COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1147 **Cir. Ct. No. 2005CF1881**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK J. MEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Sherman, Kloppenburg and Neubauer, JJ.

¶1 PER CURIAM. Mark Mey appeals an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2013-14).[1] We affirm.

¶2 The State alleged that Mey was one of a number of people who jumped from three vehicles in the street, fired a hail of bullets up a driveway towards a group of people near a garage, and then quickly fled. At trial, the State presented several witnesses who claimed to have been among the shooters, and who testified as to the involvement of Mey and three other co-defendants tried at the same time. The jury found the defendants guilty on three counts each of attempted first-degree intentional homicide while armed, and three counts each of endangering safety by use of a firearm, under WIS. STAT. § 941.20(2)(a) (2007-08).

¶3 Mey filed a postconviction motion under WIS. STAT. § 974.06 that raised several claims. The circuit court denied the motion without an evidentiary hearing.

¶4 Mey argues that the circuit court committed plain error when reading the jury instruction for the second and third counts, which were two of the attempted homicide counts. Each time, the court stated: "To this charge, each of the defendants before you has entered a plea of *guilty*, which means the State must prove every element of the offense charged beyond a reasonable doubt." (Emphasis added.) Mey argues that this caused him prejudice by leading the jury to believe that he had already pled guilty, and that it need not deliberate and reach a decision of its own.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 We agree with the State that Mey was not prejudiced by this error. We believe that most jurors would understand this was an error by the court. The remainder of the instructions made it clear that it was the jury's task to determine the defendants' guilt on all counts that were the subject of the trial.

¶6 Next, Mey argues that his trial counsel was ineffective in relation to numerous references to gang affiliations that were made during the trial. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show 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. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** Because no evidentiary hearing was held, the issue before us is whether Mey alleged facts which, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶7 In Mey's opening brief, he argues that counsel was ineffective by not objecting to these gang references as violations of the circuit court's pretrial order regarding such references. We ordered supplemental briefing on this issue. In Mey's supplemental brief, he recognizes that the gang references elicited by Mey's trial counsel, or other defense counsel, cannot be in violation of the pretrial order because that order controlled only the use of such evidence by the State. Accordingly, he separates his argument into one section for State-elicited gang references, and one section for counsel-elicited gang references. We follow the same path.

¶8 As to the gang references elicited by the State, these were relatively few in number. Mey's supplemental brief notes only two or three specific examples of such gang references that he argues violated the circuit court's order because they went beyond providing context and instead described violence within gang life. For purposes of this discussion, we assume, without deciding, that these references were violations of the court order that trial counsel should have objected to. However, we conclude that Mey was not prejudiced by these references. In the context of this lengthy trial, they were too few in number to undermine our confidence in the outcome.

¶9 As to the gang references elicited by the various defense counsel, including Mey's own, we decline to address this issue further because we conclude it is being raised for the first time on appeal. Mey's postconviction motion and opening brief on appeal were limited to whether counsel was ineffective by not objecting to these references *on the ground that they violated the pretrial order*. Now, on appeal, Mey changes his theory to argue that counsel was ineffective by allowing introduction of these references because some of them were prejudicial to the defendants and did not serve any rational strategic purpose. We usually do not address issues that are raised for the first time on appeal, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and we decline to do that in this case.

¶10 Next, Mey argues that we should reverse under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried, due to the court's error in the instruction saying that Mey pled guilty and the admission of the gang references. We conclude that the real controversy was fully tried. In addition, we ordered supplemental briefing on whether we should reverse under § 752.35 on

the ground that justice miscarried. We decline to exercise our discretion to reverse on that ground.

By the Court.—Order affirmed.

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