A criminal defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a court concludes that a defendant has not established one prong of the test, the court need not address the other. *Id*. at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Id*. at 688. Said another way, the defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id*. at 690. In assessing the reasonableness of counsel's performance, a reviewing

court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. A court should presume that counsel rendered adequate assistance. *Id.* at 690; s*ee also State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 ("[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate.").

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Carter*, 324 Wis. 2d 640, ¶ 37. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 792 (2011).

A claim of ineffective assistance of counsel is a mixed question of law and fact. *Carter*, 324 Wis. 2d 640, ¶ 19. Thus, while this court must uphold the circuit court's findings of fact unless clearly erroneous, the ultimate determination of whether counsel's assistance was ineffective presents a legal question, which this court reviews de novo. *Id.*

A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a hearing unless the motion alleges sufficient facts to entitle a defendant to relief. The circuit court may still deny the hearing if the record conclusively demonstrates that a defendant is not entitled to relief. A circuit court must exercise its independent judgment and support its decision denying a hearing through a written decision based upon a

review of the records and pleadings. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

If a circuit court improperly denies the defendant a hearing on a claim of ineffective assistance of counsel, a reviewing court will remand the matter for a *Machner* hearing. The lack of a hearing prevents an appellate court from reviewing trial counsel's performance. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

B. None of Robinson's ineffective assistance claims have merit.

Robinson's brief highlights numerous claims of ineffective assistance of counsel. Robinson makes most of these claims in a summary manner, failing to adequately reference the relevant portions of the record in his argument. More importantly, he fails to explain why trial counsel's failure to take various actions constituted deficient performance or how it prejudiced him. The State requests this court to summarily deny those claims for which Robinson fails develop his argument. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

1. Trial counsel was not ineffective for failing to seek severance of the charges.

As explained in part III above, the State properly joined the armed robbery and criminal damage to property charges. The circuit court would not have severed them because the crimes were "basically one continuous event with the first event providing context for the second event in [D.S.'s] and [W.H's] apartment" (51:2). To pursue a severance motion when the two offenses are closely interwoven in terms of time, place, and witnesses would

have been futile and does not constitute deficient performance. *Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1997) ("Failure to raise a losing argument, whether at trial or on appeal, does not constitute ineffective assistance of counsel.").

2. Trial counsel was not ineffective for failing to object to certain testimony at trial.

Robinson asserts that trial counsel was ineffective for failing to object to certain questions presented to W.H. and Officer Marcus.

Questions posed to W.H. Robinson asserts that trial counsel should have objected to a series of questions related to (a) the man with a white shirt and braids kicking on the door to apartment 107; (b) the man with a white shirt and braids ripping the camera off the wall; (c) the man with the white shirt and braids holding D.S.'s purse when the police arrived; and (d) the man with the white shirt and braids whom officers chased down the hall. Robinson contends that such questions were "leading, unduly prejudicial and/or not admissible to prove the commission of the armed robbery." Robinson's brief at 22. Without otherwise developing his argument, he simply asserts that the use of leading questions was improperly used to establish W.H.'s identification of Robinson. Robinson's brief at 22. Robinson does not otherwise develop this argument or support it with reference to legal authority. This court may decline this argument on this basis alone.

Further, a trial court "has broad discretion in determining whether the question is truly leading and suggestive and whether the circumstances justify a leading and suggestive question." *Jordan v. State*, 93 Wis. 2d 449, 471, 287 N.W.2d 509 (1980); *see also* Wis. Stat. (Rule) § 906.11(3).

To the extent that these questions were leading, the questions Robinson challenges do not assume that Robinson was the individual engaged in the conduct that was the subject of the question. W.H. could not identify Robinson as the person who committed the criminal damage to property or armed robbery. Instead, the prosecutor carefully worded these questions to refer to the description of the person that W.H. had previously described: a man wearing a white shirt with braids (64:71, 72). The questions' form minimized any prejudice to Robinson and trial counsel was not deficient in failing to object them.

In addition, the prosecutor asked these questions to help place W.H.'s prior testimony into its proper context. For example, with respect to the question "So you're saying the male with the white shirt and braids was walking up and down the hallway?" (64:72), the prosecutor was essentially clarifying W.H.'s prior answers to nonleading questions in which W.H. identified the man with the white shirt and braids and then identified a man who was "just walking back and forth in the hallway" (64:72). Likewise, the question "And that's the same male with the white shirt and braids that ripped the camera off the wall?" (65:17) occurred after W.H. testified to these facts (64:75). Similarly, the question "and that's the same male with white shirt and braids that came into your apartment while the female had the gun to your head" (65:18) was asked after W.H. testified that the man with the white shirt and braids and the woman with the gun came into his apartment (64:77). Trial counsel was not deficient for failing to object to questions that restated W.H.'s prior testimony.

Finally, Robinson fails to show how counsel's failure to object to any leading questions prejudiced him. Had counsel objected and the court sustained the objection, the prosecutor could have asked the same question in a different form. W.H. would have provided

the same answer and the result of the proceeding would have been the same.

Questions posed to Officer Marcus: Robinson also objects to testimony that Officer Marcus provided regarding the nature of the dispatch and his response upon arriving at the scene. Robinson's brief at 23. These questions helped develop Marcus' testimony by providing an explanation as to his reason for going to the apartment building (65:44-46). *See* Wis. Stat. (Rule) § 906.11(3). These questions followed W.H.'s detailed testimony regarding the people who had terrorized W.H. and D.S. through the use of a firearm, damaged property, and robbed them of their belongings at gunpoint. Neither the prosecutor's questions nor Officer Marcus' answers implicated Robinson by name (65:44-46), so any prejudice to Robinson was minimal. The jurors were well aware that the case involved a citizen complaint of an armed robbery and that the police responded to it as it was occurring. Following W.H.'s testimony, jurors would have expected Officer Marcus to respond as though the situation presented a threat. This testimony merely established a complaint of an armed robbery, not its actual commission. Under the circumstances, counsel's failure to object to the obvious does not constitute deficient performance.

3. Trial counsel was not ineffective for failing to call Detective Elisabeth Wallich to testify that no property was taken from D.S.

Robinson claims that trial counsel was ineffective for failing to call Detective Elisabeth Wallich. At the preliminary examination, Detective Wallich stated that no property was taken from D.S. (55:8-9). Robinson claims that this testimony would have undermined the State's argument that D.S.'s property was taken from her

presence as required for the armed robbery charge. Robinson's brief at 24.

Trial counsel was not ineffective for failing to call Detective Elisabeth Wallich. Detective Wallich's testimony about what D.S. may have stated to her constituted hearsay and would not have been admissible unless it fell within an exception to the rule. Wis. Stat. § 908.02. For example, because D.S. did not testify, Wallich's testimony would not have been admissible to impeach D.S. with a prior statement. Wis. Stat. § 908.01(4)(a).

Furthermore, Wallich's isolated statement during the preliminary examination is inconsistent with other information available to trial counsel. According to the criminal complaint, Detective Davora documented his interviews with D.S. and W.H. (2:2-4). D.S. reported that a woman with a gun pointed it at her head and asked "Where's the money?" (2:3). D.S. related that one of the male assailants reached onto the table next to the couch. After the assailants left, she realized that her black bag that contained her bible and was on the table was missing (2:3). W.H. testified that the man with the dreadlocks, subsequently identified as Robinson, took D.S.'s black bag and then dropped it in the hallway (2:4). Thus, trial counsel was well aware that other evidence supported the claim that Robinson took D.S.'s property as well as W.H.'s property. Failing to examine Detective Wallich regarding D.S.'s isolated hearsay statement simply does not constitute deficient performance.

Under the circumstances, trial counsel did not provide ineffective representation when he declined to call Detective Wallich.

4. Trial counsel was not ineffective for failing to object to the admission of Exhibit 10 at trial.

While trial counsel did not object to the admission of Exhibt 10, a post-arrest photograph of Robinson extending his middle finger forward, counsel timely objected to its publication to the jury (65:53). The circuit court redacted the offending portion of the photograph to address its potentially unduly prejudicial nature before publication (51:3; 65:60-61). As explained in part V. above, the admission of Exhibit 10 in its redacted form was neither prejudicial nor cumulative. In light of the record, any objection would have been futile. Trial counsel is not ineffective for failing to pursue a futile objection. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

5. Trial counsel was not ineffective for failing to request lesser-included jury instructions.

In denying this postconviction claim, the circuit court concluded that trial counsel was not ineffective for failing to request a lesser-included instruction because there was no reasonable probability that the jury would have acquitted Robinson of armed robbery (51:3). On appeal, Robinson does not develop and explain why trial counsel's performance was deficient for failing to request this instruction. As explained in part IV.C. above, Robinson was not entitled to a lesser-included jury instruction as the evidence did not present a reasonable basis for an acquittal on the armed robbery and a conviction on a lesser charge.

Further, to request instructions on lesser-included offenses would have been inconsistent with Robinson's defense strategy that W.H. could not identify Robinson as one of his robbers and that Robinson did not commit these

crimes.[9] Arguing that Robinson committed a lesser offense other than armed robbery would have undermined his primary defense that he did not participate in the armed robbery. Trial counsel's performance is not deficient when trial counsel decides not to request a lesser-included instruction that would be inconsistent with the general theory of defense. *State v. Eckert*, 203 Wis. 2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996); *see also State v. Westmoreland*, 2008 WI App 15, ¶ 21, 307 Wis. 2d 429, 744 N.W.2d 919 (recognizing that while a lawyer may argue inconsistent defenses, "a lawyer is not ineffective for *not* arguing inconsistent theories"). Trial counsel was not ineffective for failing to request lesser-included jury instructions.

6. Trial counsel was not ineffective for failing to object to Exhibits 3 and 4 on the grounds of legal relevance.

In his argument, Robinson merely asserts that trial counsel was ineffective for failing to object to the admission of Exhibits 3 and 4 on legal relevance grounds. This court should deny Robinson's ineffective assistance claim because he does not explain why trial counsel's failure to object constituted deficient performance or how it prejudiced him.

In any event, the circuit court would not have sustained the objection (51:3). Exhibit 3 is an innocuous photograph of the apartment building hallway (65:84-85; 68:Ex. 3). Exhibit 4 is a photograph of the shell casing recovered in the apartment hallway (65:85-86; 68:Ex. 4). This evidence was admissible to complete the story of the crime on trial by establishing the immediate context of

[9] On appeal, Robinson does not question trial counsel's defense strategy of undermining the witnesses' identification of him as a participant in the armed robbery. Robinson has not suggested that trial counsel pursued this defense without his permission.

happenings near in time and place. *State v. Pharr*, 115 Wis. 2d 334, 348-49, 340 N.W.2d 498 (1983). Evidence of the discharge of the firearm provides a motive for the destruction of the security camera and the armed robbery of the apartment managers, W.H. and D.S. It also confirms W.H.'s claim that his assailants had a firearm, lending support to his claim that an armed robbery occurred. Under the circumstances, trial counsel's failure to object does not constitute deficient performance.

CONCLUSION

For the above reasons, the State respectfully requests this court to affirm Robinson's judgment of conviction and the trial court's denial of his motion for postconviction relief.

Dated this 19th day of November, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,570 words.

Dated this 19th day of November, 2014.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of November, 2014.

_____
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