COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0520-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDRON D. BROOMFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Edron D. Broomfield appeals a judgment convicting him of one count of burglary, contrary to § 943.10(1), STATS., and one count of operating a motor vehicle without the owner's consent, contrary to § 943.23(2), STATS., as well as a subsequent order denying his motion for postconviction relief. Broomfield contends on appeal that he was denied effective

assistance of counsel when his trial attorney failed to challenge a jury selection process in which the prospective jurors included those who had sat on a prior hung jury involving Broomfield; he was denied a fair trial when jurors discussed extraneous information regarding his past alleged misconduct; and he was denied due process by the mistaken inclusion of a jury instruction on Broomfield's credibility, when he did not testify. However, we conclude that counsel properly relied on *voir dire* and peremptory challenges to remove prior jurors from the instant case; Broomfield failed to meet his burden of proving that jurors did in fact discuss extraneous information during their deliberations; and that the instructional error the circuit court made was unlikely to have misled the jury. Therefore, we affirm the judgment and order of the circuit court.

BACKGROUND

On May 18, 1995, Broomfield and Ferdinand Sparger entered a house where Broomfield's friend, Arica Madonna, lived with her grandmother, Dorothy Seeman. After Broomfield learned that no one was home,[1] he took the keys to Seeman's car and drove off in it. When Broomfield and Sparger were stopped by police, Sparger told police that Madonna had given them permission to take the car, which he later admitted was a lie. Broomfield's theory of defense was that Sparger had also lied to him about having permission to drive the car.[2] However, in exchange for the dismissal of several charges against him, Sparger

[1] Seeman was staying with her daughter as the result of an incident which had occurred two days earlier. Someone had broken into the home while both Seeman and Madonna were present, and had punched Seeman and ransacked her bedroom.

[2] In addition, the defense presented two witnesses who claimed that Sparger had subsequently stated that he had stolen a car and that Broomfield was in jail for it.

agreed to testify at trial. He said that taking the car was all Broomfield's idea, and that the two had agreed to lie after they had been pulled over by the police.

On the morning of the trial, August 21, 1995, defense counsel advised the court that the jury panel by and large consisted of the same panel members who had been used three weeks earlier in a disorderly conduct/bail-jumping case against Broomfield, which had resulted in a hung jury. The court suggested using the *voir dire* process to determine whether the jurors might be prejudiced from the prior proceeding, and counsel agreed.

Five of the first twenty prospective jurors called had served on the prior jury. The court asked whether any of them felt that their previous jury experience would influence their ability to be fair and impartial, and two indicated that it might do so. Those two were dismissed for cause. Three other prospective jurors were called and excused for the same reason. The court explained to the remaining panel members that Broomfield's prior trial had ended with a hung jury and had "absolutely nothing to do with this." Defense counsel asked the panel whether the knowledge that Broomfield had been charged with something in the past led any of them to feel he was guilty of the presently charged crimes, and they all responded negatively. He asked whether they would be able to listen to and decide the case on its merits and they responded affirmatively. All three of the remaining jurors from the bail-jumping case were dismissed on peremptory challenges: two by the defense and one by the prosecution. There was no motion to strike any of the last three for cause.

Broomfield did not testify. Nonetheless, at the close of the trial, the court gave the following instruction from WIS J I—CRIMINAL 300:

> Under the law, a defendant is a competent witness and you should not discredit the testimony merely because the defendant is charged with a crime. The defendant's testimony should be weighed as the testimony of any other witness. Considerations of interest, appearance, manner and other matters bearing upon credibility apply to the defendant in common with all witnesses.

This instruction was directly followed by the standard instruction WIS J I—CRIMINAL 315:

> A defendant in a criminal case has the absolute constitutional right not to testify.
>
> The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

Because the jury instruction conference was only partially recorded, it is unclear whether Broomfield pointed out that the last paragraph of WIS J I—CRIMINAL 300 was inapplicable or objected to its inclusion.

At a postconviction hearing nearly a year after the trial, one of the jurors, Gerald McCann, testified that while he was sitting in the courtroom before formal proceedings had begun that day, he overheard two people talking about Broomfield, saying, among other things, that he was a gangster and a troublemaker, that he had beat up a bunch of kids, and that he had been involved in some drive-by shootings. He also heard something about the prior hung jury and that there were other charges pending against Broomfield. However, when asked whether he had mentioned any of the things he had heard to the jury, he had no specific recollection of doing so. He felt that some of that information may have been discussed, but he couldn't remember for sure when he had heard what.

Trial counsel, Alan Bates, also testified at the postconviction hearing. He stated that the *voir dire* was sufficient to satisfy his concerns of

possible prejudice, and that he thought the problem of juror knowledge of the prior trial had been adequately addressed by the circuit court.

The circuit court considered McCann's testimony to be "very indefinite and nebulous," and the evidence of Broomfield's guilt to be overwhelming. It also considered Bates to be an outstanding defense attorney with the ability to determine what was important and what was not. Accordingly, the court denied Broomfield's motion for postconviction relief on all grounds.

DISCUSSION

Standard of Review.

Whether counsel's actions constitute ineffective assistance 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) (citing ***Strickland v. Washington***, 466 U.S. 668, 698 (1984)). The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS. However, whether counsel's conduct violated Broomfield's right to effective assistance of counsel is a legal determination, which this court decides without deference to the circuit court. ***State v. (Oliver) Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986).

Whether a prospective juror is biased depends heavily upon demeanor evidence and rests within the circuit court's discretion. ***Hammill v. State***, 89 Wis.2d 404, 415-16, 278 N.W.2d 821, 826 (1979). Thus, a circuit court's determination that a prospective juror can be impartial should be reversed only if bias is manifest. ***State v. Louis***, 156 Wis.2d 470, 478-79, 457 N.W.2d 484, 488 (1990).

The circuit court also has broad discretion when instructing a jury. ***Fischer v. Ganju***, 168 Wis.2d 834, 849-50, 485 N.W.2d 10, 16 (1992). However, whether a particular jury instruction has violated a defendant's right to due process is a question of law subject to independent review. ***State v. Kuntz***, 160 Wis.2d 722, 735, 467 N.W.2d 531, 535 (1991).

Finally, absent any constitutional violations of the type mentioned above, the circuit court has discretion whether or not to grant a new trial in the interests of justice. ***State v. Eison***, 194 Wis.2d 160, 171, 533 N.W.2d 738, 742 (1995).

Assistance of Counsel.

The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, which guarantee a criminal defendant a fair trial. *See* ***Strickland***, 466 U.S. at 684-86; ***State v. Sanchez***, 201 Wis.2d 219, 227-28, 548 N.W.2d 69, 72-73 (1996). The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. The defendant has the burden of proof on both components of the test. ***Id.*** at 688.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. (Edward) Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (citing ***Strickland***, 466 U.S. at 687). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id***. To satisfy the

prejudice prong, the defendant usually must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***Strickland***, 466 U.S. at 687. Although in the jury selection context, it may be sufficient to show that a challenge to the jury composition would or should have been sustained, prompting corrective action. ***State v. Ramos***, 211 Wis.2d 12, 27, 564 N.W.2d 328, 334 (1997) (holding that use of a peremptory challenge to remove a juror who should have been struck for cause deprived defendant of statutory right to peremptory challenges under §§ 972.03 and 973.04, STATS.); *see also* ***Davidson v. Gengler***, 852 F.Supp. 782 (W.D. Wis. 1994). In any event, it is not ineffective assistance of counsel to fail to bring futile motions. ***Quinn v. State***, 53 Wis.2d 821, 827, 193 N.W.2d 665, 668 (1972).

Broomfield contends that trial counsel's performance was deficient in two regards. First, counsel failed to object when the circuit court informed the entire *venire* panel about Broomfield's prior hung jury, so that everyone in effect learned about prior bad act evidence that would have been inadmissible at trial.[3] Second, counsel failed to move to strike the three remaining jurors from the prior disorderly conduct/bail-jumping case for cause, so that two peremptory strikes had to be used instead. Both contentions rest upon the assumption that Broomfield's right to an impartial jury was infringed by the ultimate jury composition, and should have been corrected upon a proper motion.

Like the right to effective assistance of counsel, the right to an impartial jury also stems from the fair trial guarantees of the Sixth Amendment

[3] Other wrongs evidence may be admitted under § 904.04(2), STATS., for the limited purpose of proving intent (as opposed to showing action in conformity with character), if it is shown to be relevant under § 904.01, STATS., and more probative than prejudicial as required by § 904.03, STATS. ***State v. Grande***, 169 Wis.2d 422, 430, 485 N.W.2d 282, 284 (Ct. App. 1992).

and Article I, Section 7 of the Wisconsin Constitution. ***Hammill***, 89 Wis.2d at 407, 278 N.W.2d at 822. An impartial juror is one "who says he can and will give the defendant the presumption of innocence; who can and will disregard any opinion he may have formed or expressed as to his guilt or innocence, and who can and will try him impartially and upon the evidence given in court and upon that alone." ***Id***. at 414, 278 N.W.2d at 825. A juror should not be considered biased solely because he or she has information about specific facts of the case. ***Hoppe v. State***, 74 Wis.2d 107, 112, 246 N.W.2d 122, 126 (1976).

Under this standard, the mere fact that Broomfield's jurors knew about his prior hung jury or had heard rumors about his involvement in other criminal activity, are insufficient to show that they were biased. First, while some of the bad acts information given to the jurors by the circuit court would have been inadmissible at trial,[4] such an error could have been cured by a proper instruction. ***State v. Fishnick***, 127 Wis.2d 247, 262, 378 N.W.2d 272, 280 (1985) (an instruction that the jury cannot use bad acts evidence to conclude defendant acted in conformity therewith, cures any danger of unfair prejudice); ***Pitsch***, 124 Wis.2d at 646 n.8, 369 N.W.2d at 720 n.8 (it is presumed that a jury will follow corrective instructions). And, just such an instruction was given during the *voir dire* in this case. Moreover, all of the jurors indicated that they could decide the case based upon the evidence adduced at trial. The only real basis for their dismissal, therefore, would have been a *per se* exclusion of anyone who had had any prior involvement in proceedings regarding Broomfield. But, a *per se* exclusion of jurors is not favored in Wisconsin. ***Louis***, 156 Wis.2d at 479, 457 N.W.2d at 488. Thus, even if trial counsel had moved to strike the jurors for cause, or to continue

[4] The State does not contest the inadmissibility of the evidence.

the proceedings until jurors could be drawn from a fresh *venire*, the circuit court could have denied the motions in the proper exercise of its discretion. And, since the circuit court indicated at the postconviction proceedings that it considered the *voir dire* more than adequate, there is no reason to believe that it would in fact have granted such motions had they been raised. Therefore, counsel's failure to do so did not constitute ineffective assistance.

Extraneous information.

Broomfield alleges that the jurors in his case did more than passively hear about his prior bad acts. According to Broomfield, the jury actively discussed extraneous information relating to his prior trial and other incidents during its deliberations. As the Wisconsin Supreme Court noted in ***State v. Poh***:

> When a jury considers facts in a criminal case which have not been introduced as evidence, the defendant has been deprived of the opportunity to be present when evidence is being presented, to be represented by counsel at an evidentiary proceeding during trial, to cross-examine the "witnesses" who presented the evidence, to offer evidence in rebuttal, to request curative instructions, or to take other tactical steps, including argument to the jury, to place the evidence in perspective for the jury.

State v. Poh, 116 Wis.2d 510, 525, 343 N.W.2d 108, 117 (1984). In such cases, the verdict may be impeached upon a showing of competent[5] evidence sufficient to show prejudice. ***Id.*** at 515-16, 343 N.W.2d at 112.

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[5] The competency of the evidence to impeach a verdict is limited by § 906.06, STATS., which provides in relevant part:

> (2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the

(continued)

Assuming without deciding that juror McCann was competent to testify as to whether he or other jurors discussed extraneous information in the jury room, [6] such as Broomfield having been involved in gang activity and drive-by shootings, and that such information would be prejudicial,[7] we still conclude that the evidence presented at Broomfield's postconviction hearing was insufficient to impeach the verdict. In order to overturn a verdict, the circuit court must be convinced by clear and satisfactory evidence not only that the alleged extraneous information could bias the jury against the moving party as a matter of law, but that the information actually reached the jury. ***Castanada v. Pederson***, 185 Wis.2d 199, 211, 518 N.W.2d 246, 251 (1994); ***After Hours Welding, Inc. v. Laneil Management Co.***, 108 Wis.2d 734, 740, 324 N.W.2d 686, 690 (1982).

Here, Broomfield presented only one juror, whose testimony, far from being clear and convincing, was in the words of the circuit court "indefinite and nebulous." Although McCann was quite certain that he had heard a number of extraneous facts about Broomfield prior to the *voir dire*, he could not state with

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> verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

[6] "[T]he party seeking to impeach the verdict has the burden to prove that the juror's testimony concerns extraneous information (rather than the deliberative processes of the jurors), that the extraneous information was improperly brought to the jury's attention, and that the extraneous information was potentially prejudicial." ***State v. Poh***, 116 Wis.2d 510, 520, 343 N.W.2d 108, 114 (1984).

[7] The test for prejudice resulting from the exposure of extraneous information to the jury is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ***Poh***, 116 Wis.2d at 529, 343 N.W.2d at 119.

specificity one single extraneous fact which had actually been discussed by the jury. Therefore, the circuit court properly refused to set aside the verdict on that ground.

Jury Instruction.

It is error to instruct a jury on an issue not supported by the evidence. ***D.L. v. Huebner***, 110 Wis.2d 581, 624, 329 N.W.2d 890, 909 (1983). However, a conviction will not be reversed based on an erroneous instruction, unless it is probable—not merely possible—that the jury was mislead. ***Fischer***, 168 Wis.2d at 849, 485 N.W.2d at 16. The totality of the instructions as given must be judged in light of the facts that the jury is asked to resolve. ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976).

In addition, a criminal defendant is constitutionally entitled to have the jury instructed that his failure to testify cannot be considered on the question of guilt. ***Carter v. Kentucky***, 450 U.S. 288 (1981). The mere possibility that an instruction might be interpreted to erode that constitutional right is sufficient to warrant reversal. ***Sandstrom v. Montana***, 442 U.S. 510, 526 (1979).

The circuit court admitted that it had not intended to read the last paragraph of WIS J I—CRIMINAL 300, and that its inclusion in the instructions to the jury was error. Broomfield claims there is a possibility that the jury was misled by the instruction into thinking that his failure to provide evidence as other witnesses were required to do might lower his credibility or increase the likelihood of his guilt. We conclude that there was no possibility of such a misinterpretation in light of the very specific instruction, "The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner," which directly followed the erroneously given instruction. We

conclude it acted as a curative instruction to the one preceding it, which had been given in error. Therefore, Broomfield's constitutional right not to testify was not violated.

CONCLUSION

An attorney may properly rely on the *voir dire* procedure to identify bias in potential jurors who have knowledge of prior bad acts of the defendant, and need not move to strike for cause potential jurors with such knowledge who have indicated that they could decide the instant case on its merits. Nor was it necessary for an attorney to request a new *venire* on the basis of panel exposure to such bad acts evidence, when the circuit court issued a curative instruction to the panel to disregard it. While actual discussion of a defendant's inadmissible prior bad acts during deliberations could undermine a defendant's right to a fair trial, Broomfield failed to meet his burden of showing that extraneous information was actually discussed during the proceedings. Finally, there is no merit to Broomfield's contention that an erroneously given instruction relating to the weight to be given to his non-existent testimony violated his constitutional right to remain silent.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.