COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP533 **Cir. Ct. No. 1990CF903777A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY DEON MARTIN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. In 1992, Corey Deon Martin was convicted of first-degree intentional homicide and first-degree recklessly endangering safety while using a dangerous weapon, both as party to a crime. In 1995, this court affirmed the judgment of conviction. ***State v. Martin***, No. 1993AP3369-CR,

unpublished slip op. (WI App. May 2, 1995) (***Martin I***). In this appeal, taken from orders denying a WIS. STAT. § 974.06 (2007-08)[1] postconviction motion and a motion for reconsideration, Martin, *pro se*, raises several claims of ineffective assistance of trial counsel, couched in challenges to the effectiveness of postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (ineffective assistance of postconviction counsel in failing to raise a meritorious issue can be a sufficient reason to avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994)). For the reasons stated below, we affirm the circuit court's orders.[2]

FACTS

¶2 The following facts were set forth in ***Martin I***, and we restate them here to set the background for Martin's current contentions.

> Numerous witnesses testified in the six-day jury trial. Their testimony conflicted and, on some instances, was contradictory. Nevertheless, the following evidence was presented at trial. Roderick Carter and Brian Dorsey were members of the Milwaukee street gang, Brothers of the Struggle (or BOS gang). On the Thursday preceding the incidents at issue in this case, Carter and Dorsey were at a night club when an altercation broke out between Dorsey's friend and a member of a rival gang, the "2-7s." The altercation grew between the BOS gang associates on one side, and the "2-7s" and their related gang, the "1-9 Deacons," on the other. Carter and Dorsey stepped in to calm things down, and as they did this, a small gray car

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The Honorable Victor Manian presided over Martin's jury trial. Sitting as a reserve judge, Judge Manian also ruled on Martin's WIS. STAT. § 974.06 motion and the reconsideration motion.

> drove past. Gregory Hayes, Martin's co-defendant in this case, was driving the car and Martin was in the front passenger seat. An hour later, Carter and Dorsey were standing outside another gathering spot when a gray car, similar to the one seen earlier, drove by and its occupants fired several gun shots at Carter's parked car. Carter concluded that Hayes or Martin did the shooting and he let the word out on the streets that he expected payment of damages from Hayes or Martin or he would "handle it by any means necessary."
>
> Four days later, Carter drove Dorsey and several others to a party on North Second Street. While Dorsey left the car to go to the party, Carter remained in the parked car on Second Street. As Dorsey walked between two houses to the rear cottage where the party was held, Hayes and another man confronted Dorsey. Hayes held a handgun to Dorsey's head, and asked whether Dorsey was "looking for him." As several people came out of the house, Hayes and his companion left, going down the alley to Second Street.
>
> Meanwhile, at the same time that Hayes was confronting Dorsey, Martin approached Carter in the parked car. He held a handgun to Carter's head and asked him if he was "looking for him." Carter jumped out of his car and struggled with Martin for the gun. The gun discharged twice, wounding Martin once in the leg. At that time Hayes and his companion emerged from between the houses. As Carter broke away from Martin and stood up, Hayes opened fire on Carter, striking him in the head. Carter fell to the ground. Hayes walked over to Carter, firing until he emptied his gun. He then stood over Carter, put another clip into the handgun and kept shooting. Thirty-one spent shell casings were later recovered at the scene. Martin, Hayes, and his companion left in the gray car rented by Martin. Carter was pronounced dead at the scene; a later autopsy showed that Carter's body had seventeen bullet entrance wounds to the head, chest, and abdomen.

Martin I, unpublished slip op. at 2-4. Further facts will be stated below as necessary.

DISCUSSION

¶3 As noted, Martin argues that his trial counsel was ineffective in several respects. The two-part test for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). If the defendant is unable to show one prong, the court need not address the other. ***Id.*** at 697. The first prong of ***Strickland*** requires a defendant to show, against a "strong presumption that counsel acted reasonably within professional norms," that his counsel's performance was deficient. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The first test requires the defendant to show that his counsel's performance was deficient. 'This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***Id.*** at 127 (*quoting* ***Strickland***, 466 U.S. at 687). An attorney's performance is not deficient if it is reasonable under prevailing professional norms and considering all the circumstances. ***Id.*** at 127. Further, the failure to voice an objection does not constitute deficient performance if the objection would have been overruled. *See* ***State v. Traylor***, 170 Wis. 2d 393, 405, 489 N.W.2d 626 (Ct. App. 1992). The second prong of ***Strickland*** requires the defendant to prove that his right to a fair trial was prejudiced. ***Strickland***, 466 U.S. at 687. "The 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.

A. Supplemental Jury Instruction

¶4 During deliberations, the jury informed the circuit court that it was having difficulty reaching a verdict. After restating the gist of the party-to-a-crime instruction, the circuit court told the jury the following:

You have to decide whether the facts, as you find them and applying that law to those facts makes the defendant guilty or not guilty. That's the job of the jury is to determine, you can't debate the law, the law is what I gave you, so [you] have to decide whether that law applies to the facts as you find them and if the defendant is guilty, then he's guilty.

…

So, the instruction tells you what aiding and abetting is.

You have to determine whether the facts that are proven beyond a reasonable doubt in your estimation fit aiding and abetting as the law is defined for you in that instruction.

…

You're supposed to see whether the facts, in your estimation, have been proven beyond a reasonable doubt and you have to agree on that, all 12 of you have to agree.

…

[Y]ou've spent, you know, a week-and-a-half here, you've heard all the facts there are, those are all the facts and there's no reason why you can't decide the facts any less than any other jury would have to do it, if you're hung.

…

So, you know, we've already, all of us have spent a week-and-a-half on this case, and obviously, we'd like to have it resolved, everyone here would like to have it resolved.

I don't want to force you to come to a decision, but part of your – the duty of a juror is to – is to listen, to weigh what the other jurors say, take that all into consideration.

That doesn't mean if you're absolutely convinced that the case hasn't been proven that you should give in just to compromise, but you should listen to each other and see if you, after looking at another person's view, see it from a different perspective.

Martin contends that the circuit court erroneously gave the jury a coercive ***Allen***[3] instruction, and that the circuit court "conveyed an unconstitutional burden of proof to the deliberating jury, contrary to ***In re Winship***," 397 U.S. 358 (1970). Martin also contends that his attorney was ineffective because he did not object to the instructions given to the jury.

¶5 We agree with the postconviction court that no instructional error occurred.[4] Therefore, Martin's trial counsel was not ineffective because he did not object to the circuit court's supplemental instructions. *See* ***Traylor***, 170 Wis. 2d at 405.

¶6 Martin first focuses on the phrase, "if the defendant is guilty, then he is guilty," and argues that the circuit court was suggesting to the jury that Martin was guilty and that any "reluctance to find Martin guilty was somehow improper." Martin takes the circuit court's statement out of context, and a consideration of that context defeats Martin's argument. The circuit court's statement was part of a larger charge in which the circuit court emphasized the jury's responsibility "to decide whether the facts, as you find them, and applying th[e] law to those facts makes the defendant guilty or not guilty" and that "the job of the jury is … decide whether that law applies to the facts as you find them." The circuit court did not

[3] ***Allen v. United States***, 164 U.S. 492 (1896). An "***Allen*** instruction" directs a juror to distrust his or her judgment if a large majority of jurors hold a different opinion. *See* ***State v. Edelburg***, 129 Wis. 2d 394, 399 n. 2, 384 N.W.2d 724 (Ct. App. 1986).

[4] In his postconviction motion, Martin argued that his trial attorney was ineffective for not objecting to "the foreclosing of juror dissent." That argument focused on the circuit court's handling of the jury's request to have a witness's testimony read back to it. Martin does not renew that argument on appeal, and we do not address it. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994) (issue raised in the circuit court but not briefed or argued on appeal is deemed abandoned).

instruct the jury to find Martin guilty if, after applying the law to the facts, it concluded that Martin was not guilty.

¶7 Martin also contends that the circuit court altered the burden of proof when it told jurors they should "listen to each other and … see it from a different perspective" unless the juror is "absolutely convinced that the case hasn't been proven." Martin again takes a phrase out of context, and when the entire statement is considered, Martin's argument fails. After alluding to the length of the trial and the desire to resolve the matter, the circuit court told jurors that is was not "forc[ing] … a decision," and that "part of … the duty of a juror is … to listen, to weigh what the other jurors say, [and] take that all into consideration." The circuit court went on to tell the jurors that they should not "give in just to compromise" if they are "absolutely convinced that the case hasn't been proven" but that jurors "should listen to each other and see if you, after looking at another person's view, see it from a different perspective." We see nothing improper or coercive in the circuit court's statements which merely told the jurors to listen to and consider each other's views.[5]

[5] We also reject Martin's contention that the circuit court's statements were similar to those found improper in ***Mead v. Richland Center***, 237 Wis. 537, 297 N.W. 419 (1941). In ***Mead***, the circuit court told a jury that was split eight to four, that "the four who do not agree with the eight might well consider whether their judgment is better than the eight who have listened … just as carefully to the evidence" and that "those in the minority might well consider … whether they are warranted in standing on their views as against that of their fellow jurors, who … have been just as anxious to render a just and true verdict as the minority has." ***Id.*** at 539-40. The supreme court determined that the circuit court had erroneously "intimat[ed]" that the minority jurors "were not warranted in standing on their own views because the eight held to the contrary" and "impli[ed] that eight men are more likely to be right than four, and the four should therefore accept the view of the eight." ***Id.*** at 540-41. As we note above, the circuit court's comments directed jurors to consider the views and perspectives of fellow jurors. The circuit court did not inquire into the split within the jury nor did it suggest that either position, be it guilt or acquittal, was more valid than the other.

B. Brian Dorsey's Testimony

¶8 Co-defendant Gregory Hayes was tried before Martin, and Brian Dorsey testified at Hayes's trial. Dorsey also testified at Martin's trial. On appeal, Martin argues that his trial counsel should have used Dorsey's testimony from Hayes's trial to impeach testimony given by Dorsey at Martin's trial.

¶9 In response to the prosecutor's question whether he knew "Hayes to be a member of any street gang," Dorsey replied "Well, he hung out with a lot of them 2-7's." The prosecutor next asked Dorsey whether Martin was "associated with any street gang, and Dorsey replied, "I can't say that for sure, but I know he hung up with [Hayes] an awful lot." Martin views that testimony as inconsistent with Dorsey's testimony at Hayes's trial that Martin and Hayes "hung out together[,] [o]ccasionally."

¶10 At both trials, Dorsey connected Martin to Hayes. Although "occasionally" and "an awful lot" have different meanings, Dorsey prefaced his "awful lot" response with a substantial qualifier—"I can't say … for sure." More importantly, as the State points out, both Hayes and Martin testified that they saw each other often and Martin testified that he and Hayes "would hang out places together." Additionally, other witnesses linked both Hayes and Martin to the "2-7" street gang.[6] In its postconviction order, the circuit court ruled that "there

[6] In his reply brief, Martin correctly points out that Police Officer Leon Staples, one of the witnesses that the State relies on in its brief, did not testify before the jury. The record confirms that Staples's testimony was part of an offer of proof and that the jury was not present during his testimony. The record, however, contains ample other evidence linking this incident to gang animosity. On direct appeal, this court held that "gang affiliation evidence … was clearly relevant to show Martin's motive, and the absence of mistake." ***State v. Martin***, No. 1993AP3369-CR, unpublished slip op. at 10-11 (WI App. May 2, 1995).

[was] not a reasonable probability [that] the outcome would have changed had Dorsey been impeached" with the testimony from Hayes's trial. We agree.

C. Prosecutorial Misconduct

¶11 Martin next argues that his trial counsel was ineffective for not objecting to several instances of prosecutorial misconduct during the State's closing argument. Martin contends that the State misrepresented facts and referred to evidence not in the record.

¶12 Counsel is allowed considerable latitude during closing argument. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him or her and should convince the jurors. ***State v. Nielsen***, 2001 WI App 192, ¶46, 247 Wis. 2d 466, 634 N.W.2d 325.

¶13 This court has reviewed the State's closing argument and particularly those portions of argument cited by Martin as improper. We concur with the following statements made by the circuit court in its postconviction order:

> The court has reviewed the State's closing argument and does not find that the prosecutor's comments rose to the level of prosecutorial misconduct. This was closing argument. The prosecutor's argument and conclusions were fair game. The court also finds the State did not improperly vouch for the witness's credibility as alleged by the defendant. This was fair argument and also did not constitute prosecutorial misconduct.

Because the State's closing argument was not improper, Martin's trial counsel was not ineffective for failing to object to the argument.[7] *See* ***Traylor***, 170 Wis. 2d at 405.

D. Written Jury Instructions

¶14 Martin next contends that the jury was not given a set of written instructions for use during deliberations, and he faults his trial counsel for not "ensur[ing]" that the circuit court complied with WIS. STAT. § 972.10(5) (1991-92) which required the court to "provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided."

¶15 Martin's argument rests on Record Item 38—a copy of WIS JI—CRIMINAL 1010 and 400, first-degree intentional homicide and party to a crime instruction. Item 38 does not include any other substantive instruction.[8] In its postconviction order, the circuit court stated that "[i]t was typical at the time [1992] to provide the jury with a complete set of instructions, but they were not usually filed in the court file after they had been used." The circuit court hypothesized that Item 38 might be defense counsel's submission of WIS JI—CRIMINAL 1010 and 400. The circuit court found that "it did not utilize [Item] 38 when it instructed the jury … and that it instead utilized the standard jury instructions." The circuit court further found that "[t]he instructions that would

[7] The State also notes that even if the State did misrepresent evidence, the remedy would have been for the circuit court to instruct the jury that the statements of counsel are not evidence. *See* WIS JI—CRIMINAL 157 and 160.

[8] Martin does not contend that the circuit court did not read all of the appropriate instructions to the jury prior to their deliberations.

have gone to the jury would have been copies of what the court actually read prior to closing arguments."

¶16 A comparison of Item 38 with the instructions actually read to the jury supports the circuit court's findings—Item 38 bears little resemblance to the actual instructions read to the jury. The circuit court's findings are not clearly erroneous. Because the record shows that Item 38 is not the instructions that were given to the jury, the underlying premise of Martin's argument is defeated.

E. New trial in the Interest of Justice

¶17 Martin asks this court to order a new trial in the interest of justice under WIS. STAT. § 752.35. We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have determined that no reversible error occurred. A new trial in the interest of justice is not justified on a combination of non-errors. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Orders affirmed.

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