COURT OF APPEALS
DECISION
DATED AND RELEASED

June 21, 1995

No. 94-0731-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY JACKSON,

Defendant-Appellant.

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

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

PER CURIAM. Terry Jackson appeals from a judgment convicting him of being party to the crime of first-degree intentional homicide with a dangerous weapon and an order denying his postconviction motions. We conclude that he received effective assistance of counsel at trial, the trial court did not err in denying his request for a mistrial, the sentence is an appropriate exercise of the trial court's discretion and the jury pool was not constitutionally infirm.

INEFFECTIVE ASSISTANCE OF COUNSEL

Jackson alleges his two trial attorneys were ineffective. He claims that his first counsel, Michael Backes, was ineffective because he did not move to substitute Judge Gerald Ptacek and did not discuss the possibility of substitution with Jackson. Jackson further alleges that the attorney who replaced Backes, Domingo Cruz, was ineffective for failing to seek Judge Ptacek's removal from Jackson's case. Jackson also alleges that Cruz failed to call four witnesses who would have established that he was not a gang member at the time of the homicide, and that a co-actor, Christopher Berry, was involved in gang activity and most likely assisted the juvenile who shot and murdered Darnell Williford.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** Review of counsel's performance is premised upon great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 127, 449 N.W.2d at 847-48.

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced the defense. ***Id.*** at 127, 449 N.W.2d at 848. The defendant must show a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. ***Id.*** at 129, 449 N.W.2d at 848. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (quoted source omitted).

Whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). We will not overturn a trial court's findings of fact

concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

Jackson argues that Backes should have moved to substitute Judge Ptacek because in his former capacity as district attorney he was involved in prosecuting Jackson. At the postconviction motion hearing, Backes testified that he was aware of the right to substitute judges and that Jackson had previous contacts with Judge Ptacek. Backes testified that he discussed with Jackson whether Judge Ptacek should preside over his trial and that he informed Jackson of his discussions with "other attorneys, defense attorneys, public defenders" regarding whether Judge Ptacek should preside.

Judge Ptacek took judicial notice of his involvement as a district attorney in two previous cases involving Jackson. In one case, Judge Ptacek signed the criminal complaint against Jackson and attended the initial appearance. However, he did not make the charging decision in the case; he merely signed the complaint to swear the complaining officer. In another case, Judge Ptacek appeared on a motion to modify Jackson's bond. Judge Ptacek stated that Jackson's name was familiar to him but he did not recall any details of the prior cases and was not biased against Jackson. Judge Ptacek stated that neither substitution nor recusal was necessary to ensure that Jackson would be tried before an impartial judge.

Jackson testified that after the preliminary examination, he advised Backes that Judge Ptacek had prosecuted him on a prior occasion. Jackson testified that Backes did not discuss with him whether they should seek substitution of Judge Ptacek. However, he conceded that he was somewhat aware of the right to substitute.

Jackson also alleges that Cruz was ineffective for failing to seek Judge Ptacek's recusal because he had been involved in earlier prosecutions of Jackson.[1] Cruz testified that he and Jackson discussed his previous contacts

[1] By the time Cruz undertook Jackson's case, the time for filing a motion for substitution had

with Judge Ptacek, and he did not believe that a request for recusal on that basis would have any merit because the contacts had been minimal.[2] Jackson testified that he asked Cruz to take action to remove Judge Ptacek, but he declined to do so. Jackson stated that because Judge Ptacek remained on the case and made rulings favorable to the prosecution, he decided to testify against the advice of Cruz. In his postconviction hearing testimony, Cruz opined that it was Jackson's testimony which lost the case.

Judge Ptacek rejected Jackson's claims of ineffective assistance of counsel relating to his presence in the case. Judge Ptacek noted that he had no specific recollection of his contacts with Jackson six to eight years earlier and he would not have recused himself had he been asked to do so. The trial court found that Backes and Jackson were aware of the substitution statute and that the failure to seek substitution was not ineffective assistance of counsel.

We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether a defendant was prejudiced is a question of law which we decide de novo. ***Id.***

We conclude that Jackson has not met his burden to show a reasonable probability that but for counsels' failure to seek Judge Ptacek's removal, the result of the proceeding would have been different. *See* ***Johnson,*** 153 Wis.2d at 129, 449 N.W.2d at 848. With regard to the claim that Cruz should have filed a recusal motion based upon Judge Ptacek's previous contacts with Jackson, we observe that counsel cannot be faulted for not bringing a motion that would have failed. *See* ***State v. Simpson,*** 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994). At the postconviction motion hearing, Judge Ptacek stated that he would not have granted a motion on that basis. Finally, because we reject Jackson's claims of trial court error throughout this opinion, we do not see a reasonable probability that another presiding judge would have resulted in a different outcome at trial.

(..continued)
passed. *See* § 971.20, STATS.

[2] Cruz did file a motion to recuse based upon the fact that Judge Ptacek presided over the trial of Jackson's co-actor, Berry. That motion was denied and is not the subject of this appeal.

We turn to Jackson's complaint that Cruz was ineffective for failing to call four witnesses at trial. Jackson complains that Cruz declined to call the following four individuals to testify: Shirley Young, Felicia Scott, Carl Pruit and Monique Overstreet. Jackson argues that had these individuals been called to testify, they would have demonstrated that he is "a quiet person and a person who was not involved in gang activity." Additionally, Jackson contends that they would have established that his co-actor, Berry, was the type of person who would have been involved in the murder, was heavily involved in gang activity, was involved with the juvenile who committed the murder, and Berry and the juvenile were together without the defendant thirty minutes before the shooting.

Jackson claims that he was prejudiced by Cruz's failure in two ways. First, the record does not contain the testimony from these witnesses to counter the State's contention that Jackson was involved in gang activity. Second, Jackson contends that Cruz's failure to seek recusal and call these allegedly favorable witnesses caused him to testify to his detriment and against the advice of counsel.

At the hearing on Jackson's ineffective assistance of counsel claim, Cruz testified that he reviewed statements taken from these witnesses by an investigator before and during trial as part of his continuing preparation of Jackson's defense. Cruz testified that testimony from these witnesses would have been inconsistent with his theory of defense; namely, that Berry and the juvenile killed the victim and had a motive to do it arising from Berry's drug-related dispute with the victim and the juvenile's interest in becoming a gang member.

Cruz also discounted the utility of testimony from the four witnesses to the effect that Jackson was not a gang member. First, the witnesses would have testified that Jackson did not have a gang-member persona; the witnesses would not have testified that Jackson was not a gang member. Second, in presenting evidence of Jackson's non-gang member character, the defense would have opened the door for the State to establish that Jackson was a gang member. Instead, Cruz's strategy was to discredit or impeach the State's evidence on the issue of whether Jackson belonged to a gang.

Third, Cruz believed that Young's testimony would have been cumulative and of little probative value because she hardly knew Jackson. Overstreet's testimony would have been cumulative on the question of when Jackson came on the scene. Scott's testimony would have opened the door to further evidence regarding Jackson's gang activities. Pruit's testimony probably would have placed Jackson among a group of individuals who the State theorized were making gang signs, encouraging and giving moral support to the juvenile prior to the shooting. Pruit's testimony would have undermined Cruz's theory that Jackson was standing in front of the location where the shooting occurred but was not associating with the alleged gang members. Finally, Cruz stated that he discussed the utility of the four witnesses with Jackson and Jackson acquiesced in his strategic decision not to call them.

Jackson testified that he wanted the four witnesses to testify because they had testimony favorable to the defense. He denied that he agreed with Cruz's decision not to call these witnesses.

The trial court acknowledged Cruz's trial strategy to suggest that Berry and the juvenile, not Jackson, were involved in the killing. The trial court also acknowledged Cruz's assessment of Young's and Overstreet's testimony as cumulative, that Scott's testimony would have opened the door to more evidence that Jackson was a gang member, and that Pruit's testimony would have been disadvantageous. The trial court found that regardless of whether Jackson acquiesced in the decision not to call the four witnesses, Cruz made a strategic decision not to call these witnesses and that his strategy was based upon "logic and reason and common sense when looking at the facts of this trial and the effect that the evidence which was not presented would have had the witnesses been called."

"An attorney's strategic decision based upon a reasonable view of the facts not to call a witness is within the realm of an independent professional judgment." ***Whitmore v. State,*** 56 Wis.2d 706, 715, 203 N.W.2d 56, 61 (1973). We do not second-guess "trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." ***State v. Felton,*** 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). We assess Cruz's performance from the perspective of the prudent lawyer standard which requires that "strategic or tactical decisions must be

based upon rationality founded on the facts and the law" as they existed at the time of trial counsel's conduct. ***Id.*** at 502-03, 329 N.W.2d at 169.

We agree with the trial court that Cruz's decision not to call these witnesses was the product of a reasoned trial strategy rationally based upon the facts and the law. *See* ***id***. at 502, 329 N.W.2d at 169. Because Jackson has not made a sufficient showing that Cruz's performance was deficient in this regard, his ineffective assistance claim fails. *See* ***Strickland***, 466 U.S. at 687.

Furthermore, as the State extensively points out, given the other evidence presented against Jackson, it is not reasonably probable that the testimony of the four witnesses would have resulted in a different result at trial. While we do not repeat the State's analysis here, we find it compelling.

MISTRIAL

Jackson argues that the trial court erroneously declined to grant his motion for a mistrial due to belatedly discovered exculpatory evidence. On the fourth day of trial, the defense learned details surrounding the execution of a search warrant at a Racine residence (1135 Geneva Street) where three spent .38-caliber shell casings were found.[3] The defense argued this information should have been disclosed as exculpatory because it supported the defense's theory that a gang which frequented 1135 Geneva, the Shorty Vice Lords, was involved in Williford's death. The defense argued that had this evidence been disclosed prior to trial, it would have been able to mention it in its opening statement as further evidence of a conspiracy between the Shorty Vice Lords and Berry to kill Williford.

In opposing the motion for a mistrial, the State informed the trial court that information relating to the search of 1135 Geneva and the evidence discovered there was available in the district attorney's office for review by counsel, along with ballistics tests on the bullet removed from the victim and the shell casings found at Geneva Street. An expert in ballistics testified that he

[3] Williford was killed by a .38-caliber bullet.

could not determine whether the bullet removed from Williford and the three shell casings were fired from the same gun.

The trial court concluded that the shell casings were not exculpatory and denied the motion for a mistrial. The trial court observed that Jackson had already suggested to the jury that Shorty Vice Lords gang members, not Jackson, were involved in the murder. Therefore, the trial court noted that the shell casings were additional evidence which could be argued to support that theory. The trial court found that the State did not willfully conceal the evidence from the defense, but granted a continuance from 10:00 a.m. Friday morning to 1:30 p.m. the following Monday to permit the defense to investigate the evidence and prepare to argue it in closing.

At the hearing on Jackson's ineffective assistance of counsel motion, Cruz testified that although the trial court denied his motion for a mistrial, it did give him a sufficient opportunity to investigate the evidence before resuming trial. Cruz also testified that the evidence was helpful to the defense because it supported its theory that Berry and the juvenile were responsible for the killing because they frequented the premises where .38-caliber shell casings were found.

The State must disclose evidence that is favorable to the accused and material either to guilt or punishment. ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991) (citations and quotation omitted). We will assume, without deciding, that the shell casings were favorable to Jackson and material to guilt. Having made that assumption, we turn to the manner in which the trial court handled the belated disclosure of this evidence. Where there has been noncompliance with the duty to disclose evidence, it is appropriate to grant a continuance to permit investigation of the belatedly produced evidence. ***State v. Calhoun,*** 67 Wis.2d 204, 218-19, 226 N.W.2d 504, 511 (1975).[4]

[4] Indeed, the trial court should consider alternatives to a mistrial. ***State v. Calhoun,*** 67 Wis.2d 204, 219, 226 N.W.2d 504, 511 (1975).

Whether to grant a continuance is discretionary with the trial court. ***State v. Braunsdorf,*** 98 Wis.2d 569, 576, 297 N.W.2d 808, 811 (1980). We will sustain the trial court's exercise of its discretion if the record demonstrates that the trial court had a reasonable basis for its decision. *See* ***State v. Thompson,*** 146 Wis.2d 554, 558-59, 431 N.W.2d 716, 718 (Ct. App. 1988). Here, the trial court had a reasonable basis for its decision to grant a continuance. The evidence was disclosed in the middle of the trial rather than at the end. Therefore, a continuance permitted the defense to investigate the evidence and prepare to argue it.

Jackson further argues that the late discovery of this evidence deprived him of the reasonable opportunity to make full use of it, a problem which the ***Garrity*** court addressed by ordering a new trial. ***Garrity,*** 161 Wis.2d at 850-52, 469 N.W.2d at 222-23. ***Garrity,*** however, is distinguishable from the instant case because Garrity's trial counsel stated that his trial strategy would have been substantially different had certain evidence been disclosed prior to trial. ***Id.*** at 850-51, 469 N.W.2d at 222-23. In contrast, Jackson's trial attorney testified that the late disclosure of the evidence did not adversely affect his trial strategy and that he had a sufficient opportunity to investigate the evidence.

Having rejected Jackson's appellate challenges to the identity of the presiding judge, the late discovery of shell casings, and the failure to call certain witnesses, we must also reject Jackson's attempt to link these matters to his decision to testify at trial. We have already observed that Jackson's decision to testify was against the advice of his counsel. In fact, counsel opined that Jackson's testimony lost the trial. "An accused cannot follow one course of strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial." ***Cross v. State,*** 45 Wis.2d 593, 605, 173 N.W.2d 589, 596 (1970). Jackson made a bad choice and he cannot seek relief from that choice by linking it to unavailing claims of ineffective assistance of trial counsel and trial court error.

SENTENCE

Jackson argues that the trial court did not adequately explain the reasons for the disproportionate sentences it imposed on Jackson (life imprisonment with parole eligibility in fifty years) and Berry (life imprisonment

with parole eligibility in thirty-five years). He also contends that his sentence is unduly harsh.

The trial court was required to exercise its discretion in setting Jackson's parole eligibility date. *See* ***State v. Borrell,*** 167 Wis.2d 749, 767, 482 N.W.2d 883, 888 (1992). In setting a parole eligibility date, a court must consider the factors it would consider if it were imposing a sentence. ***Id.*** at 774, 482 N.W.2d at 892. The primary factors to be considered are the gravity of the offense, the offender's character and the need to protect the public. ***Id.*** at 773, 482 N.W.2d at 892.

The trial court acknowledged that the presentence investigation report recommended (and the State concurred in) a sixty-year parole eligibility period. Jackson suggested a twenty-five year eligibility period. The court reviewed the circumstances of the crime: Jackson traded the murder weapon with Berry and assisted Berry in getting the juvenile to the roof of a building from which the juvenile shot Williford. The court noted Jackson's long criminal record, including numerous offenses as a juvenile, and observed that Jackson had spent the majority of his life in various juvenile and adult penal institutions.[5] The presentence investigation report stated that Jackson is a long-time gang member, a menace to society and has no regard for the value of human life.[6] The trial court considered that the crime was vicious and aggravated and that Jackson was in need of close rehabilitative control given his long history of criminal activity without successful rehabilitation. The trial court also considered that the case involved gang activity and that Jackson used a juvenile who wanted to become a gang member to commit what the trial court termed a "murder for hire." The trial court found that Jackson did not express any remorse[7] and that the public requires protection from Jackson.

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[5] Four months after his last parole from prison, Jackson was involved in the Williford murder.

[6] The trial court noted that Jackson declined to be interviewed by the author of the presentence investigation report.

[7] In exercising his right of allocution, Jackson maintained his innocence.

It is clear from the record in this case that the trial court considered the proper factors in establishing Jackson's parole eligibility date. We see no misuse of the trial court's discretion.

Jackson argues that Berry's sentence was less than that imposed upon him. While that may be true, "[a] mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994). Jackson has the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing. *See* ***State v. Perez,*** 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App.), *cert. denied*, 113 S. Ct. 416 (1992). The trial court properly considered all of the factors relevant to establishing Jackson's parole eligibility date and did not consider any irrelevant factors.[8]

JURY POOL

Finally, Jackson argues that the jury pool did not represent a fair cross-section of the community. Jackson's pretrial motion claimed that Racine County's method of impaneling jury pools systematically excluded minority jurors contrary to ***Duren v. Missouri,*** 439 U.S. 357 (1979), and ***State v. Pruitt,*** 95 Wis.2d 69, 289 N.W.2d 343 (Ct. App. 1980), and the Sixth and Fourteenth Amendments to the United States Constitution. The motion stated that Jackson is an Afro-American and that a March 11, 1991, census reveals that minorities constitute approximately 16% of Racine County's population. Jackson challenges what he claims is Racine County's practice of limiting minority participation in jury pools to 10%, which is less than the overall percentage of minorities in the county's population. The trial court rejected Jackson's challenge to the jury array.

On appeal, Jackson challenges the jury pool creation process because it groups all nonwhite individuals into a "minority category" rather than insuring that the pool contains a representative percentage of each Racine

[8] In fact, the trial court contrasted the length of Jackson's criminal record with Berry's less lengthy one.

County minority. This particular argument is waived on appeal because it was not made in the trial court. We generally do not address arguments made for the first time on appeal, particularly when the appellate issue involves factual elements not brought to the attention of the trial court. ***Wirth v. Ehly,*** 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980).[9] Even if this issue were not waived, we would conclude that Jackson has not met his burden to show a prima facie violation of the Sixth Amendment right to a jury pool representing a fair cross-section of the community.

We turn to Jackson's broader claim that the jury pool did not represent a fair cross-section of the community because it did not contain a percentage of minorities in proportion to their presence in the county. In order to show a prima facie violation of the Sixth Amendment fair cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.

Pruitt, 95 Wis.2d at 74-75, 289 N.W.2d at 345, *quoting* ***Duren,*** 439 U.S. at 364. We conclude that Jackson has not shown that minorities were systematically excluded from the jury selection process.

Lawrence E. Flynn, the clerk of the Racine County Circuit Court, testified that the names of potential jurors are selected from voter registration and driver's license lists and that 12,000 questionnaires were sent out to form the jury pool from which Jackson's jurors were drawn. The questionnaire asked

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[9] Here, as the State points out, the record does not indicate that Jackson presented evidence of the number or percentages of African-Americans within the Racine County population. Additionally, the record on appeal does not include an exhibit to Jackson's pretrial motion which contained the census data relied upon by Jackson in the trial court.

prospective jurors to identify their race.[10] A jury pool of 3250 was established and of that number of respondents, at least 10%, or 325, were acknowledged members of minorities. All questionnaires returned by individuals identifying themselves as members of a racial or ethnic minority were placed in the jury pool to fulfill and possibly exceed the requirement that there be at least 325 such questionnaires in the 3250-person jury pool.[11]

Based on this testimony, we cannot conclude that minorities were systematically excluded from the jury pool from which Jackson's jurors were drawn. Additionally, we conclude that the fact that minorities comprised at least 10% of the jury pool in contrast to their status as 16% of Racine County's population satisfied the "substantial representation" requirement established in ***Pruitt.***

In ***Pruitt,*** the court concluded that young adults are a distinctive group whose systematic exclusion from jury service would violate the fair cross-section requirement. ***Id.*** at 75-76, 289 N.W.2d at 345-46. However, the court went on to hold that the fact that young adults serving on several previous jury panels constituted 12.7% of those called when their proportion of the county's population was 25% did not violate the fair cross-section requirement because they were fairly and reasonably represented. ***Id.*** at 78, 289 N.W.2d at 347. The ***Pruitt*** court noted that "[t]he jury pool need not be a statistical mirror of the community. Absolute proportional representation is not required. The fair-cross-section requirement is met if *substantial* representation of a distinctive group exists." ***Id.*** at 78, 289 N.W.2d at 347 (citations omitted).

Moreover, the disparity between the minority representation in the Racine County jury pool (10%) and the county's population (16%) is *de minimis. See* ***United States v. McAnderson***, 914 F.2d 934, 941 (7th Cir. 1990) (holding that district in which blacks comprised 20% of its population but only 12% of a particular jury venire was *de minimis* disparity and not violative of fair

[10] At the time this jury pool was created, respondents were not required to identify themselves by race.

[11] As the State points out, because the questionnaire did not require the respondent to identify his or her racial origin, it is possible that more than 325 minorities were included in the 3250-person jury pool.

cross-section right). "As the Supreme Court has noted, discrepancies of less than ten percent, standing alone, cannot support a claim of underrepresentation." ***Id.*** at 941.[12] Because Jackson has not satisfied the third prong of the ***Duren*** test, his challenge to the jury pool fails.

By the Court.—Judgment and order affirmed.

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

[12] The record reflects that six of the fifty-two jurors summoned for voir dire in Jackson's trial were minorities, or 11.5% of the total individuals summoned. This representation in Jackson's voir dire was higher than the minimum 10% required to be included in the annual jury pool and reduces the discrepancy between the Racine County minority population and the minority representation in the jury venire. As we held earlier, we are addressing the overall minority representation in the jury pool, rather than Jackson's challenge to the number of African-Americans in the pool.