COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3209-CR **Cir. Ct. No. 91-CF-564**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERT J. PRICE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Albert J. Price, Jr., appeals from a judgment convicting him as a habitual offender of two counts of endangering safety, one count of attempted first-degree intentional homicide, five counts of attempted first-degree intentional homicide while armed, and four counts of aggravated battery while armed. He also appeals from an order denying his motion for

postconviction relief. He claims that he was denied due process by the prosecution's failure to disclose exculpatory evidence regarding an expert witness, he was denied the effective assistance of trial counsel, a competency hearing should have been conducted, certain evidence should have been excluded, he should have been permitted postconviction discovery, and that he is entitled to a new trial in the interests of justice because the real controversy was not tried. We reject his claims and affirm the judgment and order.

¶2 The convictions arise out of the events that transpired on June 3, 1991. Price struck a little girl with his truck and continued driving. An off-duty police officer observed the accident and pursued Price's truck. Price then smashed into the back of a vehicle, causing a four-car chain reaction collision. Price exited his vehicle, yelling incoherently and swinging a machete. In the melee which followed, Price swung the machete at and injured at least three persons. Bystanders managed to disarm Price and tackle him to the ground. When police arrived they found it necessary to place Price in leg irons because he was so combative. He continued to struggle with police officers even after arriving at the jail.

¶3 A competency review was requested on the day of Price's first court appearance. The examining doctor concluded that Price was competent to stand trial. Trial counsel waived Price's right to an evidentiary hearing on competency and did not contest the doctor's finding. Price argues that a hearing should have been conducted because the trial court had reasons to doubt his competency before and during the trial. He contends that counsel's waiver was inadequate. However, a personal waiver of the right to an evidentiary hearing on competency is not required. ***State v. Guck***, 176 Wis. 2d 845, 853-54, 500 N.W.2d 910 (1993). The

trial court properly accepted counsel's waiver and made a determination that Price was competent to stand trial.

¶4 Price contends that during trial he had several instances of erratic behavior which should have prompted additional competency proceedings. The cited instances do not rise to the level of suggesting that Price was unable to comprehend the proceedings and assist in his defense. Indeed, two outbursts were directed at the veracity of a witness's testimony and indicated Price's ability to follow the proceeding and comprehend the significance of the testimony. Although Price exhibited confusion when questioned about his decision not to testify, the trial court conducted an adequate colloquy to establish that Price was able to comprehend the significance of his waiver of the right to testify. The trial court later made a finding that Price had been quite involved in his defense as the trial proceeded. A trial court's determination that a defendant is competent to stand trial is afforded deference due to its superior position in being able to observe the defendant. ***State v. Byrge***, 2000 WI 101, ¶44, 237 Wis. 2d 197, 614 N.W.2d 477.

¶5 Price draws our attention to written evaluations that suggest that he had suffered from mental illness in the past. "Although a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to stand trial." ***Id.*** at ¶31. The presence of some mental illness suggests that Price's odd behavior during the trial would not be unusual or even unexpected. In short, we cannot conclude that there was any reason for the trial court to interrupt the trial to conduct a competency hearing.

¶6 Price entered a not guilty by reason of mental disease or defect (NGI) plea. The prosecution presented Dr. Vincent Giannattasio as its expert

during the NGI phase of the trial. Price argues that he was denied due process because the prosecution did not inform him that at the time of trial Dr. Giannattasio was facing a federal indictment charging fifteen counts of Medicaid fraud.

¶7 The prosecution has a duty to disclose to the defense exculpatory and inculpatory evidence that applies to the credibility of a witness. ***State v. Randall***, 197 Wis. 2d 29, 37, 539 N.W.2d 708 (Ct. App. 1995). It is no excuse that the prosecution was unaware of the indictment against Dr. Giannattasio because it is obligated to investigate the records of its witnesses. However, Price did not make a specific request for Dr. Giannattasio's criminal record. A specific request is required to obligate the prosecution to produce a criminal record from a foreign jurisdiction. *See* ***Jones v. State***, 69 Wis. 2d 337, 349-50, 230 N.W.2d 677 (1975). The critical fact is that Dr. Giannattasio was not under an active indictment when the prosecution retained him. The federal indictment was filed May 23, 1991, and dismissed with prejudice on August 5, 1991. Dr. Giannattasio was retained by the prosecution on October 30, 1991, and he testified during the NGI phase on November 13, 1991. That the dismissal of the indictment was being appealed and was ultimately reversed on November 30, 1992, does not change the fact that at the time of trial Dr. Giannattasio was not under indictment. Therefore, Dr. Giannattasio could not have been impeached with the dismissed indictment. "The law in Wisconsin is well established that in a criminal case a witness cannot be impeached by showing an arrest where there is no conviction." ***State v. Cathey***, 32 Wis. 2d 79, 89, 145 N.W.2d 100 (1966). There was no failure to disclose exculpatory evidence.

¶8 Even if there was a failure to disclose this information, it may be considered harmless error. ***Randall***, 197 Wis. 2d at 38. Undisclosed evidence

violates due process only if there is a reasonable probability that if the evidence had been disclosed the result of the trial would have been different. ***State v. Lass***, 194 Wis. 2d 591, 603, 535 N.W.2d 904 (Ct. App. 1995). Although the charges against Dr. Giannattasio were based on fraud, there was no direct link between those charges and Dr. Giannattasio's testimony in this case. Possible financial fraud against the government cannot be equated with a disposition to lie on a professional diagnosis in an unrelated criminal case. Wisconsin has aligned itself with cases holding that unproven allegations of professional wrongdoing, misconduct or negligence unrelated to the case on trial are not the proper subject of impeachment of an expert medical witness. ***State v. Lindh***, 161 Wis. 2d 324, 360, 468 N.W.2d 168 (1991), *rev'd sub nom.* ***Lindh v. Murphy***, 521 U.S. 320 (1997). Moreover, there can be no suggestion that Dr. Giannattasio's testimony was crafted to curry favor with federal prosecutors. "[W]here a witness is himself subject to a prosecution by those who are separate and distinct from those who have called him as a witness, there is no reasonable basis to believe the witness has a motive to curry favor or hope for leniency by virtue of his testimony." ***State v. Lindh***, 161 Wis. 2d at 352. We recognize that on remand from the Supreme Court Lindh's conviction was reversed on the ground that his right to confrontation was violated when he was not permitted to impeach the psychiatrist with evidence that the psychiatrist was being prosecuted for sexual misconduct with patients and was about to lose his medical license and faculty positions. ***Lindh v. Murphy***, 124 F.3d 899 (7th Cir. 1997). However, that reversal does not impair our reliance on ***State v. Lindh***. Reversal was based on the "rosy glow" in which the prosecutor had bathed the psychiatrist by particular focus on the witness's credentials and professional stature. ***Lindh v. Murphy***, 124 F.3d at 901-02. Here, there was no particular emphasis placed on Dr. Giannattasio's credentials. Any error in disclosing the dismissed indictment was harmless error.

¶9 Doctor Robert Drom testified as the court-appointed expert during the NGI phase of the trial. Price argues that the trial court erroneously exercised its discretion in refusing to strike Dr. Drom's testimony because he did not give his opinion to the required degree of medical certainty. He also contends that Dr. Drom's testimony was improper because it rested on the idea that Price was under the influence of drugs or alcohol at the time of the incident, a conclusion not supported by the evidence. He believes Dr. Drom's suggestion that drugs or alcohol played a role in his behavior tainted the jury's impression and was therefore subject to exclusion under WIS. STAT. § 904.03 (1999-2000) as misleading, confusing, irrelevant and prejudicial.

¶10 The admissibility of expert opinion testimony is proper if it assists the jury in understanding the evidence or determining a fact in issue. ***State v. Pittman***, 174 Wis. 2d 255, 267, 496 N.W.2d 74 (1993). Determining whether expert testimony assists the jury is a discretionary decision of the trial court. ***Id.*** at 268. Dr. Drom was unable to conclude whether or not Price suffered from a mental disorder at the time of the incident. His "nonopinion" was stated to be to a reasonable degree of medical certainty. The trial court determined that Dr. Drom's testimony was otherwise helpful to the jury.

¶11 Price's assertion that Dr. Drom's testimony was misleading or confusing because there was no evidence of drugs or alcohol ingested overstates Dr. Drom's testimony. Dr. Drom did not affirmatively state that Price had consumed alcohol or was under the influence of drugs. Dr. Drom indicated that the episode was consistent with a "substance induced psychosis." He explained that Price's state of mind during the incident was much like delirium that can be related to alcohol ingestion or withdrawal. He also explained that an individual previously tolerant to alcohol can suddenly experience a shift in tolerance and

become acutely drunk or develop psychotic symptoms upon the consumption of very little alcohol. The record established that Price was a long-time chronic user of alcohol. Although Price told Dr. Drom that he had not had a drink in the six months preceding the incident, he also indicated that he believed someone put something in his drink the Saturday night before the Monday occurrence. Price also admitted to Dr. Drom some alcohol use over the weekend preceding the incident. Contrary to Price's assertion, the prosecution did not stipulate that there were no drugs in Price's system at the time of the incident. The prosecution merely stipulated that drug tests done two days later were negative. Those tests did not include tests for alcohol (which would have dissipated from Price's system) or marijuana. Dr. Drom's testimony was not vastly removed from the evidence of record so as to be either misleading, confusing or overly prejudicial. The trial court properly exercised its discretion in refusing to strike Dr. Drom's testimony.

¶12 With respect to Dr. Drom, Price also contends that the trial court should have reappointed Dr. Drom during postconviction proceedings so that Dr. Drom could make an evaluation based on evidence he had not received at the time of trial. "[A] defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence." ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). We agree with the State that the reappointment of Dr. Drom was not permissible postconviction discovery when all that was to be accomplished was review of the previous opinion. Price's claim presupposes that Dr. Drom's opinion would change if provided with additional evidence. We conclude later in this opinion that there was no showing that the additional evidence would have changed the result. Thus, Price had no right to

postconviction discovery. Price could have subpoenaed Dr. Drom to obtain his presence at the postconviction hearing. He did not do so.

¶13 Price has a number of claims premised on ineffective assistance of counsel. To establish ineffective assistance of counsel a defendant must show deficient performance and prejudice. ***State v. Byrge***, 225 Wis. 2d 702, 718, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

> The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. In applying this test, we inquire whether, under the circumstances, counsel's acts or omissions were outside the wide range of professionally competent assistance. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. We also must be careful to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.
>
> As to 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.
>
> What occurred at the trial level and what the attorney did or did not do are questions of historical or evidentiary fact. We will not upset the trial court's findings about these matters unless they are clearly erroneous. However, the ultimate conclusion of whether the attorney's conduct resulted in a violation of the defendant's right to effective assistance presents a legal question which we review de novo.

Id. at 719 (citations omitted).

¶14 Price argues that trial counsel should have objected to the appointment of Dr. Drom because Dr. Drom had previously examined Price for an

involuntary commitment proceeding. That proceeding was held in 1985 and resulted in a finding that Price was not mentally ill so as to need confinement. While trial counsel knew of the previous contact with Price, he believed he had no basis for objecting to Dr. Drom's appointment. We agree because Dr. Drom had no recollection of the 1985 encounter with Price and, therefore, could not have harbored prejudicial preconceptions of Price. Furthermore, the examination for involuntary commitment five years earlier had a different focus than the 1991 examination regarding an NGI defense. Price was not prejudiced by counsel's failure to object to Dr. Drom's appointment.

¶15 Price contends that counsel should have moved to strike Dr. Drom's testimony on grounds of surprise and failure to meet the required degree of medical certainty. Trial counsel's motion to strike Dr. Drom's testimony did in fact encompass the theory that Dr. Drom had failed to give his opinion to the required degree of medical certainty. We have already concluded that there was sufficient evidence of record about Price's alcohol use to permit Dr. Drom to explain delirium and to support his testimony. Moreover, since Dr. Drom did not explicitly identify delirium as the cause of Price's behavior, there was no basis to claim surprise. Counsel was not deficient with respect to identifying possible grounds to strike Dr. Drom's testimony.

¶16 We also reject Price's claim that a motion for mistrial should have been made after the trial court struck Dr. Drom's answer to the prosecution's question about reduced responsibility. The concept of reduced responsibility was introduced by the defense during cross-examination of Dr. Drom. The State was entitled to follow up on this point on redirect. The trial court properly sustained the defense objection to a portion of Dr. Drom's testimony. Nothing suggests that the trial court's admonition to the jury to disregard the stricken answer was

inadequate. Juries are presumed to follow admonitory instructions. ***State v. Leach***, 124 Wis. 2d 648, 673, 370 N.W.2d 240 (1985). There was no basis for a mistrial.

¶17 Next, Price contends that trial counsel failed to make an adequate investigation of his mental health records, specifically a finding that Price suffered from paranoid schizophrenia and alcohol abuse. He relates the absence of complete investigation to a failure to provide Dr. Drom medical data necessary to permit Dr. Drom to form an opinion. "A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Price fails to do this.

¶18 Moreover, mental illness does not necessarily translate to a finding of NGI. This is particularly true here where reports were that Price had not demonstrated any signs or symptoms of any significant mental disorder during his stay while being evaluated for competency. Also, trial counsel informed Dr. Drom of the pertinent eyewitness accounts of Price's behavior during the weekend before the crimes. Dr. Drom indicated at trial that those accounts did not change his inability to form an opinion since he could not determine the credibility of the behavioral observations. Giving Dr. Drom the actual reports would not have changed his testimony because he still could not assess the credibility of the reported observations.

¶19 Finally, the claim that trial counsel should have presented evidence found in the police reports during the NGI phase ignores the fact that during the first portion of the trial, the jury heard descriptions of Price's conduct, statements

and behavior. Price's own expert explained how the observations of various people played a role in his determination that Price was NGI. Repetition of this evidence was not necessary.

¶20 During the first phase of the trial, a police officer testified that he found two liquor bottles in the interior portion of Price's vehicle after it was towed to the police impound lot. The bottles were admitted into evidence. Price contends that trial counsel was ineffective for not objecting to the admission of liquor bottles evidence because it was irrelevant. He explains that the evidence was irrelevant because his mental state was not at issue when the evidence was admitted. He also suggests that the evidence was overly prejudicial and permeated the NGI phase of the trial by tainting the jury's perception of him. Finally, he claims that trial counsel should have cross-examined the officer about why the bottles were not discovered until after the vehicle was impounded and on testimony as to the amount of liquid left in the bottles which was inconsistent with the notation in the officer's written report. He believes counsel should have objected to the bottles going back to the jury upon request.

¶21 There was evidence at the first phase of the trial that Price appeared to be intoxicated. One witness indicated that Price appeared to be "wasted." Certainly in the NGI phase of the trial, where Price claims prejudice occurred, there was evidence suggesting that Price had consumed alcohol in the days preceding the event. The liquor bottles evidence was not irrelevant.

¶22 There was no inconsistency in the officer's testimony about the amount of liquid left in the bottles because the officer never testified at trial about the amount left in the gin bottle. He indicated that the bottles were at the same level as the day he found them. The jury itself could observe the amount of liquid

left in the bottles. For this reason, there was no basis to object to the bottles going to the jury room.

¶23 Equally without basis is Price's contention that the officer should have been questioned about the late discovery of the bottles. The officer had not testified that the vehicle had been searched prior to delivery to the impound lot so there was no point to cross-examination addressing an earlier search. Considering all of Price's complaints, we are not persuaded that trial counsel was deficient for not objecting to evidence about the liquor bottles.

¶24 Price contends that trial counsel failed to ask appropriate follow-up questions of a potential juror and to strike or have that juror struck for cause because of subjective bias. *See* ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999) (subjective bias is that "revealed through the words and the demeanor of the prospective juror"). Individual juror voir dire was conducted. Price's argument first looks at the particular juror's indication that she had read newspaper headlines about the incident. The exchange was as follows:

> COURT: [Y]ou indicated that you had read about this case and heard about this case at the time it happened?
>
> JUROR: No, I was sitting in the back, but I just read the paper, the headlines.

Price construes the juror's comment to be that she was reading the newspaper in the courtroom during general voir dire. However, the juror's comment that she was sitting in the back of the room referred to the fact that she was seated in the back of the courtroom when the initial general voir dire questions were asked. Trial counsel explained at the postconviction hearing that no one was reading the newspaper in the courtroom. The juror conveyed to the court that she had read headlines when the incident occurred. Price's attempt to establish bias from this

single comment by the juror is without merit. Moreover, the juror had only read the headlines and she did not recall anything other than what had been stated in the courtroom that morning. Trial counsel followed up with appropriate questions about the juror's exposure to media accounts of the case. She indicated that she had not heard anything about the case since its occurrence some four months earlier. She explained that she had no time to do anything but skim the headlines of the newspaper. There was no reason for counsel to strike this juror based on the comment that she had read newspaper headlines about the incident.

¶25 Price contends that this juror also admitted to having formed an opinion about whether he was NGI. His claim is based on the following exchange:

> COURT: Have you formed any opinion from what you have read about this case as to Mr. Price's mental condition?
>
> JUROR: No, I haven't.
>
> COURT: You haven't made a determination whether he is suffering from a mental disease or defect?
>
> JUROR: He wasn't.
>
> COURT: Whether or not he was at the time of these crimes suffering from mental disease or defect. All right.

¶26 The juror's "he wasn't" comment was her attempt to correct the trial court's misstatement that Price "is," as in current time, suffering from a mental disease. The juror recognized that Price's state of mind at the time of trial was not at issue and that the question should have been stated in terms of "was" Price suffering from a mental disease or defect at the time of the incident. At the postconviction hearing, both trial counsel and the court believed that the transcript was a typographical error. The trial court's finding that the transcript failed to

convey the tenor and inflection in which the witness spoke is not clearly erroneous. As the court noted, had the potential juror indicated such a strong opinion, the court would have followed up immediately. Further voir dire of the witness also confirms that she had not formed an opinion on that point. The event Price bases his claim on simply did not occur as he suggests.

¶27 The next claim with respect to the seating of this juror is that she should have been struck for cause because she expressed a dislike of interracial relationships. Trial counsel pointed out to the juror that prior to the incident Price had been dating a white woman. He asked the juror, "Any thoughts on that?" The juror responded, "to each his own" and indicated a dislike for interracial marriages because of the "Biblical aspect" of having interracial children. There is no link between the juror's dislike of interracial marriage and Price's own interracial dating relationship prior to the incident. The juror affirmatively stated that the fact that Price dated a white woman was no problem for her. There was no basis for trial counsel to conclude that the juror was biased in light of her response. *See* ***Faucher***, 227 Wis. 2d at 731 (juror's unambiguous statement that he or she can act impartially and follow the law weighs against a finding of subjective bias).

¶28 Price also contends that this juror was unable to state that she could be impartial if the evidence showed that Price had run over a young child. This is a misrepresentation of the record. In the following exchange the juror indicated her ability to be impartial even though the charges involved the attempt to run over a child:

> DEFENSE COUNSEL: Have you read anything about the fact that he has been charged with trying to run over a young child?
>
> JUROR: I read that in the paper about the corner of Washington and Hayes, because it was right by Nelsons.

> DEFENSE COUNSEL: What do you think about that having any affect on your ability as a juror?
>
> JUROR: I don't think it will have an affect.

This was a sufficient answer that no bias existed. There was no basis for trial counsel to move to strike the juror for cause.

¶29 The final claim of ineffective assistance of trial counsel pertains to waiver of the competency hearing. Price claims that counsel failed to properly consult him about waiving that hearing. Trial counsel testified that he reviewed the competency report with Price and that they agreed that to contest competency would have been a waste of time. Counsel indicated that he had no reason to claim that Price was incompetent to stand trial. Price's claim that he was not properly advised of what could be challenged during an evidentiary competency hearing is based solely on his own testimony. In concluding that trial counsel was not ineffective in advising Price regarding waiver of the hearing, the trial court implicitly rejected Price's testimony. This was a credibility determination for the trial court to make. ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752, *review denied*, 2001 WI 117, 247 Wis. 2d 1035, 635 N.W.2d 783 (Wis. Sept. 19, 2001) (No. 00-2133-CR). Price was not prejudiced by counsel's conduct because, as we have already concluded, there was no basis to suggest that he was incompetent to stand trial.

¶30 Price makes a final plea for a new trial in the interests of justice on the ground that the real controversy was not tried during the NGI phase of his trial. We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). Price's plea relies on the claims of error already made. We have not found any one claim to be reversible error. A final catch-all plea for discretionary

reversal based on the cumulative effect of non-errors cannot succeed. ***State v. Marshal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). We also reject Price's claim that he was denied a timely and meaningful appeal. We cannot discern how the appeal was prejudiced by the passage of time when the claims of error fall short. Time extensions were granted affording Price every opportunity to develop the record for appeal. Moreover, even though this court would not give appellate counsel complete freedom with briefing page limits and admonished counsel to be succinct and selective in the issues presented, counsel has provided a high level of advocacy for Price.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).