COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP2089-CR **Cir. Ct. No. 2012CF2730**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN SPOONER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. John Spooner appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree intentional homicide with use of a dangerous weapon. He claims that the trial court erred in refusing to change venue; that insufficient evidence supports the jury's finding of

guilt; that the trial court erred in refusing to give a particular jury instruction; and that the real controversy was not fully tried. We reject these arguments and affirm the judgment.

Background

¶2 On or about May 29, 2012, Spooner's home was burglarized and four shotguns were taken. Spooner believed his neighbor, thirteen-year-old Darius Simmons had been the burglar. However, there was insufficient evidence of the perpetrator's identity, so police were unable to make an arrest.

¶3 On May 31, 2012, after complaining to an alderman about the way police handled the burglary investigation, Spooner confronted Simmons as Simmons was bringing in his family's garbage can. Spooner told Simmons he wanted his stuff back; Simmons denied having any of Spooner's property. Simmons' mother, standing at her door, saw Spooner standing in front of her son, pointing a gun at him. She asked Spooner why he had the gun on Simmons; Spooner said he wanted his stuff back. Simmons was not armed. Spooner told Simmons' mother to call 911 just before shooting Simmons from a distance of six to twelve feet. Simmons fled towards a park but collapsed when he ran into a telephone pole. At least four other witnesses observed Spooner shoot Simmons and testified accordingly at trial.

¶4 When arrested, Spooner did not deny shooting Simmons; in fact, he told police, "Yeah, I shot the kid." He admitted shooting twice before the gun jammed. The shooting was also captured on Spooner's home video surveillance system. It showed him shooting Simmons, then stopping to pick something up off the ground and put it in his pocket. When Spooner was taken into custody, police retrieved a shell casing from the pocket.

¶5 Spooner was charged with one count of first-degree intentional homicide with use of a dangerous weapon. He pled not guilty and not guilty by reason of mental disease or defect. Prior to trial, Spooner moved for a change of venue or, alternatively, to draw a jury panel from another county, asserting that because of the media attention to the case, he did not believe he could receive a fair trial in Milwaukee County or with a Milwaukee County jury. The trial court denied the motion.

¶6 At the guilt phase[1] of the trial, the jury was given an instruction on the lesser-included offense of first-degree reckless homicide; Spooner had argued the video showed causation, but not intent. The jury, however, convicted him of first-degree intentional homicide with use of a dangerous weapon as charged.

¶7 During the responsibility phase of the trial, Spooner presented testimony from Dr. Basil Jackson. Jackson testified that Spooner had a rage within him that resulted in a temporary loss of control. In the heat of the moment, Spooner's "hypomanic personality" erupted, giving him a mental disease in that moment and causing him to lose the ability to differentiate between right and wrong. In short, Jackson testified that he believed Spooner was suffering a mental disease at the time of the shooting.

¶8 Dr. Deborah Collins and Dr. Robert Rawski testified for the State. Collins testified that she did not believe Spooner suffered a mental disease, nor was she aware of any ailment that presented itself in flashes like Jackson

[1] When a defendant pleads not guilty by reason of mental disease or defect, the trial is bifurcated. The jury first hears evidence relating to the defendant's guilt or innocence. If it finds guilt, the jury then hears evidence relating to the defendant's mental responsibility. *See* ***State v. Magett***, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W.2d 42.

described. Rawski also believed that Spooner did not have a mental disease—he may have been angry, but anger is not a mental disease. Rawski also testified that "hypomanic personality" is not listed in the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS "because it is not a mental disorder."

¶9 Spooner asked the trial court to give an instruction, based on an instruction from the state of Iowa, that a "mental disease or defect need not exist for any specific length of time or duration in order for" the jury to find he suffered a mental disease or defect at the time of the shooting. The trial court declined to give the requested instruction, instead utilizing the pattern Wisconsin instruction. The jury concluded Spooner did not have a mental disease or defect at the time of the shooting. The trial court sentenced the then seventy-six-year-old Spooner to life imprisonment without eligibility for extended supervision.

Discussion

I. Change of Venue

¶10 Spooner first argues that the trial court erroneously exercised its discretion when it denied his motion for a change of venue. He asserts that "pretrial news … was extremely prejudicial and judgmental" so it is "reasonably probable that inherent community prejudice existed" against him and the trial court should have changed venue or drawn a jury from outside Milwaukee County.[2]

[2] When arguing the motion, Spooner suggested drawing a jury from adjacent counties, either Waukesha or Ozaukee.

¶11 "The defendant may move for a change of the place of trial on the ground that an impartial trial cannot be had in the county."[3] WIS. STAT. § 971.22(1). A motion to change venue is committed to the trial court's discretion. *See* ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994).

¶12 While we are deferential to the trial court's ruling as an exercise of discretion, "we must 'make an independent evaluation of the circumstances'" and "'determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or impaneled jurors.'" ***State v. Messelt***, 178 Wis. 2d 320, 327-28, 504 N.W.2d 362 (Ct. App. 1993) (citations omitted).

> In making our evaluation, we consider the following factors: (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Albrecht, 184 Wis. 2d at 306.

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[3] Drawing a jury from another county is an alternative to changing venue. *See* WIS. STAT. § 971.225(1) (2015-16). However, a prerequisite for an out-of-county jury is a finding that grounds exist for a change of venue. *See* WIS. STAT. § 971.225(1)(b) (2015-16). Because we affirm the trial court's conclusion that there were no grounds for a change of venue, we not do reach the question of whether an out-of-county jury was an appropriate alternative.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶13 Spooner focuses on only three of the ***Albrecht*** factors. He contends "[l]ocal and national media inflamed the public against [him]," "[t]he timing and specificity of the publicity adversely impacted [him]," and he "was charged with the most serious crime under Wisconsin law."[4]

¶14 The pretrial motion included thirty-one different press pieces as exhibits. Approximately seventeen of the pieces referenced in the pretrial motion came from three Milwaukee-based media services: the MILWAUKEE JOURNAL SENTINEL and the websites for two local television stations. Three pieces came from Wisconsin-based sources: the websites for radio station WTAQ in Green Bay and the WISCONSIN LAW JOURNAL, which sourced its article from the Associated Press. The remaining pieces came from apparently national or international sources, including the websites of the BALTIMORE SUN in Maryland and THE GUARDIAN in the United Kingdom, THE HUFFINGTON POST website, and websites like Tumblr and BlogSpot. As the State aptly notes, when an event garners national and international attention, it decreases the likelihood that jurors from other venues have not been exposed to information about the crime.[5]

¶15 Some of the exhibits include or are sections of websites where readers can leave comments, some of which were inflammatory. However, the comments may be from anyone, anywhere. Absent more information, those comments are not demonstrative of the likely difficulty in impaneling a local jury.

[4] He also argues, under the heading of "other reasons," that this case "became the poster case for race relations and hate crimes and the jury knew all this before the trial."

[5] We note that, as a simple function of geography, Waukesha and Ozaukee Counties are part of the same media market as Milwaukee County. It is therefore not evident how Spooner believes news coverage could taint the jury pool in Milwaukee County but not adjacent counties.

¶16 On appeal, Spooner does not identify which media coverage was inflammatory. He simply characterizes some "editorials and commentaries" as "rabble-rousing." His brief, however, contains no record citations to any particularly inflammatory coverage, nor does he quote a single inflammatory word in his appellate brief. While this court does not search the record for facts to support a party's arguments, *see* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App ¶36, 293 Wis. 2d 668, 721 N.W.2d 127, a cursory review of the motion exhibits reveals that much of the supposed inflammatory coverage was instead factual and objective. Purely informational coverage does not necessarily create prejudice. *See* ***Turner v. State***, 76 Wis. 2d 1, 27-28, 250 N.W.2d 706 (1977).

¶17 The trial court heard Spooner's motion in January 2013. Most of the documents attached to the motion were published within about a month of the May 29, 2012 offense. Trial did not commence until over a year after the shooting, in July 2013. Coverage removed from the time of trial means the impact of that coverage will have dissipated. *See* ***id.*** at 28. Further, the State was not alleged to have participated in any of the adverse publicity, *see* ***Albrecht***, 184 Wis. 2d at 306, but Spooner himself wrote a letter to and was interviewed by the MILWAUKEE JOURNAL SENTINEL.

¶18 Spooner makes no claims that the pretrial publicity made it difficult to select a jury or that any jurors were excessively, prejudicially, or even passingly familiar with any of the pretrial publicity. The State, however, points out that multiple steps were taken to ensure a fair jury was ultimately impaneled: a pretrial questionnaire was sent to prospective jurors; the parties were permitted extensive *voir dire*, both with the potential jurors as a group and with individuals as warranted; several potential jurors were dismissed for cause; and both sides

exercised seven peremptory challenges. Further, when the State objected to the jury's underrepresentation of African-Americans, defense counsel responded that the jury had been selected impartially.

¶19 We are therefore unpersuaded that a change of venue was necessary. No particular community prejudice has been shown. The trial court appropriately exercised its discretion when it denied the motion.

II. Sufficiency of the Evidence

¶20 A person commits first-degree intentional homicide if he "causes the death of another human being with intent to kill that person[.]" *See* WIS. STAT. § 940.01(1)(a) (2011-12). Spooner disputes the State's claim that he intended to kill Simmons. He asserts that his conduct was reckless at most, as demonstrated by his admission that "Yeah, I shot the kid." Spooner claims this admission shows his actions "were not subject to any mental investment prior to their commission."

¶21 We view the evidence in the light most favorable to the verdict. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence, we accept the one drawn by the jury. *See* ***id.*** We overturn the verdict only if the evidence, viewed most favorably to the State and the conviction, is inherently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. *See* ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982).

¶22 "[W]hen one intentionally points a loaded gun at a vital part of the body of another and discharges it, it cannot be said that he did not intend the natural, usual, and ordinary consequences." ***State v. Kramar***, 149 Wis. 2d 767, 793, 440 N.W.2d 317 (1989). At least four witnesses saw Spooner point his gun

at Simmons from six to twelve feet away. Simmons' mother testified specifically that Spooner was pointing his gun at Simmons' chest. Another witness who had been walking by testified that he saw a man—presumably Spooner—shoot a boy and that the man was pointing his gun at the boy's chest or abdomen. The medical examiner testified that Simmons died from a gunshot wound to his chest.

¶23 Additionally, Simmons' mother testified Spooner told her to call 911 before the shooting, suggesting Spooner knew precisely what he was about to do. Spooner also told police he had shot twice before the gun jammed, which suggests he would have shot Simmons additional times but for the malfunctioning weapon. Further, Spooner made a point to retrieve at least one of the shell casings—that is, to remove physical evidence from the scene linking him to the shooting.

¶24 We are satisfied that there is more than enough evidence for the jury to have concluded Spooner intended to kill Simmons.

III. Jury Instructions

¶25 Spooner next complains that the trial court erred by failing to issue the "Iowa" jury instruction during the responsibility phase of his trial. In Wisconsin, in the responsibility phase of a trial, a jury is typically asked two questions: (1) whether, at the time the crime was committed, the defendant had a mental disease or defect and (2) whether, as a result of the mental disease or defect, the defendant lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law. *See* WIS JI—CRIMINAL 605 (2011). Spooner wanted an additional instruction that would have stated, "The term 'mental disease or defect' relates to the defendant's state of mind at the time of the commission of the crime. The mental disease or defect need not exist for any specific length of time or duration

in order for you to answer 'yes' to the first question." This requested instruction reflects Spooner's defense theory "that his mental condition did not have duration."

¶26 The trial court ruled simply that it would not give the instruction. Spooner complains that the trial court failed to engage in an exercise of discretion before denying his request to supplement the standard Wisconsin jury instruction.

¶27 The trial court "'has broad discretion in deciding whether to give a particular jury instruction.'" ***State v. Hubbard***, 2008 WI 92, ¶78, 313 Wis. 2d 1, 752 N.W.2d 839 (citation omitted). A trial court "properly exercises its discretion when it fully and fairy informs the jury" of the applicable law. *See* ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. If a given instruction does not accurately state the law, the trial court has erroneously exercised its discretion. *See* ***id.***

¶28 Spooner's proposed instruction was adapted from an Iowa jury instruction on the insanity defense. *See* Iowa Crim. Jury Instr. No. 200.10 (2004). Iowa's insanity defense, *see* IOWA CODE § 701.4 (2016), derives from the ***M'Naghten*** rule. *See* ***Iowa v. Kehoe***, 804 N.W.2d 302, 306 (Iowa Ct. App. 2011); ***M'Naghten's Case*** (1843), 10 Clark & F. *200, *210, 8 Eng. Rep. 718 (H.L.). Wisconsin initially adhered to the ***M'Naghten*** rule regarding the insanity defense. *See* ***State v. Esser***, 16 Wis. 2d 567, 593-99, 115 N.W.2d 505 (1962); WIS. STAT. § 957.11 (1967-68). However, we later rejected the ***M'Naghten*** rule in favor of the test set forth in the American Law Institute's model penal code. *See* ***State v. Shoffner***, 31 Wis. 2d 412, 425-27, 143 N.W.2d 458 (1966). The ALI test was eventually codified in WIS. STAT. § 971.15. *See* ***State v. Koput***, 142 Wis. 2d 370, 395-96, 418 N.W.2d 804 (1988); *see also* 1969 Wis. Act 255, § 55 (repealing most

of Chs. 954-964, including § 957.11), § 63 (creating multiple statutes, including § 971.15 (1969-70). Among important differences, Iowa's code specifies that "[i]nsanity need not exist for any specific length of time before or after the commission of the alleged criminal act." *See* IOWA CODE § 701.4. WISCONSIN STAT. § 971.15(1) does not so specify.

¶29 Spooner complains that the trial court did not "actual[ly] consider whether or not the proposed instruction [was] appropriate." However, the instruction given was the pattern instruction, WIS JI—CRIMINAL 605. Spooner does not claim that the instruction was an improper statement of the law. We therefore discern no erroneous exercise of discretion when the trial court declined to give a jury instruction based on another state's penal code, particularly one with a different origin and different language than the comparable Wisconsin statute.[6] *See* ***Ferguson***, 317 Wis. 2d 586, ¶9.

IV. Whether the Real Controversy was Fully Tried

¶30 Finally, Spooner asserts the real controversy was not fully tried and he is entitled to a new trial in the interest of justice.

> [S]ituations in which the controversy may not have been fully tried … [arise] in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

[6] Nevertheless, the trial court noted that although it was declining to give the Iowa instruction, Spooner was not precluded from arguing that the law does not require a mental disease to exist for any significant time period before or after the event the disease relates to.

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶31 Spooner argues that several key pieces of evidence were not presented to the jury—the first of the two ***Hicks*** scenarios. Specifically, he contends that trial counsel failed to: (1) produce evidence or argue that police manufactured evidence, based on differences in the video that was shown to the jury, which was in color, versus his video surveillance system, which he says was in black and white; (2) introduce the "adequate provocation" defense; and (3) argue that police destroyed evidence of the burglary, which is what made Spooner snap.

¶32 When a defendant "argues that he is entitled to a new trial because counsel's deficiencies prevented the real controversy from being fully tried," we should apply the ***Strickland*** test for ineffective assistance of counsel. *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115; ***Strickland v. Washington***, 466 U.S. 668 (1984). This requires the defendant to show counsel performed deficiently and that the deficiency prejudiced the defense. *See* ***Mayo***, 301 Wis. 2d 642, ¶60.

¶33 As an initial matter, we note Spooner's claims again fail to include citations to the record. Further, even if we assume trial counsel was deficient as Spooner describes, he fails to discuss the prejudice prong of the ***Strickland*** test.[7] We do not develop a party's arguments. *See* ***Industrial Risk Insurers v.***

[7] "The proper test for prejudice … [is] whether '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.'" *See* ***State v. Balliette***, 2011 WI 79, ¶¶21, 24, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted).

American Eng'g Testing, Inc., 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¶34 In any event, Spooner first claims his attorneys "neglected to introduce evidence or even argue that the police manufactured evidence." He believes evidence was falsified because, according to him, the "video shown to the jury is from a different angle than where Spooner had his cameras and the video was in color whereas Spooner's cameras were black and white."

¶35 It is not evident that such a discrepancy exists. Spooner identifies no evidence, other than the assertion in his appellate brief, that the original surveillance recordings were in black and white. There is no indication Spooner pointed out this discrepancy to trial counsel, and Spooner identifies no objections to the video played for the jury, on this or other grounds. No postconviction motion cites to any evidence in the record to support the claim of manufactured evidence.

¶36 As noted, Spooner additionally fails to demonstrate any prejudice: even if the jury would have believed police manufactured evidence, he admitted shooting Simmons, and multiple citizen witnesses saw it happen. Indeed, it is not evident that any video evidence was necessary for the conviction.

¶37 Second, Spooner complains that his trial attorneys "failed to introduce the defense of adequate provocation[.]" He claims "that the victim's burglary and follow-up taunting constituted something which Spooner reasonably believed occurred and which caused Spooner to completely lack any self-control at the time of the shooting."

¶38 "Adequate provocation is an affirmative defense only to first-degree intentional homicide and mitigates that offense to [second]-degree intentional homicide." WIS. STAT. § 939.44(2) (2011-12). "The defense applies if '[d]eath was caused under the influence of adequate provocation as defined in s. 939.44.'" ***State v. Schmidt***, 2012 WI App 113, ¶6, 344 Wis. 2d 336, 824 N.W.2d 839 (quoting WIS. STAT. § 940.01(2)(a) (2009-10)) (brackets in ***Schmidt***).

¶39 "'Adequate' means sufficient to cause complete lack of self-control in an ordinarily constituted person." WIS. STAT. § 939.44(1)(a) (2011-12). "'Provocation' means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death." WIS. STAT. § 939.44(1)(b) (2011-12). A complete lack of self-control is "an extreme mental disturbance or emotional state. It is a state in which a person's ability to exercise judgment is overcome to the extent that the person acts uncontrollably. It is the highest degree of anger, rage, or exasperation." WIS JI—CRIMINAL 1012 (2006). Adequate provocation includes both subjective and objective components. *See* ***Schmidt***, 344 Wis. 2d 336, ¶7. "Once a defendant places an affirmative defense in issue, the State is required to disprove the defense beyond a reasonable doubt." ***Id.***, ¶8.

¶40 We assume without deciding that Spooner satisfies the subjective test for adequate provocation—that he actually believed the provocation occurred and the lack of self-control was caused by the provocation. *See* ***id.***, ¶7. However, he does not make any non-conclusory arguments about why this "provocation" would cause an ordinary, reasonable person to completely lack self-control, or why it was reasonable for him to believe the provocation occurred. *See* ***id.*** That is, there is no reasonable, objective evidence to establish that Simmons stole Spooner's guns, and Spooner does not show that a hunch, even a strong hunch,

that someone was a burglar would move an ordinarily constituted person to completely lack self-control days after the burglary.[8] Because Spooner fails to demonstrate the viability of an adequate provocation defense, he has not shown trial counsel was deficient or prejudicial for failing to raise it.[9]

¶41 Finally, Spooner claims his trial attorneys "failed to introduce their argument that the police destroyed, either negligently or intentionally, evidence of the break-in." This destruction of evidence "created a state of mind … that made Spooner snap …. Spooner reported the burglary and it was as if the police did not care."

¶42 Spooner does not identify where in the appellate record there is any proof to suggest that police destroyed evidence related to the break-in. Spooner's conclusory statement about his perception of police attitude does not constitute adequate appellate argument. We are unconvinced that trial counsel was deficient for failing to introduce speculative, specious arguments. We are equally unpersuaded that the real controversy was not fully tried.

By the Court.—Judgment affirmed.

[8] Indeed, in his conversation with the alderman on the day of the shooting, Spooner reportedly said that "there are other ways of handling things like this," suggesting a certain degree of forethought rather than an uncontrollable action.

[9] Additionally, failure to introduce an adequate provocation defense did not prevent the real controversy from being fully tried. "Adequate provocation" merely mitigates first-degree intentional homicide to second-degree intentional homicide, which, save for proof of an affirmative defense, has identical elements to first-degree intentional homicide, including intent to kill. *See* WIS. STAT. §§ 940.01(1)(a) (2011-12) & 940.05(1)-(2) (2011-12). Thus, the real controversy was fully tried whether or not the question of adequate provocation was introduced.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).