COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2281-CR **Cir. Ct. No. 2010CF744**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE LAMAR RICHARDSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Jimmie L. Richardson, Jr., appeals from a judgment of conviction, entered upon a jury's verdict, on one count of second-degree reckless homicide. Richardson also appeals from an order denying his

postconviction motion. He claims that trial counsel was ineffective for not attempting to remove a particular juror from the panel on bias grounds, and that the trial court erroneously allowed the State to introduce other acts evidence at trial. We reject Richardson's assertions and affirm the judgment and order.

BACKGROUND

¶2 On February 8, 2010, police were dispatched to an apartment building for a welfare check. Upon arrival, they found Richard Bohannon in the boiler room, wearing only a t-shirt and baseball cap. Bohannon was lying in a puddle of water, bleeding from the mouth, rocking back and forth, and generally unresponsive to officers. He was taken to the hospital, where he was treated for head injuries and frostbite, but his condition deteriorated and Bohannon died on February 15, 2010.

¶3 Anna Johnson, a tenant of the building, told police that on February 7, 2010, she had encountered Bohannon and two others she did not know in the hallway. The strangers told her Bohannon was drunk and had lost his keys, and they did not know which apartment was his. Johnson called Richardson, the building manager, to report that Bohannon needed assistance. Subsequently, Johnson heard Richardson tell Bohannon that he was "tired of" Bohannon. She said that Richardson was "in a rage," and she saw him slam Bohannon repeatedly into a wall and kick and throw him down some stairs. The medical examiner reported that Bohannon died from "multiple blunt force injuries including abrasion of the head, subdural hemorrhage, rib fractures and a skull fracture." Richardson was charged in an amended information with second-degree reckless homicide for Bohannon's death.

¶4 The State filed a motion *in limine*, seeking to present other acts evidence from two witnesses who saw Richardson in both verbal and physical altercations with Bohannon on February 5, 2010. The trial court granted the State's motion after briefing.[1] The case was tried to a jury, which convicted Richardson. The trial court sentenced Richardson to nine years' initial confinement and five years' extended supervision.

¶5 Richardson filed a postconviction motion. He claimed ineffective assistance of counsel and requested a ***Machner***[2] evidentiary hearing. Richardson claimed that one of the jurors was biased, and trial counsel should have taken steps to have the juror stricken from the panel. The circuit court ordered briefing, but ultimately denied the motion as insufficiently pled.[3] Additional facts will be discussed below as necessary.

DISCUSSION

I. Juror Bias/Ineffective Assistance of Trial Counsel

¶6 In the postconviction motion, Richardson alleged that "one of the jurors who sat on [the] jury was biased and should have been stricken from the jury panel, but was not." Juror number 12, Gregory G., had indicated that his niece works for the sheriff's department, he thought in the jail. He indicated that he did not speak with his niece personally about her job but did sometimes speak

[1] The Honorable Kevin E. Martens granted the State's motion *in limine*, presided over trial, and imposed Richardson's sentence.

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

[3] The Honorable Jeffrey A. Wagner, as successor to Judge Martens' calendar, reviewed and denied the postconviction motion.

with her father, his brother, about it. Defense counsel asked Gregory G. whether hearing "stories back about something interesting or strange things that happened to your niece" might "affect how you view this case or affect your ability to be fair to the State and to Mr. Richardson[.]" Gregory G. responded, "I don't know. I guess it would depend on the case. I don't know. I don't know what to tell you on that." Richardson claims that this answer shows Gregory G. was both objectively and subjectively biased.

¶7 "If a juror is not indifferent in [a] case, the juror shall be excused." WIS. STAT. § 805.08(1) (2011-12).[4] There are three types of bias that may result in a juror's impartiality: statutory, subjective, and objective. *See* ***State v. Mendoza***, 227 Wis. 2d 838, 848, 596 N.W.2d 736 (1999). Richardson concedes that there is no statutory bias concern in this case.

¶8 Subjective bias "'is revealed through the words and the demeanor of the prospective juror' and 'refers to the prospective juror's state of mind.'" ***State v. Lindell***, 2001 WI 108, ¶36, 245 Wis. 2d 689, 629 N.W.2d 223 (citation omitted). "A prospective juror is subjectively biased if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have." ***Mendoza***, 227 Wis. 2d at 849. A circuit court is in the best position to evaluative subjective bias, so we review its findings under a clearly erroneous standard. ***Lindell***, 245 Wis. 2d 689, ¶36.

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶9 Objective bias acknowledges "that in some cases bias can be detected 'from the facts and circumstances surrounding the prospective juror's answers' even though he or she pledges impartiality." ***Id.***, ¶38 (citation omitted). "A prospective juror is objectively biased if 'a reasonable person in the prospective juror's position objectively could not judge the case in a fair and impartial manner.'" ***Mendoza***, 227 Wis. 2d at 850 (citation omitted). A question of objective bias presents a mixed question of fact and law. *See* ***id.***

¶10 However, "a defendant waives an objection to a juror's bias if no motion is made to the trial court to remove the juror for cause." ***State v. Brunette***, 220 Wis. 2d 431, 442, 583 N.W.2d 174 (Ct. App. 1998). Richardson did not move to strike Gregory G. from the jury panel, nor did he exercise a peremptory challenge to remove him. Consequently, Richardson may only challenge the juror through an ineffective assistance of trial counsel claim, based on trial counsel's failure to object to Gregory G.'s presence on the panel. *See* ***id.*** at 445.

¶11 The requirements for showing ineffective assistance of counsel are well established. A defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "Whether counsel was ineffective is a mixed question of fact and law." ***Id.***, ¶19. The defendant must show both elements of the test, and we need not address both prongs if the defendant fails to make a sufficient showing on one of them. *See* ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. Further, a "hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Review of sufficiency is constrained to "the four corners of the document itself[.]" ***Id.***, ¶23.

¶12 In the context of an ineffective-assistance claim, the prejudice prong of a juror bias issue presents as a question of whether counsel's performance resulted in the seating of a biased juror. *See* ***State v. Koller***, 2001 WI App 253, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838. Thus, Richardson would need "to show that if his trial counsel had asked more or better questions [during voir dire], those questions would have resulted in the discovery of bias on the part of" the allegedly biased juror. *See* ***id.***, ¶15.

¶13 The circuit court here noted that Richardson's postconviction motion failed to sufficiently allege prejudice. We agree. We also conclude that the motion fails to sufficiently allege deficient performance, as the motion does not actually demonstrate any juror bias. The salient paragraph of the motion alleges:

> Here, it is clear that juror 12 did not know if he could be fair in Mr. Richardson's case. When asked whether he could be fair, juror 12 indicated that he did not know, and furthermore, did not know what to further tell [trial counsel] on that issue…. There were no follow-up questions to this response, furthermore. Juror 12 was impaneled on the jury. A verdict of guilt was returned against Mr. Richardson. Juror 12 was subjectively biased. Additionally, Juror 12 was objectively biased based on the questions and responses cited above clearly indicate that retaining this juror on the jury gave the appearance that the defendant could not have a fair trial…. As such, juror 12 should have been stricken from the jury panel.

Everything about this paragraph, however, is conclusory, and the motion contains no meaningful analysis of the facts relative to the applicable legal standards.

¶14 A juror is subjectively biased if his answers to questions reveal an unwillingness to set aside prior knowledge or opinion. *See* ***State v. Oswald***, 2000 WI App 2, ¶19, 232 Wis. 2d 62, 606 N.W.2d 207. Gregory G.'s uncertainty about his ability to be fair to either side neither identifies his preconceptions nor

indicates an unwillingness to set them aside. Indeed, "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." ***State v. Erickson***, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999). Further, the mere fact of a guilty verdict, absent more, does not automatically allow a conclusion of subjective juror bias.

¶15 Objective bias comes into play "when a reasonable person in the prospective juror's position objectively could not judge the case in a fair and impartial manner." ***Id.*** at 775. Generally, though, this means that the juror must show "an ingrained attitude about the particular subject of the case" or some connection between the bias and the theory of the case. *See* ***Oswald***, 232 Wis. 2d 62, ¶26. Gregory G.'s uncertainty does not, by itself, show an ingrained attitude about the case and, thus, can hardly be said to show objective bias.

¶16 We are, therefore, unpersuaded that the motion sufficiently alleged bias of any type, which means that trial counsel may not have had a basis for moving to strike Gregory G. from the jury. *See* ***Brunette***, 220 Wis. 2d at 442. "It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶17 Further, as the circuit court noted, the postconviction motion does not adequately explore the prejudice prong. In particular, the motion does not allege any follow-up questions that trial counsel might have asked Gregory G., nor does it indicate what his answers might have been. In his brief to this court, Richardson contends that "no follow-up questions were necessary as juror #12 clearly said he did not know if he could be fair."

¶18 Given, as we have explained, that Gregory G.'s answer is not *prima facie* evidence of bias, Richardson's contention in his brief is inadequate. To demonstrate prejudice, Richardson has to show that counsel allowed a biased juror to be seated and to accomplish this, he must demonstrate that "more or better questions" in *voir dire* would have led trial counsel to uncover the juror bias and to object. ***Koller***, 248 Wis. 2d 259, ¶15.

¶19 For example, after Gregory G. answered about his ability to be fair, trial counsel asked, "You could relate … two or three of those stories [about "interesting or strange things that happened" to the niece] to us right now I suppose?" Gregory G. answered, "Possibly." Counsel responded, "Stick it in your mind. Okay, that's all I want to know." Thus, trial counsel could have explored those two or three stories for similarities to Richardson's case and examine whether any similarities caused Gregory G. to have a preformed opinion of this case. Trial counsel also could have inquired why Gregory G. thought his niece's work in the jail might prevent him from being fair. Further, it seems self-evident that counsel could have explored the potential utility of jury instructions in helping Gregory G. overcome his uncertainty and whether those instructions could help him be fair and impartial.

¶20 In light of the conclusory nature of the postconviction motion, we discern no error in the circuit court's denial of the motion without an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9 (circuit court may deny postconviction motion without a hearing if motion is insufficient or conclusory).

II. Other Acts Evidence

¶21 Richardson also contends that the trial court erroneously admitted other acts evidence. "[E]vidence of other crimes, wrongs, or acts is not admissible

to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2)(a). The rule "does not exclude the evidence when offered for other purposes," including proof of motive or absence of mistake or accident. ***Id.***

¶22 The admission of other acts evidence is governed by a three-step analytical framework: (1) is the other acts evidence offered for an acceptable purpose; (2) is the other acts evidence relevant; and (3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice or other particular concerns? *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We review a circuit court's decision to admit other acts evidence for an erroneous exercise of discretion. ***Id.*** at 780.

¶23 The other acts evidence in this case was the testimony of two witnesses. Christine Roby had been visiting Bohannon at his apartment on February 5, 2010, when Richardson pounded on the apartment door. When Bohannon answered, Roby heard Richardson tell him to turn down his music or Richardson would "fuck him up." The two men argued and cursed at each other. Richardson left and returned a few minutes later, repeating the threat. When Roby was ready to leave, Bohannon attempted to escort her from the building, but they encountered Richardson and four other men. One of the men grabbed Bohannon from behind and held him while Richardson punched him in the face. Roby fled out the door, saying she would call police.

¶24 Darin Clay, who was temporarily staying with Bohannon when Roby had visited, testified similarly about Richardson coming to the apartment. After Bohannon took Roby outside, Clay heard "tussling" in the hall. When he stepped out into the hallway, he saw Bohannon on the ground near the building's

front door, trying to get up. Clay unsuccessfully attempted to help him up when one of the men told Clay to get out of the building or he would suffer Bohannon's fate. Clay fled the building.

¶25 The trial court had allowed the testimony, concluding that it was properly admitted for motive and context, it was probative, and it was not unduly prejudicial. On appeal, Richardson complains that this evidence was "simply another way of saying that Mr. Richardson had a propensity toward violent behavior, which is prohibited character evidence." We disagree.

¶26 Other acts evidence "is permissible to show the context of the crime and to provide a complete explanation of the case." ***State v. Hunt***, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771. As the State explained, the other acts evidence helped to provide a context for Richardson's seemingly disproportionate reaction to Bohannon losing his keys: in particular, it establishes "background on Richardson's and Bohannon's relationship as a frustrated building manager and a difficult tenant." It also helped to illustrate motive by way of showing Richardson's ongoing frustration with "problem tenant Bohannon." *See* ***State v. Cofield***, 2000 WI App 196, ¶12, 238 Wis. 2d 467, 618 N.W.2d 214. We therefore agree with the trial court: the State met its burden to show an acceptable purpose for the evidence. *See* ***Sullivan***, 216 Wis. 2d at 785.

¶27 We also agree that the State satisfactorily established the relevance of the other acts evidence. *See* ***Hunt***, 263 Wis. 2d 1, ¶53. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. "'The measure of probative value in assessing relevance is the similarity between the charged

offense and the other act.'" ***Hunt***, 263 Wis. 2d 1, ¶64 (citation omitted). "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other act and the alleged crime." ***Id.*** (citation omitted). The trial court had noted the events here were close in time. We agree. We also think the similarities in place and circumstance are self-evident in light of our discussion herein.

¶28 On the final prong, probative value versus prejudice, the opponent of the evidence bears the burden of showing that the probative value of the other acts evidence is substantially outweighed by the risk of unfair prejudice. ***Id.***, ¶53. We conclude, like the trial court did, that Richardson failed to meet this burden. There must not be simply some prejudice but, rather, *unfair* prejudice. *See* ***id.***, ¶69. While Richardson expresses concern that the jury might have improperly used the other acts evidence as propensity evidence, it would not have been unfairly prejudicial in this case. The theory of defense was evidently not that Richardson had not hit Bohannon. Instead, Richardson offered competing expert medical examiner testimony in an attempt to show that some other event had occurred between the fight Johnson witnessed on February 7 and the police welfare check the next morning, and that it was this intervening event, not Richardson's beating, that killed Bohannon. Given the ***Sullivan*** analysis, we conclude that the trial court properly exercised its discretion in admitting the other acts evidence.

By the Court.—Judgment and order affirmed.

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