**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 9, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP373** **Cir. Ct. No. 1991CF105**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES EDWARD SANICKI,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH and MICHAEL T. JUDGE, Judges. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. James Edward Sanicki is serving a life sentence for first-degree intentional homicide. He appeals from the 1991 judgment of

conviction and from an order denying his 2010 motion for postconviction relief. None of his arguments persuade us; we affirm the judgment and order.

¶2 Sanicki and James Behnke were charged with first-degree intentional homicide, as parties to the crime, in the shooting death of Michael Smith. Witnesses testified that Smith was something of a freeloader at the apartment Behnke and Sanicki shared. Behnke initially claimed that he acted alone; then that he shot Smith but that Sanicki helped dispose of the body; and then pled guilty to PTAC first-degree homicide.[1] At Sanicki's trial, Behnke testified that Sanicki was the shooter. The jury convicted Sanicki and the court sentenced him to life in prison with a parole eligibility date of January 1, 2075.

¶3 Over the years, Sanicki made several attempts to challenge his conviction. In 2010, the trial court determined after a ***Machner***[2] hearing that trial counsel had not provided ineffective assistance but that postconviction/appellate counsel had. The court therefore reinstated Sanicki's direct appeal rights under WIS. STAT. RULE 809.30 (2009-10),[3] leading to the motion underlying this appeal. The trial court denied his motion, and Sanicki appeals.

¶4 Sanicki first asserts he was deprived of a fair trial because he was denied his full complement of peremptory strikes. Sanicki and the State each were entitled to seven peremptory challenges: six because Sanicki's crime was punishable by life imprisonment and one additional strike because fourteen jurors

[1] Behnke committed suicide in prison in June 1992.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

were impaneled. *See* WIS. STAT. § 972.03 (1991-92). The trial court erroneously allowed each side only six. Sanicki contends that that by itself was error and that his trial counsel's failure to demand the remaining challenge allowed two biased jurors to be seated on the panel.

¶5 During voir dire, prospective juror Lee Jaeger indicated it was a "[p]ossibility" that his having four relatives in law enforcement would make it difficult for him to be fair and impartial because he was "assuming that the murder victim was a law enforcement officer." After correcting that impression, the court asked, "Do you not think it would affect you?" Jaeger answered, "No." Sanicki describes Jaeger's answer as "noncommittal and ambiguous."

¶6 The prosecutor then told potential jurors that, being a murder case, some of the evidence could be "gory and graphic." Karyl Tutaj indicated that she had a "weak stomach" and once had fainted while watching a movie about a car accident but that simply hearing about such things "doesn't do it." The prosecutor said he did not anticipate showing movies or photographs and asked if, from hearing descriptions, she would "be able to listen to that and render a fair and impartial verdict." Tutaj answered, "Yes." The State later introduced two photos of Smith's covered body and several of a couch with dark stains. No autopsy photos were introduced.

¶7 Sanicki asserts that he could have used the seventh peremptory challenge to strike either Tutaj or Jaeger and that under the law applicable at the time he is entitled to reversal. *See* ***State v. Wyss***, 124 Wis. 2d 681, 724, 370 N.W. 2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W. 2d 752 (1990) ("The denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice." (Citation

omitted)). We disagree, whether we analyze it as the trial court's error or defense counsel's ineffectiveness.

¶8 An error is harmless if it does not affect the defendant's substantial rights. WIS. STAT. § 805.18 (made applicable to criminal cases by WIS. STAT. § 972.11(1)). The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise. ***State v. Harvey***, 2002 WI 93, ¶40, 254 Wis. 2d 442, 647 N.W.2d 189. There is a constitutional right to an impartial jury, not to peremptory challenges. ***State v. Traylor***, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992). Sanicki fails to persuade us that the jury was not impartial. The trial court's error was harmless.

¶9 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***State v. Thiel***¸ 2003 WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶20 (citation omitted).

¶10 Our review entails a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. The ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law reviewed independent of the trial court's legal

determinations. ***Id.*** We presume trial counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶11 Counsel conceded that his exercise of only six strikes was "an oversight," but testified that for a prospective juror to acknowledge queasiness about violence was not unusual and could "cut both ways" because the person might fault the prosecution for displaying the evidence. Counsel agreed that Jaeger "probably [was] not" a good juror from the perspective of his family ties with law enforcement, but testified that he decided that "somebody else was a worse juror from the defense perspective."

¶12 The trial court found that Sanicki neither demonstrated why the photos that were admitted should be considered gory and graphic nor suffered any prejudice from their admission. The court made no express finding about Juror Jaeger, but we may assume that a missing finding was determined in a manner that supports the decision. *See* ***Soma v. Zurawski***, 2009 WI App 124, ¶24, 321 Wis. 2d 91, 772 N.W.2d 724. The court also found that the playing field remained level because both sides had six strikes and that, nearly two decades later, there is no way to tell which juror would have been struck.

¶13 These findings are not clearly erroneous. We fail to see how Jaeger's "No" can be interpreted as "noncommittal and ambiguous." Sanicki thus has not established bias on the part of either Tutaj or Jaeger. Therefore, despite not having the full complement of peremptory strikes, Sanicki has not established that he was prejudiced by the jury that was empaneled. The ineffectiveness claim fails.

¶14 Sanicki next asserts that trial counsel was ineffective for failing to object to the form of the verdict and to ensure that the jury was unanimous by requesting that it be polled. This claim also fails.

¶15 The verdict read that the jury found Sanicki guilty "as charged in the Information." The Information, read during opening instructions before any jurors were impaneled, alleged that Sanicki was PTAC. The prosecutor said the court would instruct on it. Because the State's evidence focused on Sanicki's role as the trigger man, the court refused to give a PTAC instruction. Instead, the court advised the jurors that the Information charged that "the defendant did cause the death of another human being with intent to kill that person." Juries are presumed to follow the court's instructions. ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. We agree with the State that the chance that the jury recalled the PTAC language in the Information from five days earlier was virtually nonexistent. Counsel reasonably did not object to the verdict.

¶16 Sanicki also posits that counsel's failure to request individual polling of the jury prejudiced him because some jurors may have found him guilty solely as an accomplice. The trial court asked the jury as a group, "Members of the Jury, is that your verdict?" The jury responded, "Yes, it is," to which the court replied, "Let the record reflect the jury has unanimously indicated in the affirmative." Whether individual polling would have revealed anything else is speculative. Showing prejudice requires more than speculation. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶17 Sanicki next complains that counsel should have both pushed to have Behnke's written inculpatory statements sent to the jury room and objected when they were not submitted. Determining what exhibits may go to the jury

room is a matter within the trial court's discretion. ***State v. Jensen***, 147 Wis. 2d 240, 259, 432 N.W.2d 913 (1988). The jury heard the substance of the statements and counsel cross-examined Behnke on them. Sanicki has not shown how not sending the actual documents to the jury room was prejudicial. Thus, we need not address whether counsel performed deficiently. *See* ***Strickland***, 466 U.S. at 697.

¶18 Sanicki next argues that counsel failed to introduce a police videotape of Behnke "giving a virtual re-enactment of him shooting" Smith and should have called as a witness a friend of Behnke's who would have testified that Behnke confessed his culpability to him. The jury knew that Behnke had confessed in the past. It is not ineffective assistance of counsel to fail to provide cumulative evidence. *See* ***United States v. Jackson***, 935 F.2d 832, 845-46 (7th Cir. 1991) (not ineffective assistance for defense counsel not to pursue a course of investigation that would produce evidence counsel is already aware of or would add little to what is otherwise available).

¶19 The next issue involves the weapon used to kill Smith. Smith was killed with a .16-gauge shotgun. Behnke testified that he and Sanicki retrieved a .16-gauge shotgun from Sanicki's father's house the night of the shooting, shot Smith, cleaned the gun and returned it. Sanicki was known to keep a .20-gauge shotgun in his apartment. In 2008, Sanicki's brother, Mark, averred in an affidavit that he found .20-gauge shotgun shells in Sanicki's apartment shortly after Sanicki was arrested. Sanicki contends that counsel deficiently failed to adduce that evidence and to argue that if he were going to kill Smith, why would he not have used the gun and ammunition at hand?

¶20 Noting the seventeen-year time lag between the murder and Mark's affidavit, the court observed that counsel may not have made the .20-gauge

ammunition argument because the ammunition in fact was not available the night of the murder. Anyway, the State easily could have undermined that argument by asserting that Sanicki purposefully used a different kind of gun than the one he was known to possess. Sanicki's argument therefore fails because he has not carried his burden of showing how counsel's failure to investigate that angle would have altered the outcome of the trial. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

¶21 The next issue arises from the testimony of a witness who testified that she had known Sanicki for about five months "from when they turned themselves in." Sanicki asserts that trial counsel failed to correct the inaccurate impression that he had confessed to police. We reject this assertion. The comment was not highlighted and various other witnesses plainly testified that Sanicki was arrested. No witness testified that he confessed to police.

¶22 Sanicki next claims that trial counsel failed to adequately ensure that witnesses were sequestered because counsel did not move for sequestration until after opening statements, and his motion to sequester rebuttal witnesses was denied. These arguments fail. "At the request of a party, the judge … shall order witnesses excluded so that they cannot hear the testimony of other witnesses." WIS. STAT. § 906.15(1). The court granted Sanicki's motion for sequestration before any witnesses testified. Further, a motion to exclude witnesses from the courtroom is addressed to the sound discretion of the trial court. ***Fletcher v. State***, 68 Wis. 2d 381, 388, 228 N.W.2d 708 (1975). Counsel cannot be faulted for the court's decision to not sequester rebuttal witness.

¶23 Sanicki next asserts that trial counsel should have obtained his presence at two "critical junctures," the exhibit hearing and the instruction

conference. The record does not decisively establish that Sanicki was absent from both events; assuming he was, we reject his argument. Again, what exhibits may go to the jury room is a matter within the trial court's discretion. ***Jensen***, 147 Wis. 2d at 259. We already have concluded that Sanicki has not shown prejudice from the decision not to send Behnke's written confessions to the jury room.

¶24 The trial court also exercises wide discretion in issuing jury instructions, ***State v. Pruitt***, 95 Wis. 2d 69, 80-81, 289 N.W.2d 343 (Ct. App. 1980), and Sanicki does not suggest what instruction should have been given that was not or was not given that should have been. Even if counsel erred in not having Sanicki present, Sanicki fails to establish that, but for the error, the result of the proceeding would have been different. *See* ***Thiel***, 264 Wis. 2d 571, ¶20. Assertions that he could have "inspired" counsel and participated more fully are too vague to establish prejudice. We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶25 Next, Sanicki alleges that trial counsel failed to object to improper, prejudicial hearsay evidence, improper leading questions and to other prejudicial questions. The offending statements, according to Sanicki, involved Behnke's account of the events and his reasons for initially confessing to the crime. Counsel testified at the ***Machner*** hearing that he did not object to certain statements because they were consistent with the defense that Behnke, not Sanicki, was the shooter. Testimony from Behnke's parents that Behnke told them that Sanicki shot Smith was not objectionable as hearsay because those statements were consistent with Behnke's trial testimony. *See* WIS. STAT. § 908.01(4)(a)2. Similarly, a police investigator's statements were not hearsay because they were not offered for the truth of the matter asserted but to set the stage for the investigator's next actions. *See* § 908.01(3).

¶26 Sanicki gives only one example of the "many" leading questions that counsel allegedly ignored. Jason Dunkes testified that Behnke confided in him that the pair had killed Smith and that Sanicki was the shooter. Dunkes testified that when Sanicki learned of the disclosure, Sanicki gave Behnke "a bad look" and told Behnke he should not have told Dunkes. The prosecutor asked Dunkes to elaborate about the "bad look." Dunkes replied:

> A. Just the look was, you know, it was a straight, pretty much straight face, but you could see in his eyes, you know, he was mad or whatever.
>
> Q. You've heard that expression if looks could kill?
>
> A. Yeah.
>
> Q. Is that the kind of look you saw?
>
> A. Yeah.

¶27 Sanicki complains that the failure to object allowed him to be characterized as a killer. In the context of the five-day, twenty-five-witness trial, the failure to object does not undermine our confidence in the outcome.

¶28 Sanicki next briefly asserts that trial counsel failed to obtain a ruling on an objection made during closing arguments. The prosecutor stated that Mark Sanicki testified that Behnke and Sanicki got a gun from Sanicki's father's house three or four months prior to July 1991. Smith was murdered in May and his body was found in July. Counsel objected that it was a fact not in evidence. Mark actually had testified that Behnke and Sanicki had retrieved the gun "in winter."

¶29 Argument on matters not in evidence generally is improper. *See* ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980). This claim still fails. After counsel objected, the prosecutor continued: "In any event, [Mark] testified that sometime prior these guys were over there to pick up a gun

and there was only one time that this ever occurred, and when it did occur, the two of them were together." Further, the content was not otherwise inflammatory or prejudicial and Behnke had testified that he and Sanicki got the gun from the Sanicki home the night of the murder. Inconsistent evidence regarding precisely when before the murder the two obtained the weapon does not shake our confidence in the reliability of the trial.

¶30 Sanicki next complains that trial counsel was ineffective for failing to object to "many incidents" of prosecutorial misconduct, such as introducing improper character evidence and making improper remarks during closing arguments.[4] Even if error is conceded simply for the sake of argument, the cited instances, singly or together, are fatally undeveloped in terms of prejudice. Sanicki wholly fails to establish that but for the claimed error the result of the proceeding would have been different. *See* ***Thiel***, 264 Wis. 2d 571, ¶20.

¶31 In sum, we reject Sanicki's ineffective assistance claim in its entirety. Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91.

¶32 Shifting gears to the alleged trial court errors, Sanicki argues that he was denied a fair trial because the court failed to grant him a seventh peremptory strike, allowing the seating of "at least two biased jurors"; failed to sequester

[4] Sanicki realleges these same claims under the rubric of prosecutorial misconduct. We will not address them from that standpoint except to say that he cannot complain after the fact about the admission of evidence, *see* ***State v. Mayer***, 220 Wis. 2d 419, 430, 583 N.W.2d 430 (Ct. App. 1998), or the prosecutor's closing argument, *see* ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717, when he did not make contemporaneous objections.

rebuttal witnesses; made several allegedly erroneous evidentiary rulings and sustained certain objections.

¶33 We already have concluded that any error relating to the overlooked peremptory strike was harmless and rejected his claim of juror bias. Cloaking the argument in new language does not change our conclusion. The remaining points Sanicki raises all are addressed to the sound discretion of the trial court, and our review of the record reveals no erroneous exercise of that discretion.

¶34 Contending that the real controversy—the identity of the shooter—was not fully tried, Sanicki next seeks a new trial in the interest of justice. *See* ***State v. Von Loh***, 157 Wis. 2d 91, 102, 458 N.W.2d 556 (Ct. App. 1990); *see also* WIS. STAT. § 752.35. As noted, at least twenty-five witnesses testified at the five-day trial. Sanicki has not persuaded us that the jury either was not given an opportunity to hear important testimony bearing on an important issue in the case or had before it improperly admitted testimony or evidence that obscured a crucial issue. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 400, 424 N.W.2d 672 (1988). This is not an "exceptional case[]" that compels use of our discretionary reversal power. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469.

¶35 Sanicki next contends that insufficient evident supported the verdict, arguing that there is "no way" a reasonable jury could have returned a verdict of guilty. Our review of a sufficiency-of-the-evidence claim is extremely narrow. We may not substitute our judgment for the jury's "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Poellinger***, 153 Wis. 2d at 507. The evidence here was not

incredible as a matter of law and the jury could have drawn the appropriate inferences from it to find the requisite guilt. We could not overturn the verdict even had Sanicki persuaded us that the jury should not have found guilt based on the evidence before it. *See* ***id.***

¶36 Lastly, we reject Sanicki's claim that his sentence is excessive. Sanicki was sentenced to life in prison with a parole eligibility of January 1, 2075, when he will be 103 years old. Citing ***Solem v. Helm***, 463 U.S. 277, 284 (1983), Sanicki argues that the sentence violates the Eighth Amendment's prohibition on disproportionality. We disagree.

¶37 Our supreme court has noted that the United States Supreme Court's decision in ***Harmelin v. Michigan***, 501 U.S. 957 (1991), casts serious doubt on the validity of ***Solem***'s proportionality analysis for non-death penalty cases. *See* ***State v. Borrell***, 167 Wis. 2d 749, 776-77, 482 N.W.2d 883 (1992), *overruled on other grounds by* ***State v. Greve***, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

¶38 Regardless, Sanicki does not show what is disproportional about his parole eligibility date. He was found guilty of first-degree murder, a Class A felony, the penalty for which was life imprisonment. *See* WIS. STAT. §§ 940.01(1) and 939.50(3)(a) (1991-92). Sanicki has no legal or constitutional right to parole. *See* ***State v. Lindsey***, 203 Wis. 2d 423, 440, 554 N.W.2d 215 (Ct. App. 1996). By legislative grant, his parole eligibility date was a matter within the trial court's discretion. *See* WIS. STAT. § 973.014 (1991-92). In sentencing him, the court stated: "By his brutal act Mr. Sanicki has deprived Mike Smith of his life. For such an atrocious act he deserves no less, that is[,] to be deprived of freedom for the rest of his life." The court concluded that "[l]ife, Mr. Sanicki, means life."

¶39 Sanicki also argues that his sentence reflects a misuse of discretion because the court overemphasized the gravity of the crime. After considering the nature of the offense, the character of the defendant and the protection of the public, the weight given a particular factor in a particular case is for the trial court, not this one, to determine. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 281-82, 251 N.W.2d 65 (1977).

¶40 The court found that Sanicki was a threat to the community because he took the lead in murdering Smith. The court found that Sanicki obtained the gun, put boards on the wall behind Smith's head to keep the shot from getting embedded in the wall, put the gun to Smith's throat and pulled the trigger, all for the "poor, poor reason" that he did not want Smith staying at his apartment. The court termed the killing a "senseless, irrational, and inhuman act [that] show[ed] a complete and total disregard for the value of human life." Given our strong policy against interference with the court's sentencing discretion, even if we might have reacted differently to the same facts and circumstances, that by itself is not enough to warrant a determination that the trial court erroneously exercised its discretion. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 188, 233 N.W.2d 457 (1975). We see no reason to disturb the sentence.

*By the Court*.—Judgment and order affirmed.

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