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DISTRICT I

August 24, 2021

To:

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1180-CR

State of Wisconsin v. Nasif Salaam Hibbler (L.C. # 2017CF2700)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Nasif Salaam Hibbler appeals the judgment of conviction, following a jury trial, of one count of first-degree intentional homicide. He also appeals from the order denying his postconviction motion for relief. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm.

On June 8, 2017, Hibbler was charged with one count of first-degree intentional homicide for the death of his sister, Shakira. According to the criminal complaint, Hibbler set his sister,

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

who was wheelchair-bound, on fire. The complaint alleges that Hibbler poured rubbing alcohol on his sister, used a lighter to set her on fire, and then ran out of the house to the police station and told police that he set his sister on fire. Hibbler told police that he heard voices telling him “do something or they were going to kill him.” Hibbler further told police that the voices tried to sexually assault him through the couch he was sitting on, causing him to go to the bathroom, grab a bottle of rubbing alcohol, and place it on the kitchen counter. Hibbler told police that he hoped the gesture would show the voices he was willing to obey their command to “do something” so that they would leave him alone. Hibbler told police that the voices continued to harass him, prompting him to spray his sister with the alcohol and light her on fire. Police who arrived on the scene found Shakira dead.

The trial court ordered Hibbler evaluated for competency to stand trial. Dr. Deborah Collins evaluated Hibbler and diagnosed him with schizophrenia. Dr. Collins found that Hibbler was competent to proceed.

On August 24, 2017, Hibbler entered pleas of not guilty and not guilty by reason of mental disease or defect (NGI). The trial court ordered Dr. Collins to examine Hibbler to determine his understanding of the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law at the time he committed the crime.

Following an evaluation, Dr. Collins diagnosed Hibbler with schizophrenia, alcohol use disorder, and cocaine use disorder. Dr. Collins’s report states that when she asked him about the day he set his sister on fire, Hibbler admitted to drinking alcohol and said he was “probably” intoxicated that day. (One set of quotation marks omitted.) Dr. Collins concluded that Hibbler

did not lack substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of his sister's homicide.

The matter proceeded to a two-part jury trial. In the first part, the jury was required to determine whether Hibbler committed the crime. Multiple witnesses testified, including Officer Tyler Seelow, who told the jury that on June 3, 2017, Hibbler walked into the police station and told him that he (Hibbler) set his sister on fire. Police Officer David Letteer testified that following Hibbler's confession, he was dispatched to Hibbler's home. When he arrived at the home, Letteer smelled smoke and heard a fire alarm sounding. Letteer then found Shakira dead on the floor. The medical examiner deemed the cause of death a homicide, stating that she died as a result of thermal injuries and smoke inhalation.

Detective Luke O'Day testified that he conducted a recorded interview of Hibbler after Hibbler was placed in custody. The State played portions of the recorded interview for the jury. In that recording, Hibbler stated that he burned Shakira because he heard voices that threatened to sexually assault him unless he hurt someone. Hibbler then went to the bathroom, got a new bottle of rubbing alcohol, and placed it on the counter. Hibbler claimed that he placed the alcohol on the counter to show the voices that he was serious about obeying the command and hoped the voices would stop speaking to him. Hibbler told O'Day that he was diagnosed with schizophrenia and bipolar disorder and that he received monthly injections to treat his conditions, but that he did not believe he truly suffered from those conditions. O'Day testified that Hibbler did not seem symptomatic at the time of the interview and that Hibbler seemed cogent. Hibbler told O'Day that he knew he did something wrong. The jury also heard that Hibbler admitted to purchasing and using cocaine on the date of the homicide and that he had consumed alcohol. The jury found Hibbler guilty as charged.

The matter then proceeded to the second phase of the trial, where the jury was to determine whether Hibbler's actions resulted from a mental disease or defect. Dr. Diane Mosnik, a clinical neuropsychologist, testified that she diagnosed Hibbler with schizophrenia and intellectual developmental disorder. Dr. Mosnik stated, based upon her evaluation of Hibbler and her review of his records, that Hibbler lacked the mental capacity to conform his behavior to the law at the time he committed the homicide. She believed that Hibbler had been actively hallucinating and consumed alcohol and cocaine to quiet the voices in his head. Dr. Mosnik believed that Hibbler knew the difference between right and wrong on the date of the crime, but that Hibbler could not comport his actions to avoid doing things that he knew were wrong. In other words, Hibbler tried to stop himself, but could not.

Dr. Collins testified that she diagnosed Hibbler with schizophrenia, alcohol use disorder, and cocaine use disorder. Dr. Collins testified that while Hibbler did suffer from mental health disorders, he was also intoxicated at the time of the crime, thus requiring her to determine whether the primary factor controlling Hibbler's actions was either his mental illness or his intoxication. She explained that alcohol use causes one to become less inhibited and it lessens one's ability to resist urges. Dr. Collins concluded that the intoxication, not the schizophrenia, was the controlling factor in Hibbler's mental state at the time he started the fire. Hibbler did not object to Dr. Collins's testimony.

Prior to deliberations, the trial court told the jury:

You're now going to be asked to determine whether the defendant is not responsible by reason of mental disease or defect.

This issue will be presented to you in the form of two questions:

At the time the crime was committed, did the defendant have a mental disease or defect; and

2. As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law.

You'll be asked to answer the second question only if you answer the first question *yes*.

....

A voluntary induced state of intoxication by drugs or alcohol or both does not constitute a mental disease or defect.

A temporary mental state which brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental disease or defect.

(Emphasis in original.) Hibbler did not object to the trial court's instructions.

The jury found that Hibbler did not lack the substantial capacity to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law. The trial court sentenced Hibbler to life with the possibility of extended supervision after serving forty-three years in prison.

Hibbler filed a postconviction motion seeking to vacate his conviction on the grounds that both the trial court's jury instructions and Dr. Collins's testimony incorrectly suggested that Hibbler was barred from using his mental illness as an affirmative defense because he was intoxicated. Hibbler also argued that there was insufficient evidence to establish that he was intoxicated at the time of the crime. The postconviction court denied the motion. This appeal follows.

On appeal, Hibbler argues that the trial court's instruction on intoxication, combined with Dr. Collins's testimony stating "if the act occurred due to the fact that he was intoxicated or on

cocaine, that would take it out of being a result of mental disease or defect,” misled the jury to believe that it could not find Hibbler not guilty by reason of mental disease or defect if it found that Hibbler was intoxicated. Hibbler also argues that there was insufficient evidence as to his intoxication.

By failing to object, a defendant forfeits any alleged error in proposed jury instructions or forms of verdict. WIS. STAT. § 805.13(3). Moreover, where an objection was not preserved, this court does not have the power to review jury instructions for plain error under the common law. *State v. Schumacher*, 144 Wis. 2d 388, 409-10, 424 N.W.2d 672 (1988) (unobjected to jury instruction errors may be addressed only by the Wisconsin Supreme Court). We agree with the postconviction court that Hibbler’s claim is not sufficiently preserved for this court’s review.

As to Hibbler’s claim that Dr. Collins’s testimony misled the jury, we note again that Hibbler did not object to the allegedly misleading testimony. Hibbler’s claims regarding Dr. Collins’s testimony are thus forfeited by the lack of contemporaneous objection. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (objections not raised in the circuit court are forfeited).

Hibbler also contends that there was insufficient evidence for the jury to determine that he was actually intoxicated when he set his sister on fire.

The question of whether a defendant meets his burden to prove a mental disease or defect is a factual question for the jury. *State v. Leach*, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985). We will not overturn the jury’s finding if there is sufficient evidence to support it. *See id.*

Here, Hibbler confessed that he purchased and used cocaine on the date of the crime. He told officers that he drank a cup of Blue Amsterdam liquor and consumed one gram of cocaine. Hibbler's uncle brought alcohol over. Dr. Mosnik testified that Hibbler consumed alcohol and cocaine on the date of the offense. Dr. Collins also testified that Hibbler admitted to being intoxicated at the time he committed the crime. Although Hibbler was not tested for intoxicants following his arrest, he was interviewed by police several hours after setting the fire; thus, his apparent coherence during his police interview does not negate his intoxication at the time of the crime. Accordingly, we conclude that there was sufficient evidence for the jury to find that Hibbler was intoxicated at the time of the crime.

For the foregoing reasons, we affirm the trial court.

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.

Sheila T. Reiff
Clerk of Court of Appeals