COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2851-CR **Cir. Ct. No. 2009CF629**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EQUONTUS TERRELL YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Equontus Terrell Young appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree reckless homicide while armed with a dangerous weapon. He further appeals from an order denying without a hearing his postconviction motion for a new trial based on

ineffective assistance of trial counsel. Though Young contends his motion was at least sufficient to warrant a hearing, we conclude the circuit court properly denied the motion, and we affirm the judgment and order.

BACKGROUND

¶2 In June 2006, Antoine Taylor, his brother Timothy Fitch, and friend Wayne Lee left Taylor's home and drove to Lee's house. When they arrived, they discovered a fight going on outside Lee's home, with approximately twenty to fifty people gathered to watch the fight. Taylor entered the fray and attempted to separate the combatants. Three shots were fired, and Taylor fell to the ground. He was pronounced dead at the scene.

¶3 Witnesses gave varying accounts about what happened. Lee admitted that he had fired one shot into the air to try to break up the fight. As for the other shots, some witnesses saw both Young and another man, Robert Banks, with guns. Two of the witnesses heard Young make inculpatory statements. Some of the witnesses significantly changed their stories between when they gave a statement to police and when they testified at Young's trial. Banks was originally arrested as a suspect around the time of the incident, although he was evidently never charged. When Young was charged in 2009, no explanation was given for the charging delay.

¶4 During *voir dire*, the State asked whether any of the potential jurors had a friend or family member killed as the result of a homicide. Juror 23 responded that his cousin had been killed, but no arrest was made. The State asked whether that experience would influence the juror, who responded, "No." The State then inquired whether the juror would be able to put that experience aside when hearing this case. The juror responded, "I don't really know. I can't

really answer." The State moved on, and defense counsel asked no follow-up questions. Juror 23 was empaneled.

¶5 Ultimately, the jury convicted Young as charged. The circuit court sentenced him to forty years' initial confinement and ten years' extended supervision. Young moved for a new trial, alleging ineffective assistance of trial counsel. Specifically, Young claimed trial counsel was ineffective when he failed to: (1) ask follow-up questions of, and move to strike for cause, Juror 23 after the juror's responses "showed bias"; (2) call four witnesses, who Young believes had beneficial testimony; and (3) object, on confrontation grounds, to the testimony of medical examiner Christopher Happy, who had not performed Taylor's autopsy. The circuit court denied the motion without a hearing, and Young appeals.

DISCUSSION

I. Standard of Review

¶6 To be entitled to a hearing on a postconviction motion, a defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, a hearing is required. ***Id.*** If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in determining whether to grant a hearing. ***Id.***

¶7 To demonstrate ineffective assistance of counsel, Young must show that counsel performed deficiently and that the deficiency prejudiced his defense. *See* ***State v. Eckert***, 203 Wis. 2d 497, 506, 553 N.W.2d 539 (Ct. App. 1996). Proving deficiency requires a showing that counsel made errors so serious that he

was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** Demonstrating prejudice requires a showing that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** at 507 (citation omitted). We need not address both components if Young fails to make a satisfactory showing on one of them. *See* ***id.*** Young asserts that he is not necessarily asking us to find counsel ineffective but, rather, that his motion at least was sufficient to warrant an evidentiary hearing.

II. Juror 23

¶8 Young asserts that Juror 23 expressed equivocation on the potential for bias, requiring trial counsel to ask follow-up questions under ***State v. Traylor***, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992). He contends that the circuit court, in determining that Young was not entitled to relief, erroneously concluded that Juror 23 had been unequivocal in his answers.

¶9 The portion of *voir dire* with which Young is concerned is as follows.

> [DISTRICT ATTORNEY]: I am certainly not asking you to not remember. And I'm sure some of the evidence you hear in this case or even the discussion of it will probably bring up some memories of what happened to your cousin. I guess my question to you is, despite, or taking into account what happened to your cousin, is the fact – or if you're asked to sit here as a juror, is there anything about that that would influence you one way or the other where you don't think you could be fair and impartial?
>
> JUROR NO. 23: No.

> [DISTRICT ATTORNEY]: No. You think you could not put it aside but you think it's something that is not going to overcome your ability to sit as a juror?
>
> JUROR NO. 23: I really don't know. I can't really answer.

Young complains that the circuit court, in concluding that Juror 23 was not biased and that trial counsel was not ineffective, focused on the juror's first answer while ignoring the second.

¶10 "'Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias.'" ***State v. Smith***, 2006 WI 74, ¶19, 291 Wis. 2d 569, 716 N.W.2d 482 (citation omitted). There are three types of potential juror bias: statutory, subjective, and objective. *See* ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999). Statutory bias is clearly not at issue in this case, but Young does not identify whether he believes that Juror 23 was subjectively or objectively biased.

¶11 Subjective bias "'refers to the bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind.'" ***Smith***, 291 Wis. 2d 569, ¶20 (citation omitted). Subjective bias may be revealed by a juror who has "'expressed or formed any opinion, or is aware of any bias or prejudice in the case[.]'" *See* ***id.*** (citation omitted).

¶12 To exclude a juror because of objective bias, there must be either: "(1) some direct or personal connection between the challenged juror and some important aspect of the particular case, or (2) a firmly held negative predisposition by the juror regarding the justice system that precludes the juror from fairly and impartially deciding the case." ***State v. Jimmie R.R.***, 2000 WI App 5, ¶19, 232 Wis. 2d 138, 606 N.W.2d 196. That is, a juror "should be viewed as objectively

biased if a reasonable person in the juror's position could not avoid basing his or her verdict upon considerations extraneous to evidence put before the jury at trial." ***State v. Tody***, 2009 WI 31, ¶36, 316 Wis. 2d 689, 764 N.W.2d 737.

¶13 We are simply not persuaded that Juror 23's answers reveal subjective or objective bias. We discern no subjective bias because nothing about Juror 23's answers suggest that he had prejudged the case or had his own preset "concept of justice." *See* ***Traylor***, 170 Wis. 2d at 399. We discern no objective bias because we are not persuaded that a reasonable juror in Juror 23's position could not set aside his own experiences and judge the case fairly and impartially. The juror was clear that he did not think his experience would impact his ability to be impartial. At worst, Juror 23's second answer reflects an uncertainty about whether he would be able to put his own experience out of his mind while reviewing this case, but the answer does not indicate bias.

¶14 Consequently, this case is not like ***Traylor***, which Young believes stands for the proposition that defense counsel must seek clarification of all equivocal answers from prospective jurors. Jurors in ***Traylor*** had expressed various beliefs that the defendant was guilty "right away," that someone who was arrested had probably done something wrong, and that a defendant really should take the stand to testify. ***Id.*** at 397-98. We concluded that trial counsel was deficient because the lack of any follow-up questions meant that "there was a failure to conclusively determine whether the juror would follow the law as instructed by the trial court instead of following his or her own concept of justice." ***Id.*** at 399. Juror 23's answers cause no such concerns.

¶15 The record demonstrates that Juror 23 displayed no bias in his *voir dire* answers. Therefore, counsel was not required to ask follow-up questions

under ***Traylor*** and did not perform deficiently by failing to do so. The circuit court was not required to grant a hearing on this issue.

III. Uncalled Witnesses

¶16 Young complains that trial counsel "failed to call at least four witnesses having favorable testimony whose potential testimony was included in the discovery materials." These witnesses are Megan Lee, Edward Patterson, Caressa Adams, and Kewaun Clark.

¶17 In his postconviction motion, Young alleged that each of these witnesses implicated Banks as the shooter, so failure to call them "deprived the jury of hearing substantial exculpatory evidence." In his brief to this court, Young complains that the circuit court's analysis is mostly "a recapitulation of the testimony from the trial" and the circuit court "never suggests that the allegations in the postconviction motion are lacking in specificity[.]"

¶18 In fact, the circuit court held that "[t]he defendant's motion is not supported by any affidavits from these witnesses, and therefore, it is unknown what they actually would have said at trial." This is effectively a finding that the motion was "lacking in specificity." Indeed, "[w]hen a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what that particular witness would have said if called to testify." ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647. Young does not allege what the witnesses would have testified to; he merely repeats what they told police.

¶19 Further, the circuit court necessarily viewed the omitted witnesses' statements against the trial proceedings. Assuming that trial counsel was deficient

for not calling the witnesses, Young must show that the error led to a reasonable probability of a different result. *See* ***Eckert***, 203 Wis. 2d at 507. The circuit court concluded that there was no reasonable probability of a different result at trial, and upon review, we agree.

¶20 Though Megan Lee first identified Banks as the shooter, she later identified Young as the shooter. Patterson allegedly identified Banks as the shooter, but he had not seen the shooting himself and actually identified Young as the person he saw fleeing the scene with a gun. Adams' identification of Banks was based on hearsay—someone in the crowd called out his name when Adams pointed to him—and Adams later told police she had heard that Young was the shooter. Finally, Clark first told police that he saw Banks with a gun, but not until after shots were fired. He did place Young at the scene. Clark also told police that he did not believe Banks was the shooter, because Banks had told everyone he had not done the shooting. A year later, Clark told police that both Young and Banks were armed and that he saw Banks fire. When police asked about the inconsistency in his statements, Clark replied that he thought he had said all along that Banks was the shooter.

¶21 Absent affidavits, we do not know which version of events each witness might have told a jury. *See* ***State v. Domke***, 2011 WI 95, ¶52, 337 Wis. 2d 268, 805 N.W.2d 364 (reasonable attorney faced with vacillating witness should investigate to determine whether witness is going to provide damaging or useful testimony). Even if the witnesses would have testified consistent with the statements that Young put in his motion, there is nothing particularly exculpatory to the statements, but there is considerable testimony that could be inculpatory. *See* ***Eckert***, 203 Wis. 2d at 515 (neither deficient nor prejudicial to not call a

witness whose testimony would be more beneficial to the State). We also do not know whether the witnesses would have appeared to testify if called.[1]

¶22 Absent sufficient pleadings which, if true, would indicate that a failure to call any of these witnesses was deficient or prejudicial, *see* ***Allen***, 274 Wis. 2d 568, ¶24, Young was not entitled to a hearing on this issue.

III. Confrontation Clause

¶23 The autopsy on victim Taylor was performed by Dr. Alan Stormo. At the time of trial, Dr. Christopher Happy was the medical examiner, and he testified at trial. Happy reviewed Stormo's report and testified that in his opinion, Taylor's cause of death was a gunshot wound to the upper back that resulted in exsanguination. In response to the postconviction motion, the circuit court ruled that there was no confrontation clause violation. Though Happy based his conclusion on Stormo's recorded observations, it was nevertheless Happy's own conclusion, not Stormo's. *See* ***State v. Williams***, 2002 WI 58, ¶20, 253 Wis. 2d 99, 644 N.W.2d 919. Young does not dispute this characterization of Happy's testimony, but insists that it is nevertheless a confrontation clause violation.

¶24 This question has been recently revisited by the United States Supreme Court. Analogizing to settled law allowing an expert to testify based on hypothetical facts, a plurality of the Court concluded that out-of-court statements

[1] Trial counsel had obtained one adjournment to look for witnesses, then attempted to obtain a second adjournment. The circuit court denied the second adjournment request because there was no reason to believe that additional time would have secured the witnesses' presence. Indeed, at least one witness was in warrant status. Young contends that it is not clear whether the four witnesses he now identifies were the ones for which trial counsel sought the adjournment. Nevertheless, Young's pleadings do not sufficiently establish the availability of the witnesses, even if counsel had thought to call them.

relied on by experts for explaining the assumption on which their opinions rest are statements that are not offered for the truth of the matter asserted and, therefore, do not violate the confrontation clause.[2] ***Williams v. Illinois***, 132 S.Ct. 2221, 2228 (2012). Under this standard, there would be no merit to raising a confrontation clause issue. Counsel's failure to pursue a meritless issue does not constitute deficient performance. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶25 However, even if admission of Happy's testimony constituted a confrontation clause violation to which trial counsel should have objected, admission of the testimony was harmless error. *See* ***State v. Weed***, 2003 WI 85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485 (confrontation clause issues subject to harmless error analysis). Taylor's cause of death was undisputed. Rather, the primary issue for trial was the identity of the shooter. Consequently, our confidence in the outcome is not undermined. ***Eckert***, 203 Wis. 2d at 507. Accordingly, the record conclusively demonstrates that trial counsel was not ineffective with regard to Happy's testimony, so Young was not entitled to a hearing on this issue, either.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[2] Justice Thomas concurred in the result that there was no confrontation clause violation in that case, though he concluded it was because the report on which the expert relied was not testimonial in nature. *See* ***Williams v. Illinois***, 132 S.Ct. 2221, 2255 (2012) (Thomas, J., concurring).