COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP515-CR **Cir. Ct. No. 2009CF3304**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL RYAN CURRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and RICHARD J. SANKOVITZ, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Daniel Ryan Curry appeals a judgment of conviction for felony murder—aggravated battery, as a party to a crime. Curry also appeals from the order denying his motion for postconviction relief. Curry argues that he

is entitled to a new trial on the grounds of newly discovered evidence and juror bias. We affirm.

BACKGROUND

¶2 In July 2009, Curry was charged with felony murder—aggravated battery, as a party to a crime, stemming from the death of Michael Ward. According to the complaint, early on the morning of July 11, 2009, Ward, his wife, and two friends left the Ugly Mug Tavern, 604 South 64th Street, Milwaukee, when they heard three individuals start to yell obscenities at them. The three individuals also began throwing rocks at the group. Ward's friend, David Mathe, confronted the group and then was struck in the head by one of the group members. Mathe fell unconscious, but told police that upon regaining consciousness he found Ward lying on the ground, bleeding from his head. Ward later died from head injuries.

¶3 The complaint contains statements from various witnesses pertaining to the altercation outside of the Ugly Mug Tavern. One witness, Ray Bahr, told police that he and a friend left the tavern shortly after Ward and Ward's friends. Bahr stated that he heard an altercation between a group of individuals and Ward and his friends. Bahr attempted to intervene after witnessing Mathe's injury, and then witnessed an individual—identified in the complaint as Curry—strike Ward on the head. Bahr identified Curry in a photo array as the individual that struck Ward.

¶4 An acquaintance of Curry's, identified in the complaint as Jennifer Roesch, told police that she was also at the Ugly Mug Tavern shortly before Ward's death, and that she was drinking with Curry, Martiza Rivera, and other friends. Roesch told police that she witnessed Curry strike "a white male on the

side of the head," and that she saw Ward fall to the ground after his "head snap[ped] back."

¶5 Multiple witnesses also testified at trial. Among them was Rivera, a defense witness. Rivera told the jury that in July 2009, she lived across the street from the tavern. She stated that around 12:30 a.m. on the morning of July 11, 2009, she went to the tavern with some friends, including Curry and Roesch. Rivera testified that at the time her friends arrived at her home, approximately an hour before leaving for the bar, her thirteen-year-old nephew and her young son were home.

¶6 Rivera further testified that after leaving the bar, she saw her neighbor, Christopher Edwards, engaged in an argument with a "white male" in a nearby alley. She stated that she witnessed Edwards pick up a brick, strike the man he was arguing with, and then saw the man fall to the ground. The man, identified as Ward, "didn't get up" after being hit, according to Rivera. On cross-examination, Rivera admitted that she did not tell police that she saw Edwards strike Ward out of fear from Edwards' family. She stated that she did not "want to get me or my son involved in something that could come back at me."

¶7 Curry was convicted by the jury and sentenced to twenty-one years, comprised of fourteen years' initial confinement and seven years' extended supervision. Curry filed a postconviction motion arguing that he was entitled to a new trial based on newly discovered evidence and juror bias. Specifically, Curry argued that Rivera's nephew and son witnessed the altercation outside the Ugly Mug Tavern and saw Edwards strike Ward. Curry attached two affidavits, one from each of the boys, T.U. and M.R., stating that they did not see Curry strike Ward. Curry argued that the boys' potential testimony was newly discovered

because the boys were minors and Curry did not have access to their testimony prior to his conviction. Curry also argued that one of the jurors in his case was biased towards him. Curry's argument was based on his discovery that the juror at issue, "juror number twelve," withheld information pertaining to the juror's prior convictions during *voir dire*.

¶8 In two written decisions, the trial court denied both of Curry's motions. This appeal follows. Additional facts will be included as relevant to the discussion.

DISCUSSION

¶9 On appeal, Curry contends that he is entitled to a new trial based on newly discovered evidence because the affidavits of T.U. and M.R. prove that Edwards, not Curry, struck Ward. Curry also argues that he is entitled to a new trial on the grounds of juror bias. We disagree.

Newly Discovered Evidence.

¶10 "Motions for a new trial based on newly discovered evidence are entertained with great caution." ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). A reviewing court will affirm the trial court's denial of such a motion as long as it had a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). On appeal, we review the trial court's determination for an erroneous exercise of discretion. *See* ***State v. McCallum***, 208 Wis. 2d 463, 472, 561 N.W.2d 707 (1997).

¶11 "In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish

that a defendant's conviction was a 'manifest injustice.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). "When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***Id.*** (citation omitted). "If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.***

¶12 We conclude that the potential testimony of T.U. and M.R., as described by their affidavits, does not constitute new evidence. The record is clear that Curry knew the boys were eyewitnesses to the altercation that led to Ward's death prior to Curry's conviction. According to a police report taken a few days after Ward's death, Curry told police that he went to Rivera's house the night of July 10, 2009, before going across the street to the Ugly Mug Bar with her. He told police that he and Rivera had returned to Rivera's house prior to the altercation outside of the bar, and that only Rivera's son and nephew were home with them at that time.

¶13 According to the police report taken the day after Ward's death, Rivera told police that at approximately 1:00 a.m., the morning of July 11, 2009, she was home with her nephew and son, when she decided to go across the street to the bar. Rivera stated that approximately twenty minutes later, she returned home and then heard screaming outside her home. She stated that only her son and nephew were home when she returned from the bar. A supplemental police report indicates that Rivera told police that her nephew witnessed the altercation

outside of the bar. As stated, Rivera also testified at trial, telling the jury that Curry came to her home prior to going to the tavern and that the boys were home at the time of the incident. Her son also accompanied her to the trial.

¶14 Curry contends that because Rivera admittedly withheld information from the defense and, in essence, blocked his access to the boys, he was not negligent in failing to seek the boys' testimony prior to his conviction. By Curry's own admission to police, he knew that the boys were home during the altercation. His argument that he was unaware that the boys witnessed the altercation because Rivera withheld that information both contradicts his own admission and ignores his subpoena power. The record further establishes that Curry and Rivera were friends and that Rivera was cooperative with the defense—Rivera was the key defense witness. Curry has not established by clear and convincing evidence that the newly discovered testimony of these witnesses did not come to his attention until after the trial.

Juror Bias.

¶15 Curry also seeks a new trial on the grounds of juror bias, arguing that juror number twelve withheld information about his prior convictions. A defendant who seeks a new trial on the ground that a juror lacked candor at the *voir dire* must demonstrate that the juror responded incorrectly or incompletely to a material question, and that it is more probable than not that the juror was biased against the defendant under the facts and circumstances of the particular case. ***State v. Faucher***, 227 Wis. 2d 700, 726, 596 N.W.2d 770 (1999). Bias may be statutory, subjective or objective. ***Id.*** at 716. Curry contends that the juror was objectively biased.

¶16 "[T]he focus of the inquiry into 'objective bias' is not upon the individual prospective juror's state of mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial." ***Id.*** at 718. When assessing objective bias, a trial court must consider the facts and circumstances surrounding the *voir dire* and the facts involved in the case. ***Id.*** "However, the emphasis of [the] assessment remains on the reasonable person in light of those facts and circumstances." ***Id.*** at 718-19. We give weight to the trial court's conclusion that a prospective juror is or is not objectively biased, and will reverse only if, as a matter of law, a reasonable judge could not have reached such a conclusion. *See* ***id.*** at 721.

¶17 During *voir dire*, the State asked the jurors whether any of them had been convicted of a crime. Four jurors responded in the affirmative and described their convictions. The transcript indicates that juror number twelve did not respond to the State's inquiry. However, according to documents attached to Curry's postconviction motion, juror number twelve indeed has been convicted of multiple prior offenses.

¶18 The trial court recognized juror number twelve's failure to disclose his prior convictions, but noted that Curry offered no plausible reasons as to why juror number twelve was biased against him. Upon review of Curry's postconviction motion, we agree with the trial court that Curry offered no plausible reasons as to why juror number twelve could be biased against him. Nor does Curry offer any plausible reasons on appeal. Withholding information about prior convictions, by itself, is not evidence of juror bias. Nor do prior convictions, by themselves, constitute such evidence of bias. Curry simply requests, without support, an evidentiary hearing to "[inquire] into [juror number twelve's] state of

mind."[1] We cannot conclude that juror number twelve's prior convictions made it more probable than not that he was biased against Curry. In fact, juror number twelve's experience as a defendant may even have made him sympathetic towards Curry. Curry has not met his burden of showing that a reasonable person in juror number twelve's position could not be impartial. *See* ***id.*** at 718.

¶19 For the forgoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[1] Curry's original motion to the trial court argues objective and subjective bias. On appeal, Curry cites only the standard for objective bias, but states that an evidentiary hearing conducting "an inquiry into [juror number twelve's] state of mind is needed." An "objective bias" analysis does not inquire about a juror's state of mind. Our opinion focuses on the standard cited by Curry, and not on whether the juror at issue was subjectively biased.