COURT OF APPEALS
DECISION
DATED AND FILED

February 07, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2992-CR **Cir. Ct. No. 1992CF920612**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT LEWIS FLYNN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 KESSLER, J. Robert Lewis Flynn appeals from a judgment of conviction and an order denying his motion for postconviction relief.[1] He argues that he is entitled to a new trial because: (1) the jurors were exposed to extraneous and prejudicial information; (2) the trial court failed to conduct a colloquy to ensure Flynn's waiver of his right to testify was voluntary, and his waiver was not, in fact, voluntary because his trial counsel threatened him; and (3) the trial court erroneously refused to admit evidence of Flynn's offer to take a polygraph test. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 This case has an extensive procedural history. Flynn was found guilty by a jury of two counts of armed robbery based on crimes that took place in 1992. He was sentenced to an indeterminate sentence of imprisonment of twenty years on one count, and eighteen years on the other count, to run consecutively to each other.

¶3 Flynn proceeded *pro se* on his direct appeal. As part of that direct appeal, Flynn's counsel testified at a ***Machner***[2] hearing. The trial court denied Flynn's postconviction motion for relief and we affirmed in a published decision. *See* ***State v. Flynn***, 190 Wis. 2d 31, 527 N.W.2d 343 (Ct. App. 1994).

[1] The original judgment was entered by the Honorable Arlene D. Connors, who also presided over the jury trial. The order denying the postconviction motion that is the subject of this appeal was also issued by the Honorable Richard J. Sankovitz.

[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶4 In April 2003, Flynn's sentence was modified by the trial court. He was sentenced to sixteen years on one count and twelve years on the other, to run consecutively to each other.

¶5 On August 1, 2003, we reinstated Flynn's right to a direct appeal on grounds that he did not knowingly, voluntarily or intelligently waive his right to counsel on his direct appeal. The trial court appointed postconviction counsel for Flynn. Flynn filed a motion for postconviction relief arguing that he was entitled to a new trial for the same reasons alleged in this appeal. The trial court denied the motion and this appeal followed.

DISCUSSION

¶6 Flynn raises three issues on appeal, relating to: (1) whether the jurors were exposed to extraneous and prejudicial information; (2) Flynn's waiver of the right to testify; and (3) evidence of Flynn's offer to take a polygraph test. Before we address these issues, we note that the first two were raised and rejected in Flynn's first direct appeal. Flynn urges this court to take a fresh look at these issues, and asserts that the first Court of Appeals decision should not operate as the "law of the case" so as to bar consideration of the issues raised in this appeal. The State did not respond to Flynn's argument; we infer the State does not believe Flynn is automatically bound by our previous decision. Accordingly, we will take a fresh look at the issues. However, as explained below, the rules of law announced in ***Flynn*** are still applicable, and we conclude that much of the same reasoning applies. As a result, we once again affirm.

A. Whether the jurors were exposed to extraneous and prejudicial information

¶7 Flynn asserts that the jurors were exposed to extraneous and prejudicial information concerning evidence of a gun that was found in Flynn's wife's home. Evidence of that gun had been suppressed and was not presented as part of the State's case against Flynn. However, Flynn asserts that during the trial the jurors overheard a sidebar conversation and thereby learned about the gun.

¶8 WISCONSIN STAT. § 906.06(2)[3] "broadly prohibits evidence of anything said or done during jury deliberations." ***Grice Eng'g, Inc. v. Szyjewski***, 2002 WI App 104, ¶12, 254 Wis. 2d 743, 648 N.W.2d 487. "This rule discourages juror harassment by disappointed litigants, furthers free and open discussion among jurors, reduces the incentive for jury tampering, promotes verdict finality, and helps maintain the jury's viability 'as a judicial decision-making body.'" ***Id.*** (citation omitted).

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[3] WISCONSIN STAT. § 906.06(2) (2003-04) provides:

> **(2)** 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 upon 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.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶9 Nonetheless, there is a procedure for overturning a verdict and granting a new trial where jurors were prejudiced by extraneous information. This test requires the moving party to demonstrate that juror testimony about the information is competent and admissible under WIS. STAT. § 906.06(2) by establishing that: (1) the juror's testimony concerns the extraneous information and not the deliberative process of the jury; (2) the extraneous information was improperly brought to the jury's attention; and (3) the extraneous information was potentially prejudicial. ***State v. Eison***, 194 Wis. 2d 160, 172, 177, 533 N.W.2d 738 (1995).

¶10 Once it is determined that the moving party has satisfied the WIS. STAT. § 906.06(2) requirements, the trial court determines whether one or more jurors engaged in the alleged misconduct and whether the error was actually prejudicial. ***Eison***, 194 Wis. 2d at 172-73. This second step presents a mixed question of fact and law. Whether a juror engaged in the misconduct is a factual question, but whether the extraneous information constituted prejudicial error requiring reversal is a question of law. ***Id.*** at 177.

¶11 Here, Flynn provided the trial court with his signed affidavit, dated February 22, 1994, in which he asserted facts in support of his claim that the jurors overheard extraneous, prejudicial information during a sidebar conference.[4] The affidavit states:

> During a side bar in the hearing distance of the jurors the prosecutor and defense counsel were arguing about the

[4] This affidavit was not provided to the trial court that considered Flynn's 1993 *pro se* postconviction motion, and we declined to consider it when Flynn submitted it for the first time as part of his *pro se* direct appeal. *See* ***State v. Flynn***, 190 Wis. 2d 31, 46 n.4, 527 N.W.2d 343 (Ct. App. 1994).

> search of my home on February 7, 1992, defense counsel said something to the effect that the prosecutor knows that the police went all through the home, at which point the prosecutor responded in a loud tone that: "YES, AND THEY FOUND THE GUN THAT WAS SUPPRESSED ……." This was done during a side bar that was not recorded as most of the side bars were not recorded. This was done within several feet of the jurors and they did hear the constant arguing that defense counsel and the prosecutor had throughout the entire trial. The gun was suppressed evidence that the jury was not suppose[d] to know about….

(Capitalization in original.) In support of his motion, Flynn also offered an affidavit/transcript of a recorded conversation that took place between Flynn's wife and a juror in 1993. That affidavit/transcript included the following discussion toward the end of the call:

> [JUROR]: … The fact that there was a gun – that he had access to a gun – that was another reason why the jurors all voted to[] – that was a factor there – there was a gun available, that he used a gun and had a gun in the house. So that was one of the things that made us decide also.
>
> [FLYNN'S WIFE]: Are you absolutely sure about the statement that you just made?
>
> [JUROR]: Why yes, it did come up and it was one of the things we did use to decide the verdict.
>
> ….
>
> [FLYNN'S WIFE]: … I did not sit through the trial because I was sequestered, but the gun found in my home was suppressed evidence, so I am curious as to how that information got to the jurors.
>
> [JUROR]: Well, you are right – I don't remember anything about a gun being argued about at the trial, but – somehow it was an issue and it did become a matter for us to consider and we did.
>
> [FLYNN'S WIFE]: I understand, but I do need to know how that became an issue.

> [JUROR]: I'm sorry, but I can't really remember which person brought it up, but it was definitely brought up and we did know about it.

¶12 The trial court concluded that this court's decision on this issue in ***Flynn*** controlled and, therefore, did not engage in a detailed analysis of its own. Because we have declined to apply the "law of the case" doctrine here, we have independently examined the affidavits provided to the trial court to determine if Flynn demonstrated that: (1) the juror's testimony concerns the extraneous information and not the deliberative process of the jury; (2) the extraneous information was improperly brought to the jury's attention; and (3) the extraneous information was potentially prejudicial. *See* ***Eison***, 194 Wis. 2d at 177 (court will independently review record to determine if there was a basis for trial court's implicit determination that moving party had provided sufficient evidence of extraneous, potentially prejudicial information that was improperly brought to jury's attention).

¶13 In ***Flynn***, we engaged in the same analysis of the affidavit/transcript of the juror's conversation with Flynn's wife. *See* ***id.***, 190 Wis. 2d at 44. We observed:

> In that statement, the juror asserts that the jury discussed a gun during the course of their deliberations. The transcript/affidavit does not, however, indicate that the gun was improperly brought to the jury's attention during the course of the trial[.]
>
> ….
>
> In light of the ambiguous nature of the juror's recollection, Flynn has not carried his burden…. These were armed robberies; it would be natural for the jury to discuss a gun during its deliberations. There is no evidence in the record that the jury discussed the gun that was suppressed by the trial court.

Id. at 44-46 (footnote omitted).

¶14 The only thing that has changed since our decision in ***Flynn*** is that we now can properly consider Flynn's own affidavit. While this affidavit, taken at face value, provides an explanation for how the jurors might have learned about a suppressed gun, it does not change the fact that the juror's affidavit/transcript is insufficient evidence that the extraneous information about the suppressed gun was actually brought to the jury's attention. Indeed, the affidavit/transcript indicates that even when asked about the sidebar conferences, this particular juror had no memory of hearing about a gun by overhearing a sidebar conference. We conclude, as we did in ***Flynn***, that Flynn has failed to carry his burden of showing that the juror's testimony is competent and admissible under WIS. STAT. § 906.06(2). *See* ***Eison***, 194 Wis. 2d at 172, 177. We therefore affirm the trial court's denial of Flynn's postconviction motion on this issue.

B. Whether Flynn waived his right to testify

¶15 A defendant's right to testify on his own behalf in defense of a criminal charge is a fundamental constitutional right. ***Rock v. Arkansas***, 483 U.S. 44, 53 n.10 (1987). A trial court's findings of historical fact relevant to whether a violation of a constitutional right has occurred will not be overturned unless they are clearly erroneous. ***State v. Landrum***, 191 Wis. 2d 107, 113-14, 528 N.W.2d 36 (Ct. App. 1995). Application of constitutional principles to the facts of a case is subject to *de novo* review. ***Id.*** at 114.

¶16 Flynn argues that he is entitled to reversal based on a denial of his right to testify. Specifically, he argues the trial court

> failed to carry out any colloquy designed to insure that Mr. Flynn was aware of his right to testify in his own defense and that his waiver of that right was both knowing and voluntary and where the record shows that his decision to waive his right to testify and present a defense was

> coerced by his attorney's threat to withdraw in mid-trial if Mr. Flynn insisted on exercising his right.

¶17 Flynn acknowledges that at the time of his trial, a formal colloquy concerning a defendant's decision not to testify was not required. This changed in 2003, when the Wisconsin Supreme Court directed trial courts to "conduct an on-the-record colloquy to ensure that the defendant is knowingly, intelligently, and voluntarily waiving his or her right to testify." ***State v. Weed***, 2003 WI 85, ¶2, 263 Wis. 2d 434, 666 N.W.2d 485. Flynn's argument focuses not on whether ***Weed*** should apply retroactively to this reinstated-direct appeal, an issue we do not decide, but on his contention that ***Weed*** "placed the right of a defendant to testify in his own defense squarely within that class of constitutional violations the courts have found to defy harmless-error review."

¶18 For reasons outlined below, we conclude that even though the trial court did not conduct a colloquy and even if, as Flynn alleges, he was deprived of his fundamental right to testify in his own defense because his trial counsel threatened him, those errors were harmless and do not require reversal.

¶19 At the ***Machner*** hearing conducted in 1993 when Flynn was proceeding *pro se*, he questioned trial counsel about the decision that Flynn would not take the stand. In response, trial counsel acknowledged that he threatened to withdraw if Flynn took the stand:

> [FLYNN]: You threatened to walk out of the Court on me, didn't you?
>
> [TRIAL COUNSEL]: Yes.
>
> [FLYNN]: If I wanted to take the stand, you said: you take this case and try it myself, because I will get out of here?
>
> [TRIAL COUNSEL]: I said I will ask the Court of my relief of my responsibility to represent you.

> ….
>
> [TRIAL COUNSEL]: Under no circumstances, if I were to try the case over again today, would I ever allow him to take the witness stand. I think any lawyer that would, would be guilty of malpractice or certainly poor judgment, if he allowed him to take the witness stand.
>
> [FLYNN]: When you say "allow," not physically preventing him from taking the witness stand?
>
> [TRIAL COUNSEL]: That was a choice he would have to make; but if I were defending, as I told him, I would ask the Court to relieve me of my obligation, because as I have said before, that would be tantamount to throwing in a guilty plea.

¶20 Flynn's claim that his trial counsel had prevented him from testifying in his own defense was addressed in ***Flynn*** in the context of Flynn's claim of ineffective assistance of counsel. *See* ***id.***, 190 Wis. 2d at 49-57. In that decision, we recognized that the trial court had not made findings as to whether Flynn had knowingly and voluntarily relinquished his right to testify. ***Id.*** at 51. We held that although remand would be needed to make such findings, remand was unnecessary "because we are convinced that Flynn was not prejudiced, even if we assume that Flynn's trial counsel did prevent Flynn from testifying." ***Id.*** (footnote omitted). Applying the ineffective-assistance-of-counsel test, but looking to harmless error cases as part of our analysis, we concluded that Flynn had not been prejudiced and, therefore, affirmed his conviction.[5] *See* ***id.*** at 53-57.

[5] In ***Flynn***, we explained:

> Although, as we have noted, an analysis of prejudice under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]'s second prong is not a harmless-beyond-a-reasonable-doubt inquiry, the two inquiries are conceptually similar. Both require a balancing of, on one side, the system's need for reliable results, and, on the other side, the system's need for an end to litigation. Accordingly, we turn to the cases that discuss "harmless error"

(continued)

¶21 Our decision in ***Flynn*** was not unanimous. The Dissent argued that where a defendant was denied the fundamental right to testify by a threatened deprivation of counsel, the harmless error rule and the rule that considers whether counsel's ineffective assistance was prejudicial should not be applied. *See* ***id.*** at 59, 64 (Schudson, J., dissenting). In this appeal, Flynn presents similar arguments as those made by the Dissent in ***Flynn***. He further contends that a subsequent United States Supreme Court case, ***Neder v. United States***, 527 U.S. 1 (1999), requires automatic reversal where one has been denied the right to testify in his own defense.

¶22 In response, the State argues that Flynn is incorrectly interpreting ***Neder***; we agree. ***Neder*** recognized that there is "a limited class of fundamental constitutional errors that defy analysis by harmless error standards." ***Id.*** at 7 (citations and quotation marks omitted). However, the limited class of cases ***Neder*** offered as examples (*e.g.*, complete denial of counsel, denial of public trial) did not include the denial of the right to testify on one's own behalf. *See* ***id.*** at 8. Moreover, the issue in ***Neder*** involved jury instructions, not the denial of the right to testify. *See* ***id.*** ***Neder*** simply does not hold that the denial of the right to testify in one's own defense requires *per se* reversal.

¶23 We have reviewed the parties' briefs and conducted our own legal research. We have not found any binding precedent that overturns our holding in

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> in the context of constitutional violations only to assist our determination of whether the prejudice prong of the *Strickland* test should be applied in cases where trial counsel has prevented the defendant from testifying.

Id. at 53-54 (citations and footnote omitted).

Flynn that denial of the right to testify in one's own defense is subject to a harmless error analysis.[6] *See* ***id.***, 190 Wis. 2d at 56. We remain bound by the legal holding of that published decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court … has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). We conclude that the harmless error test is applicable.

¶24 In ***Flynn***, we concluded that in the context of ineffective assistance of counsel, the alleged error was not prejudicial, such that he was not entitled to reversal. *See* ***id.***, 190 Wis. 2d at 53-57. Even if we consider this case using the harmless error analysis employed for other constitutional deprivations, we reach the same conclusion as the court in ***Flynn***: Flynn is not entitled to reversal.[7]

¶25 The harmless error analysis requires us to review the entire record. ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. The

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[6] Although ***Flynn*** was ultimately decided based on application of the prejudice prong of ***Strickland v. Washington***, 466 U.S. 668 (1984), ***Flynn*** looked to harmless error cases "to assist our determination of whether the prejudice prong of the *Strickland* test should be applied in cases where trial counsel has prevented the defendant from testifying." *See* ***Flynn***, 190 Wis. 2d at 53-54. In doing so, ***Flynn*** explicitly recognized: "[T]he harmless-error analysis *does* apply to the deprivation of a defendant's right to testify" when that alleged deprivation is not asserted in the context of an ineffective assistance of counsel claim. ***Id.*** at 56 (emphasis in original). The Dissent in ***Flynn*** specifically objected to this statement. *See* ***id.*** at 59 (Schudson, J., dissenting). Nonetheless, the statement remained part of the ***Flynn*** decision, and ***Flynn*** subsequently has been cited as a case recognizing that Constitutional claims are generally subject to a harmless error analysis. *See*, *e.g.*, ***State v. VanBronkhorst***, 2001 WI App 190, ¶19, 247 Wis. 2d 247, 633 N.W.2d 236.

[7] As we noted in ***Flynn***, the trial court at the 1993 ***Machner*** hearing did not make findings about the voluntariness of Flynn's decision to waive his right to testify. No trial court has subsequently made findings. Therefore, if we were to conclude that the alleged error was not harmless, we would be required to remand this case for a factual determination by the trial court. *See* ***Flynn***, 190 Wis. 2d at 51. Such an analysis is not necessary, however, as we conclude the error was harmless.

test for harmless error "is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Weed***, 263 Wis. 2d 434, ¶29 (citations and quotation marks omitted).

¶26 Flynn's convictions were based on two armed robberies of service stations. The trial court examined the evidence of each crime and concluded that it was harmless error not to have conducted a colloquy with Flynn regarding his decision not to testify:

> I believe the error was harmless because it is so unlikely that Mr. Flynn's taking the stand would have changed the outcome. Mr. Flynn suggests only one thing that would have changed if he had testified: he could have provided the jury with a voice exemplar to compare with the audio portion of the surveillance tape of one of the robberies. Mr. Flynn contends that the jury would have been persuaded that his voice was "neither the one described by the witnesses nor heard on the videotape."
>
> This suggestion does not undermine my confidence in the outcome of the trial. First, Mr. Flynn does not present me with the evidence. He does not even characterize the evidence for me, or describe the differences he claims between his voice at the time and the voice captured on the tape and heard by the witnesses. He presents me with no evidence to persuade me that his voice is in fact distinct from the recorded voice and the voice the witnesses heard. While the State bears the burden of proof under the harmless-error analysis … Mr. Flynn bears at least the burden of production, and he has not met it. If Mr. Flynn's claim was that a videotape of the crime exonerated him, I would expect to be presented with the videotape. If Mr. Flynn's claim was that he was identified in a suggestive photo array, I would expect to be presented with the photo array. Because I have no evidence before me to determine if there is any substance at all to his claim, I must reject it.[8]

[8] The trial court added in a footnote that "if Mr. Flynn has such evidence and merely neglected to provide it, I will entertain a motion to reconsider this conclusion." No motion to reconsider was ever filed.

> Furthermore, evidence of an apparent difference between his voice and the voice captured on the audiotape could not overcome the pointed evidence that supports his convictions. The voice comparison evidence is suspect to begin with – if it was strong enough to rescue Mr. Flynn from his conviction, one would think he would have asserted this claim before ten years had passed. Moreover, the other evidence in the case was so much stronger and more direct. The eyewitness identification of Mr. Flynn and his car and the evidence of the gun (that would have become admissible in impeachment) would be far more conclusive to a rational[] jury. Mr. Flynn, for his part, makes no effort to explain how a rational[] jury would reject this evidence, or reconcile it with the voice evidence in favor of acquittal.
>
> The evidence supporting Mr. Flynn's convictions was so strong that it led the court of appeals to conclude that "there is no reasonable likelihood of a different outcome on a retrial should he testify." The court was testing the evidence under a different standard than applies here, the prejudice prong of [ineffective assistance of counsel], and the court so declared. Nevertheless, the "conceptual" and "substantive" similarities between the two tests … make the court of appeals' conclusion compelling.

¶27 Although the trial court focused primarily on whether it was error to fail to conduct a colloquy with Flynn, rather than on whether Flynn was coerced by his attorney, we agree that the reasoning and conclusion are correct. Flynn contends that he was wrongfully denied his right to testify. Other than arguing that the jury would have had a chance to hear his voice if he had testified, Flynn points to no other reason why his testimony would have been relevant. We agree with the trial court's analysis of the voice testimony and of the significant, compelling evidence of Flynn's guilt. Like the trial court, we are convinced that the error complained of did not contribute to the verdict obtained. *See **id.***

C. Admission of Flynn's offer to take a polygraph examination

¶28 Flynn argues that the trial court erroneously refused to admit at trial evidence that Flynn had offered to take a polygraph test. "While a polygraph test

result is inadmissible in Wisconsin, an offer to take a polygraph test is relevant to an assessment of the offeror's credibility and may be admissible for that purpose." ***State v. Pfaff***, 2004 WI App 31, ¶26, 269 Wis. 2d 786, 676 N.W.2d 562 (citations omitted). "An offer to take a polygraph test is relevant to the state of mind of the person making the offer -- so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible." ***Id.***

¶29 The trial court concluded that even if Flynn could prove that he made such an offer, the trial court's alleged failure to admit the evidence was harmless error. We affirm without even reaching the harmless error issue because, as the State points out, Flynn has not alleged that he believed at the time he offered to take a polygraph test that the results would be admissible in court. His affidavit states:

> Several months before … trial [Flynn made defense counsel] aware of his desire to take a polygraph examination in connection with the charges at issue here.
>
> At the time … it was [Flynn's] belief that a polygraph test was possible.
>
> Further, at that time … it was [Flynn's] belief that polygraph tests were accurate and could be used to prove innocence as well as to indicate guilt.
>
> [Flynn] further believed that taking a polygraph test would demonstrate to the police and to the State that he was, in fact, innocent, and that polygraph tests were routinely used for this purpose.
>
> No one threatened [Flynn] in any way or promised him anything in order to get him to agree to take a polygraph test.

Noticeably absent is the suggestion that Flynn believed a jury would ever hear the results of a polygraph examination. Even in Flynn's brief he argues only that he believed at the time he offered to take a polygraph test

> that polygraph testing was possible, that polygraph tests were accurate, that taking a polygraph test would demonstrate to the police and to the State that the defendant was, in fact, innocent, that the defendant believed that polygraph tests were routinely used for this purpose and that no one threatened [Flynn] in any way or promised him anything in order to get him to agree to take a polygraph test[.]

¶30 Because Flynn failed to allege one of the three requisite bases for a valid request to admit evidence of an offer to take a polygraph examination, *see* ***id.***, we conclude that his postconviction motion for relief on this ground was properly denied.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.