COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1749-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GEORGE OWENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. George Owens appeals from a judgment entered after a jury found him guilty of first-degree recklessly endangering safety by use of a dangerous weapon. *See* §§ 941.30(1), 939.63(1)(a)(3), STATS. He also appeals from an order denying his motion for postconviction relief. Owens argues: (1) that the trial court erred in admitting the victim's preliminary-

examination testimony at trial; (2) that his counsel was ineffective because he failed to adequately question the victim at the preliminary examination; (3) that his constitutional right to a speedy trial was violated; and (4) that his right to an impartial jury was violated. We affirm.

BACKGROUND

On March 18, 1997, Owens and his son went to see Owens's nephew, Maurice Owens, at the nephew's home in Milwaukee. Owens and his nephew met on the porch of the home and began arguing about a car. Owens then went to his car and got a shotgun. Owens's nephew ran into the house and slammed the door as Owens fired the shotgun at the front door. The shotgun pellets broke the glass of the screen door and splintered the door frame; some of the pellets went into the house, breaking portions of the drywall in the living room.

On March 24, 1997, Owens was arrested on a charge of first-degree recklessly endangering safety. On April 1, 1997, a preliminary examination was held. At the preliminary examination, Owens's nephew testified that the shooting occurred as we have recounted it. Following the trial court's finding of probable cause, Owens was bound over for trial and an information was filed. Owens's nephew died before Owens went to trial; therefore, his preliminary-examination testimony was admitted at the trial. The jury found Owens guilty, and the trial court entered judgment accordingly.

DISCUSSION

1. Admission of testimony from preliminary examination.

Owens argues that the trial court erred in admitting his nephew's preliminary-examination testimony. He argues that the admission of the testimony violated his right under the Sixth Amendment to the United States Constitution to confront witnesses against him because his nephew was not sufficiently cross-examined at the preliminary examination.

A trial court has broad discretion in determining the admissibility of proffered evidence. *See* ***State v. Oberlander***, 149 Wis.2d 132, 140, 438 N.W.2d 580, 583 (1989). Our review is limited to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Larsen***, 165 Wis.2d 316, 320 n.1, 477 N.W.2d 87, 89 n.1 (Ct. App. 1991). We will not reverse the trial court's decision to admit evidence unless there is no reasonable basis for that decision. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

> The standard to be applied in determining whether hearsay evidence is admissible in a criminal case may be summarized as follows. The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability. If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. This inference of reliability does not, however, make the evidence admissible per se. The trial court must still examine the case to determine whether there are unusual circumstances which may warrant exclusion of the evidence. If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness.

State v. Bauer, 109 Wis.2d 204, 215, 325 N.W.2d 857, 863 (1982).

Owens apparently concedes that the testimony from the preliminary examination fits within a firmly rooted hearsay exception, but asserts that its admission nonetheless violated his confrontation right because his nephew was insufficiently cross-examined.[1] "'Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" ***State v. Myren***, 133 Wis.2d 430, 439 n.4, 395 N.W.2d 818, 823 n.4 (Ct. App. 1986) (quoting ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985)). "Except in extraordinary cases no inquiry into the 'effectiveness' of the cross-examination is required." ***Id.***, 133 Wis.2d at 440 n.4, 395 N.W.2d at 823 n.4. The record discloses that the trial court did not significantly limit Owens's cross-examination of his nephew at the preliminary examination, and that Owens's confrontation right was thus satisfied. *See* ***id.***, 133 Wis.2d at 438–440, 395 N.W.2d at 823 (rejecting the defendant's argument that his confrontation right was violated by the admission of preliminary-examination testimony that contained "virtually no

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[1] The trial court concluded, and Owens does not dispute, that the testimony fell under the hearsay exception listed in RULE 908.045(1), STATS.:

> **908.045 Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> **(1)** FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

See also ***State v. Myren***, 133 Wis.2d 430, 437–438, 395 N.W.2d 818, 823 (Ct. App. 1986) (testimony from preliminary examination falls within firmly rooted hearsay exception stated in RULE 908.045(1), STATS.).

cross-examination" to test the witness's credibility because cross-examination at the preliminary examination was not significantly restricted and the "opportunity for effective cross-examination" satisfied the defendant's confrontation right). The trial court did not err in admitting the testimony from the preliminary examination.

2. Ineffective assistance of counsel.

Owens argues that his counsel was ineffective in failing to sufficiently cross-examine his nephew at the preliminary examination, and that the trial court, therefore, erred in denying his motion for postconviction relief without holding an evidentiary hearing. He asserts, without elaboration, that his counsel was deficient because he failed to ask Owens's nephew the right questions, and that the deficient performance rendered the result of the trial unreliable.

If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *See* ***id.***

> "However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (quoted source omitted). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See* ***id.***, 201 Wis.2d at 311, 548 N.W.2d at 53.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***id.*** "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** To show prejudice, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

We reject Owens's conclusory allegations that his counsel was ineffective. As noted, Owens does not specifically identify which questions his counsel should have asked, and he does not explain how counsel's failure to ask any specific question prejudiced the defense. His allegations are therefore

insufficient to support his claim. *See* ***Strickland***, 466 U.S. at 690–694 (to prevail on a claim of ineffective assistance of counsel a defendant must identify specific acts or omissions that constitute deficient performance and demonstrate how the deficient performance prejudiced the defense); ***Bentley***, 201 Wis.2d at 309–310, 548 N.W.2d at 53 (conclusory allegations are insufficient to entitle a defendant to a hearing on a claim of ineffective assistance of counsel; the defendant must allege sufficient facts to raise a question of fact). Moreover, as noted, counsel's conduct is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***Strickland***, 466 U.S. at 690. Counsel could not have foreseen that Owens's nephew would die prior to trial; he was not deficient in failing to cross-examine Owens's nephew at the preliminary examination as fully as he might have at trial.

3. Speedy trial.

As noted, Owens was arrested on March 24, 1997. On April 18, 1997, Owens made a demand for a speedy trial. Owens's trial was originally set for July 14, 1997. On that date, however, Owens was not produced for trial, and Owens's nephew also was not present because the State was unable to locate him. Owens's counsel agreed that the trial should be adjourned, but said that Owens did not want to waive his right to a speedy trial. The trial was reset for August 20, 1997.

The trial did not proceed on August 20, 1997, because the State still had not located Owens's nephew. The trial was reset, over Owens's objection, for October 29, 1997. Owens's trial proceeded as scheduled in October of 1997. Owens argues that he was denied his constitutional right to a speedy trial.

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 7 of the Wisconsin Constitution.[2] Whether a defendant has been denied his or her right to a speedy trial is a constitutional question, which we review *de novo*. *See* ***State v. Ziegenhagen***, 73 Wis.2d 656, 664, 245 N.W.2d 656, 660 (1976). The trial court's underlying findings of historical fact, however, are upheld unless they are clearly erroneous. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987); § 805.17(2), STATS.

Under both the Wisconsin Constitution and the United States Constitution, in determining whether a defendant has been denied his or her right to a speedy trial, a court must consider: (1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *See* ***Doggett v. United States***, 505 U.S. 647, 651 (1992); ***Barker v.***

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[2] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article 1, section 7 of the Wisconsin Constitution provides:

> **Rights of accused.** SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

Wingo, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis.2d 236, 242–246, 212 N.W.2d 489, 492–494 (1973). The first factor, the length of the delay, is a threshold consideration, and the court must determine that the length of the delay is presumptively prejudicial before inquiry can be made into the remaining three factors. *See* ***Doggett***, 505 U.S. at 651–652 ("Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay."); ***Hatcher v. State***, 83 Wis.2d 559, 566–567, 266 N.W.2d 320, 324 (1978). If the length of the delay is presumptively prejudicial and the court determines that, under the totality of the circumstances, the defendant has been denied the right to a speedy trial, the court must dismiss the charges. *See* ***Barker***, 407 U.S. at 522, 533.

The length of the delay between Owens's arrest and his trial was seven months. *See* ***Doggett***, 505 U.S. at 655 (speedy trial inquiry triggered by arrest, indictment, or other official accusation). We conclude that this relatively short delay was not so unreasonable as to be presumptively prejudicial. *See* ***Beckett v. State***, 73 Wis.2d 345, 349–350, 243 N.W.2d 472, 475 (1976) (delay slightly over seven months was not presumptively prejudicial); *cf.* ***Doggett***, 505 U.S. at 652 n.1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). Therefore, we need not consider the remaining ***Barker*** factors. Nonetheless, we conclude that the remaining factors, considered together, do not support Owens's claim that he was denied his right to a speedy trial.

The record reveals that Owens consistently asserted his right to a speedy trial. The short delay in proceeding to trial and the cause for the delay, however, weigh heavily against Owens's claim. As noted, Owens was not produced for the first scheduled trial date, and the victim, Owens's nephew, was

unavailable on both the first and second scheduled trial dates. The only prejudice that Owens claims to have suffered as a result of the delay in proceeding to trial is that his nephew had died and was unable to be confronted regarding his testimony. This claim of prejudice is not supported by the record, however, because Owens's nephew was not present for the earlier trial dates, and thus he would not have been available for cross-examination if the trial had proceeded earlier. Owens's constitutional right to a speedy trial was not violated.

4. Impartial jury.

After the jury had begun deliberating, the foreperson sent a note to the trial court that read: "As foreperson it has come to my attention that [Juror K] has withheld information regarding her boyfriend, who is currently on trial. She has made it clear to me, in confidence[,] that due to this situation she can not be objective." Shortly thereafter, the jury returned its verdict finding Owens guilty.

After discharging the jury, the trial court spoke with the foreperson. The foreperson told the trial court that Juror K "could not trust the police and appeared to have a bias against white officers." The foreperson also said that she had been concerned that Juror K "may not have answered truthfully questions regarding knowing the defendant, his family, having strong feelings that would be anti-police officers, and matters of that sort."

In an essentially undeveloped argument, Owens asserts that Juror K's presence on the jury denied him his right to an impartial jury. We disagree.

Whether a new trial should be granted upon a claim that a juror gave an incorrect or incomplete response to a question during *voir dire* involves a two-part analysis:

> To be awarded a new trial upon such a claim, the defendant in this case must demonstrate: "(1) that the juror incorrectly or incompletely responded to a material question on *voir dire*; and, if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party."

State v. Delgado, 223 Wis.2d 270, 281, 588 N.W.2d 1, 6 (1999) (quoted source omitted); *see also* ***State v. Faucher***, No. 97-2702-CR, slip op. at 24 (Wis. July 8, 1999).[3] "Whether a juror answers a particular question on *voir dire* honestly or dishonestly, or whether an incorrect or incomplete answer was inadvertent or intentional, are factors to be considered in determining whether the juror was biased against the defendant." ***Delgado***, 223 Wis.2d at 282, 588 N.W.2d at 6.

Owens has not alleged any facts to establish that Juror K was biased against him. Indeed, the record discloses that Juror K may have been biased in Owens's *favor*. The jury foreperson indicated that she believed that Juror K may have had a relationship with Owens, and that Juror K had expressed a bias against

[3] A juror's bias may be statutory, subjective or objective. *See* ***State v. Faucher***, No. 97-2702-CR, slip op. at 13–17 (Wis. July 8, 1999). Statutory bias "derives from Wis. Stat. § 805.08 and declares as a matter of law that certain categories of persons shall be removed as jurors 'regardless of his or her ability to be impartial.'" ***State v. Kiernan***, No. 97-2449-CR, slip op. at 7 (Wis. July 8, 1999) (quoting ***Faucher***, slip op. at 14). Subjective bias "inquires whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have." ***Id.***, slip op. at 8. Objective bias "inquires whether a 'reasonable person in the juror's position could set aside [an] opinion or prior knowledge,'" and "can be detected 'from the facts and circumstances surrounding the ... juror's answers' notwithstanding a juror's statements to the effect that the juror can and will be impartial." ***Id.*** (ellipsis in ***Kiernan***) (quoted sources omitted).

the white police officers who testified against Owens. These facts do not establish a bias against Owens.

Moreover, to the extent that Owens argues that Juror K may have revealed extraneous prejudicial information to the jury, Owens's allegations do not justify an inquiry into the validity of the verdict under RULE 906.06(2), STATS. In determining whether a jury verdict may be impeached by juror testimony, a court must consider: "(1) [w]hether the proffered evidence is competent; (2) whether the evidence demonstrates a substantial ground sufficient to overturn the verdict; and (3) whether the conviction should be overturned because the defendant's rights were prejudiced." ***State v. Casey***, 166 Wis.2d 341, 345–346, 479 N.W.2d 251, 253 (Ct. App. 1991).

RULE 906.06(2), STATS., governs the competence of juror testimony offered to impeach a jury verdict. It provides:

> INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

RULE 906.06(2), STATS. In order to establish that juror testimony proffered to impeach a jury's verdict is competent evidence, the party seeking to impeach the verdict must show: (1) that the testimony concerns extraneous information; (2)

that the extraneous information was improperly brought to the jury's attention; and (3) that the extraneous information was potentially prejudicial. *See* ***Casey***, 166 Wis.2d at 346–347, 479 N.W.2d at 253.

Owens has not alleged any facts indicating that extraneous prejudicial information was brought before the jury. In his brief to this court, and in his postconviction motion to the trial court, Owens makes only a vague and conclusory assertion that Juror K "revealed information about the alleged victim and the defendant's family in the presence of the jury." Brief of Defendant-Appellant at 8. This allegation is insufficient to support Owens's claim. The trial court properly denied Owens's request for a new trial on the basis of alleged juror misconduct. *See* ***State v. Marhal***, 172 Wis.2d 491, 497, 493 N.W.2d 758, 761–762 (Ct. App. 1992) (the right to an evidentiary hearing regarding juror misconduct requires a preliminary showing of facts that, if true, would require a new trial).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.