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DISTRICT I

April 15, 2025

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Sarah Burgundy
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You are hereby notified that the Court has entered the following opinion and order:

2023AP401-CR State of Wisconsin v. Giovannie Rivera-Gonzalez
(L.C. # 2019CF780)

Before Donald, P.J., Geenen and Colón, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Giovannie Rivera-Gonzalez appeals the judgment convicting him of first-degree intentional homicide and the order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2023-24).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

Background

The charge against Rivera-Gonzalez stemmed from a cold-case homicide that occurred in January 2001 when the body of Scott Fisher was found wrapped in a bedsheet in a city of Milwaukee garbage bin. Fisher died from a single gunshot fired at his head; the bullet was found in Fisher's mouth.

Approximately six weeks after Fisher's body was found, in February 2001, police arrested Rivera-Gonzalez on unrelated charges and seized two guns, one of which was a .357 magnum revolver. Rivera-Gonzalez admitted to police that the revolver was his and that it had been in his possession for the previous six weeks.

In 2004, based on information from an informant, police began investigating Rivera-Gonzalez for Fisher's homicide. The investigation included testing the revolver seized when police arrested Rivera-Gonzalez in 2001. Testing revealed that the revolver had discharged the bullet found in Fisher's mouth.

In 2014, police sent the bedsheet that was wrapped around Fisher to the crime lab. DNA testing of a hair found on that bedsheet matched Rivera-Gonzalez.

In 2018, police located and secured the cooperation of eyewitnesses who either were present at the shooting or assisted with disposing of Fisher's body. The State filed the underlying complaint against Rivera-Gonzalez in 2019.

A jury convicted Rivera-Gonzalez of first-degree intentional homicide, with the use of a dangerous weapon and as a party to a crime. The circuit court sentenced him to life imprisonment with eligibility for extended supervision in 2047.

Postconviction, Rivera-Gonzalez filed a motion alleging that his trial counsel was ineffective. Following briefing and a ***Machner***[2] hearing, the circuit court denied the motion.

Rivera-Gonzalez appeals. We provide additional facts as necessary in the discussion that follows.

Discussion

Rivera-Gonzalez renews his postconviction claims of trial counsel ineffectiveness. To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To prove prejudice, "[t]he 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." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, a reviewing court need not address the other. ***Id.*** at 697. Whether counsel's performance was deficient and whether any deficiencies caused prejudice are legal questions that this court reviews *de novo*. ***State v. Breitzman***, 2017 WI 100, ¶¶37-39, 378 Wis. 2d 431, 904 N.W.2d 93.

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

Rivera-Gonzalez argues that trial counsel was ineffective in presenting a "Mr. Castillo" theory of defense and for failing to remove a juror he believes was subjectively biased against him. We address each claim in turn.

A. The "Mr. Castillo" theory of defense.

During his opening statement, trial counsel told the jurors that the murder weapon was not found in Rivera-Gonzalez's possession, but rather in another man's possession, a man he referred to as "Mr. Castillo." Trial counsel then cross-examined two detectives about whether they had sufficiently investigated Castillo and his connection to the gun.[3] After trial counsel opened the door, the State proceeded to introduce evidence proving that Rivera-Gonzalez is Castillo. According to Rivera-Gonzalez, the fact that "Castillo" was Rivera-Gonzalez's alias was obvious from the discovery; consequently, trial counsel's "Mr. Castillo" theory amounted to a concession that Rivera-Gonzalez possessed the murder weapon.

We focus on the prejudice prong of the ineffective assistance analysis. To support his argument as to prejudice, Rivera-Gonzalez contends that the moment the State's witnesses established that Rivera-Gonzalez and Castillo were the same person, trial counsel lost all credibility with the jury. Beyond the loss of credibility, Rivera-Gonzalez argues that trial counsel's "malformed opening and theory of defense resulted in the concession and highlighting of damaging facts to the jury." Rivera-Gonzalez contends that trial counsel's choice to bring up the Castillo alias opened the door to bad character evidence that the State could not have

[3] The transcripts and other record documents reflect alternative spellings (Castillo-Lugo, Castillo-Ludo, and Castillo) of Castillo.

otherwise introduced, which "alter[ed] the entire evidentiary picture." *See* ***Strickland***, 466 U.S. at 695-96.

The alleged bad character evidence that Rivera-Gonzalez references includes the following testimony: the murder weapon was found in Rivera-Gonzalez's apartment; police officers were called to investigate a domestic violence complaint at the apartment Rivera-Gonzalez shared with his girlfriend; the officers found guns and drugs at the apartment; and the manner by which Rivera-Gonzalez was identified as Castillo, along with evidence that Rivera-Gonzalez used other aliases in the commission of criminal activity. Even if we accept, without deciding, that trial counsel's mention of the name Castillo can be said to have caused the jury to hear these "bad facts," Rivera-Gonzalez has not shown prejudice in light of the State's strong evidence of guilt.

The State charged Rivera-Gonzalez with firing a point-blank shot into Fisher's head and dumping his body into a garbage bin. Police seized the gun used to murder Fisher from Rivera-Gonzalez approximately six weeks after the murder. Rivera-Gonzalez admitted to police that he purchased the gun approximately six weeks earlier. Forensic testing of a hair found on the bedsheet Fisher was wrapped in produced a DNA profile that matched Rivera-Gonzalez. Two eyewitnesses testified that Rivera-Gonzalez was responsible for killing Fisher. An inmate additionally testified that Rivera-Gonzalez admitted to the murder.

The evidence against Rivera-Gonzalez was powerful. There is not a reasonable probability that, absent the theory of defense relating to Mr. Castillo, the jury would have had a reasonable doubt respecting Rivera-Gonzalez's guilt. *See* ***State v. Sholar***, 2018 WI 53, ¶45, 381 Wis. 2d 560, 912 N.W.2d 89 ("In ineffective assistance challenges, a defendant must establish

that but for his lawyer's error, there is a reasonable probability the jury would have had a reasonable doubt as to guilt."). This claim fails on the prejudice prong.

B. Juror 23

Rivera-Gonzalez additionally claims that trial counsel was ineffective for allowing Juror 23, whom he contends was subjectively biased, to decide the case. Trial counsel's failure to object or to further question a juror may be raised as a claim of ineffective assistance of counsel. ***State v. Williams***, 2000 WI App 123, ¶21, 237 Wis. 2d 591, 614 N.W.2d 11. "[W]hether a prospective juror is subjectively biased turns on his or her responses on *voir dire* and a circuit court's assessment of the individual's honesty and credibility, among other relevant factors." ***State v. Faucher***, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999).

To obtain relief on this claim, Rivera-Gonzalez must prove: (1) Juror 23 incorrectly or inaccurately responded to a material question during jury selection; and (2) it is more probable than not under the circumstances that Juror 23 was biased against him. *See* ***State v. Funk***, 2011 WI 62, ¶32, 335 Wis. 2d 369, 799 N.W.2d 421. "Jurors are subjectively biased when they have 'expressed or formed any opinion' about the case prior to hearing the evidence." ***Id.***, ¶37 (citation omitted). The circuit court is in the best position to assess whether a juror is subjectively biased; consequently, this court defers to the circuit court's factual findings on that point and reverses only when those findings are clearly erroneous. ***State v. Lepsch***, 2017 WI 27, ¶23, 374 Wis. 2d 98, 892 N.W.2d 682.

During *voir dire*, the prosecutor asked whether the jurors had something occur in their lives—a belief system or simply a desire not to find someone guilty—that would prevent them from convicting someone of a crime even if the evidence supported a conviction. Juror 23 raised

his hand and said: "Just I don't believe in guns, and that might give me some trouble making the right decision." The circuit court immediately followed up:

> THE COURT: This isn't about guns, per se, or your philosophy on guns.
>
> JUROR: No.
>
> THE COURT: So, you know, there's a number of people that don't like guns.
>
> JUROR: Just wanted to point that out.
>
> THE COURT: It's not going to help you get out.
>
> JUROR: No, no, that's not the point. I'm here already.
>
> THE COURT: Okay.

The prosecutor then proceeded with her next question.

At the end of trial, during deliberations, Juror 23 passed a note to the circuit court stating, "I am having a problem making a decision about this case. I do not believe I can make the right decision." With the parties' agreement, the court responded that Juror 23 should continue deliberating and follow the jury instructions. The jury subsequently arrived at a guilty verdict.

At the postconviction hearing, trial counsel testified that he did not have an independent recollection of Juror 23's comments. He also stated that his practice was to make a note if a juror said something concerning and that his written notes from *voir dire* in Rivera-Gonzalez's case reflected no comments about Juror 23. Trial counsel also testified that based on his experience, he would move to strike a juror for cause if they made statements showing actual bias.

The circuit court held that trial counsel was not ineffective because there was no indication in the record that Juror 23 was biased against Rivera-Gonzalez. According to the court, the response by Juror 23, when taken in context, was a "generic" response that one might see in any criminal case. The court held that "the fact that a juror could have some trouble making a decision doesn't equate to a subjective bias against the defendant."

To resolve this issue, we focus on the deficient performance prong of the ineffective assistance analysis. Rivera-Gonzalez contends: "Juror 23's answers in *voir dire* combined with his mid-deliberation note to the court make clear that he was biased. And yet, no one asked him any questions to ensure that, despite his comments, he could be fair and impartial." Given that this was a murder prosecution where Fisher was shot to death at close range, Rivera-Gonzalez argues that it was deficient for trial counsel not to have queried Juror 23 further about his gun-based bias. In the event that the record does not make Juror 23's bias plain, Rivera-Gonzalez alternatively argues that he should have been allowed to call Juror 23 as a postconviction witness to question him further.

The fact that Juror 23 indicted some uncertainty about his ability to serve did not reflect subjective bias. "[A] prospective juror need not respond to *voir dire* questions with unequivocal declarations of impartiality. Indeed, we ... fully expect a juror's honest answers at times to be less than unequivocal." *See* ***State v. Tobatto***, 2016 WI App 28, ¶22, 368 Wis. 2d 300, 878 N.W.2d 701 (alterations in original; citation omitted). We note that Juror 23 told the court and the parties that he had had no contacts with the criminal justice system. He did not respond when the prosecutor asked whether a loved one had been the victim of or been charged with a serious crime or crime involving a gun. Additionally, he did not raise his hand when counsel

asked potential jurors whether any of them would be unable to hold the State to its high burden of proof.

While acknowledging that Juror 23's original statement in *voir dire* "could be read as equivocation," Rivera-Gonzalez goes on to argue that "any equivocality that might exist in Juror 23's *voir dire* comments was purged mid-deliberation." Still, Rivera-Gonzalez argues, trial counsel did nothing. Rivera-Gonzalez highlights that trial counsel did not ask for Juror 23 to be individually questioned about the content of the note, move for a mistrial, or ask that Juror 23 be removed.[4]

As support, Rivera-Gonzalez relies on ***State v. Carter***, 2002 WI App 55, 250 Wis. 2d 851, 641 N.W.2d 517. In that case, during *voir dire*, a juror identified a relevant personal experience and unambiguously stated that that experience *would* influence his ability to be fair and impartial. ***Id.***, ¶3. The juror ultimately served on the jury that convicted the defendant. ***Id.***, ¶4.

On appeal, this court concluded that the juror's response unequivocally demonstrated that he was subjectively biased. ***Id.***, ¶8. Yet, trial counsel "failed to further question the juror's statement of admitted bias, failed to move to strike the prospective juror for cause and failed to use a peremptory challenge to remove him from the jury panel." ***Id.***, ¶15. We held that trial

[4] We are not convinced by Rivera-Gonzalez's assertion that "[t]he State's silence on the combined effect of Juror 23's comments during *voir dire* and deliberation is fatal to its attempt to rebut [Rivera-Gonzalez]'s argument." The State's brief adequately addressed the combined effect of Juror 23's comments. And, in any event, we may affirm the circuit court's ruling for reasons other than what was argued to the circuit court or to us. *See* ***State v. Butler***, 2009 WI App 52, ¶15, 317 Wis. 2d 515, 768 N.W.2d 46 (noting this court's "authority to affirm the circuit court for reasons not relied on by it, and, also, on grounds not argued by the respondent").

counsel's failure to act to remove the biased juror constituted deficient performance resulting in prejudice. ***Id.***

The facts at issue here are easily distinguishable from those at issue in ***Carter***, even accounting for the combined effect of Juror 23's remarks during *voir dire* and deliberation. There was no relevant personal experience or unambiguous statement by Juror 23 that his ability to be fair and impartial would be influenced. Moreover, the circuit court, which presided over both the trial and the postconviction proceedings and was in the best position to find or observe evidence of bias, found none. *See* ***Lepsch***, 374 Wis. 2d 98, ¶23. Rivera-Gonzalez has not shown that trial counsel's performance was deficient for not doing more to reveal Juror 23's purported bias.

Finally, Rivera-Gonzalez contends that he should have been allowed to call Juror 23 as a witness during the postconviction proceedings "to ferret out the bias" that Rivera-Gonzalez claims went undiscovered. The legal authority Rivera-Gonzalez relies on to support his position is factually distinguishable and does not stand for the broad proposition that a defendant has a right to present a juror's testimony at a postconviction evidentiary hearing or that such testimony is required anytime a defendant claims ineffective assistance of counsel for not striking a biased juror. *See generally* ***Funk***, 335 Wis. 2d 369; ***State v. Delgado***, 223 Wis. 2d 270, 588 N.W.2d 1 (1999); ***State v. Koller***, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838. We agree with the circuit court's determination that such testimony was not warranted in this case.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals