COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2267-CR **Cir. Ct. No. 2007CF695**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY L. BALLARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Tony Ballard appeals from a judgment convicting him of two counts of delivering cocaine and from an order denying his postconviction motion seeking a new trial due to ineffective assistance of counsel,

lack of an impartial jury, and erroneously admitted evidence. We affirm the judgment and order.

¶2 On appeal, Ballard complains that the prosecutor raised the question of racial bias during voir dire. He argues, without citation to authority, that only a defendant may inquire about racial bias and because he did not raise the issue, the prosecutor and the circuit court were prohibited from raising it.[1] We disagree.

¶3 Ballard is African-American; it appears that the jurors were white. During voir dire, the prosecutor noted Ballad's heritage and remarked as follows:

> Kind of the elephant in the room, I guess I would have to say at this point. Mr. Ballard is an African-American obviously. And one thing that's very important, I think, for both the State and the defense in this case to make sure that there's a balanced result in this case is that there would be no racial bias in the courtroom, has no place in the courtroom. And if anybody has any doubt at all about their ability to look past that issue, it's very important that you raise that issue now for whatever reason. If you've had a bad experience or for whatever reason if you just haven't had, if you can't get by that issue, it's important that you not sit on the jury today. Is there anybody that has an issue with that at all? Great.

No juror responded to the prosecutor's inquiry.

¶4 Postconviction, Ballard argued that the prosecutor could not raise the question of racial bias unless he first raised the issue. At the postconviction motion hearing, Ballard questioned his trial counsel about her approach to jury

[1] Because trial counsel did not object to the prosecutor's inquiry, the issue is waived on appeal. ***State v. Copening***, 103 Wis. 2d 564, 571, 309 N.W.2d 850 (Ct. App. 1981). However, waiver is a rule of judicial administration, not a jurisdictional defect. ***State v. McMahon***, 186 Wis. 2d 68, 93, 519 N.W.2d 621 (Ct. App. 1994). We may, in our discretion, address a waived issue. ***Id.***

selection. Ballard's trial counsel testified that she did not inquire about racial bias because the State often raises that issue. Trial counsel did not object to the prosecutor's inquiry because Ballard's race and the racial composition of the jury were obvious to everyone, and she did not want to draw attention to what was obvious. Had any juror expressed racial bias, that information would have been helpful to the defense as well. The prosecutor's inquiry did not interfere with any of her trial strategy.

¶5 The circuit court denied Ballard's request for a new trial due to the prosecutor's racial bias inquiry. The court noted that it has a general interest in ensuring that jurors are impartial and without racial bias. The court found that the prosecutor's inquiry was benign and intended to ferret out racial bias. The court found no merit in Ballard's contention that the State cannot inquire regarding racial bias until the defendant raises the issue.

¶6 We agree with the circuit court. It is incumbent upon the circuit court and counsel to seat an impartial jury without racial bias. The State, like the defendant, has a stake in an unbiased jury. We distinguish the prosecutor's inquiry in this case from a case where a prosecutor deliberately injects the issue of race into the proceedings for strategic reasons. Furthermore, there is no evidence that any juror acted out of racial bias in convicting Ballard. *See* ***State v. Koller***, 2001 WI App 253, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838 (prejudice exists only if a biased juror served on the case).

¶7 Ballard next argues that his trial counsel was ineffective in several respects. The ineffective assistance standards are:

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient

> performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.
>
> We review the denial of an ineffective assistance claim as a mixed question of fact and law. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law.

State v. Kimbrough, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

¶8 Ballard contends that his trial counsel was ineffective in the manner in which she cross-examined the confidential informant who testified that he purchased crack cocaine from Ballard. Specifically, Ballard contends that his counsel did not effectively cross-examine the confidential informant about the concessions he received for his testimony against Ballard.

¶9 The record shows that the confidential informant's motivation to cooperate in drug investigations was placed before the jury. On direct examination, the State inquired regarding the informant's meeting with a Sheboygan County Sheriff's Department drug unit investigator. The informant was told that if he assisted the drug unit, he would face reduced charges in his own

drug case. The informant identified Ballard as a drug seller, contacted Ballard about buying drugs, and then purchased drugs from Ballard on two separate occasions. The informant believed that he received consideration for assisting in the Ballard investigation. The informant was not convicted of any felonies, and he received probation with electronic home monitoring.

¶10 On cross-examination, Ballard's counsel inquired regarding the informant's interactions with law enforcement on the question of his own criminal cases. The informant testified that no promises were made to him but he believed that his cooperation might help his case.

¶11 Both the State and Ballard referred to the informant's consideration during their closing arguments. The State emphasized that no promises were made to the informant even though his felony charges were ultimately amended to misdemeanors, and he received electronic monitoring. Defense counsel suggested that the informant's motivation to reduce his own exposure made his credibility questionable.

¶12 Postconviction, the circuit court found that trial counsel established that the informant was motivated to assist in the Ballard investigation to ameliorate his own drug charges. On appeal, Ballard does not suggest what other information trial counsel should have been elicited on cross-examination. We agree with the circuit court that trial counsel did not perform deficiently in her cross-examination of the informant.

¶13 Ballard next argues that trial counsel performed deficiently when she failed to request color copies of the photographs used in the array from which the informant identified Ballard. During discovery, the State provided Ballard's counsel with black and white copies of the photographs used in the array. Ballard

argues that if defense counsel had reviewed the actual photographs used in the array, she would have been able to determine whether the photographs were somehow impermissibly suggestive due to differences in the persons depicted. *See* ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (discussing the standard for an impermissibly suggestive pretrial identification).

¶14 Postconviction, the circuit court viewed the color photographs and found that the array was fair because it depicted African-American males of similar age, complexions and hairstyles. Nothing about the photographs would have caused Ballard to stand out. The court concluded that Ballard was not prejudiced by his trial counsel's failure to view the color photographs used in the array. Ballard does not dispute the circuit court's findings about the photographs. Counsel did not perform deficiently.

¶15 Ballard next contends that his trial counsel did not take a consistent approach regarding evidence of prior convictions and their impact on a witness's credibility, i.e., while she tried to maximize the number of the informant's prior convictions, she did not attempt to minimize the number of prior convictions of Ballard's alibi witness, Robert Bocook. With regard to Bocook, the circuit court admitted all six of his prior convictions dating from 1998 to 2004 (resisting, possession of illegally obtained prescriptions, misdemeanor theft, felony theft and misdemeanor battery). Ballard contends that the 1998 disorderly conduct conviction should not have been admitted.

¶16 Postconviction, the circuit court concluded that Ballard was not prejudiced because even if the 1998 conviction should not have been admitted, Bocook's five other prior convictions were properly disclosed to the jury. The jury would not have distinguished between five and six prior convictions on the

credibility scale. We agree with the circuit court that reducing the number of Bocook's prior convictions by one would not have made a material difference in the jury's credibility assessment.

¶17 Ballard argues that his trial counsel was ineffective because she failed to object to the description of one of the speakers as "Tony" in a transcript of the informant's recorded drug transaction with Tony Ballard. Pretrial, the parties agreed on the format of the transcript. The jury reviewed the transcript while listening to the audiotape of the transaction. The transcript identified one of the speakers as "Tony" at the point in the conversation when the informant asked to speak to "Tony" and a person purporting to be "Tony" then spoke. The informant testified that the tape reflected his conversation with Ballard. On redirect examination, the informant conceded that although he believed he was speaking with Ballard, he had not had enough contact with Ballard to identify his voice on the telephone.

¶18 Postconviction, Ballard argued that identifying one of the speakers in the transcript as "Tony" was prejudicial. The circuit court disagreed. The transcript did not identify the other speaker as "Tony" until after the informant asked for "Tony" and the other speaker responded to that name. Because "Tony" was mentioned in the course of the recorded conversation, there was no prejudice in the manner in which the transcript was prepared.

¶19 Ballard makes a last attempt at a new trial by citing all the aforementioned inadequacies of his trial counsel. Ballard cannot combine perceived inadequacies of counsel to support a claim of prejudice requiring a new trial. ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305. More

importantly, we have not found any inadequacies that were either prejudicial or warrant a new trial.

By the Court.—Judgment and order affirmed.

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