COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1475-CR **Cir. Ct. No. 2009CF611**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE C. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jimmie C. Green appeals from a judgment of conviction entered after a jury found him guilty of one count of first-degree intentional homicide, three counts of first-degree recklessly endangering safety, and one count of discharging a firearm from a vehicle. Green also appeals from an

order denying his postconviction motion requesting access to sealed juror information and a new trial on grounds of ineffective assistance of counsel or in the interest of justice. We conclude that: (1) Green failed to make a preliminary showing that would entitle him to the sealed juror records or to further question the jurors at an evidentiary hearing; (2) trial counsel's performance was not deficient; and (3) the real controversy was fully tried, and justice was not miscarried. We affirm.

¶2 In 2009, Green was charged with five crimes, the most serious being first-degree intentional homicide by use of a dangerous weapon. The complaint alleged that as part of an ongoing gang rivalry and in retaliation for an earlier gang-related shooting, Green and his co-conspirators drove down the street shooting their guns at people outside. Several people were injured, and a twelve-year-old boy who was playing in an outside yard died as a result of gunshot wounds.

¶3 Green's case was tried to a jury. During voir dire, the prospective jurors were informed that the crime was gang related and that Green was alleged to be a gang member. The State asked whether any of the prospective jurors lived in an area where gang activity was a perceived problem. One juror responded that she had called the police because of gang activity in her neighborhood but that this experience would not affect her ability to sit on the jury. Trial counsel asked the prospective jurors if they thought that Green could still be innocent despite accusations that he was involved with gang activity and, conversely, whether anyone thought that Green must be guilty by virtue of his alleged gang affiliation. The jurors indicated that they would not be affected.

¶4 After the selected jury panel was excused for the day, one of the panel members called the clerk's office to express reservations about serving on the jury. The trial court conducted an individual voir dire of this juror in the presence of the parties. The juror indicated that she was scared and did not "want any harm put in [her] family's way." Though the court assured her that the jurors would be referred to by number rather than name and that their identifying information would be sealed,[1] the juror said she could not guarantee a fair decision. Without objection from either party, the court excused her, stating it would tell the remaining jurors "that for reasons that they don't need to know and that are not relevant to the merits of this case, [the juror] has been relieved from jury duty."

¶5 At trial, other gang members implicated Green as one of the shooters. The trial ran through Halloween and the court provided the bailiff with some leftover Halloween candy for the jury. Unbeknownst to the court, the bailiff told the jury where the candy came from. The jury sent a thank-you note to the court, which was shared with the parties and marked as an exhibit. Neither party objected nor asked further questions. Green was convicted and sentenced to a term of life imprisonment plus an additional sixty-three and one-half years.

¶6 Green filed a postconviction motion requesting access to the sealed jury records and alleging several claims of error, including that trial counsel performed deficiently in voir dire by failing to "clearly" inform the prospective jurors that Green was "in fact a gang member" and by not asking "whether that 'fact' would prevent them from being fair and impartial." Postconviction counsel

[1] The parties agreed to seal the juror information.

contended: "Given the extensive evidence that the jury selected would soon be hearing [about] this most infuriating crime with [its] direct connection to the gangster disciples, combined with the certain and extensive introduction as to Mr. [Green's] relationship to that same gang, the panel needed to be informed much more thoroughly." Green also alleged reversible error based on the court's provision of Halloween candy to the jury. The trial court denied each of Green's postconviction claims.

The Trial Court Did Not Err by Refusing to Provide Green Access to the Sealed Jury Records.

¶7 Postconviction counsel requested access to the sealed jury records, asserting the need to investigate the jurors' potential exposure to extraneous information or outside influence. Specifically, Green sought to interview the panel to find out whether the excused juror shared her apprehension with other members prior to her dismissal, and whether other jurors also harbored a bias against gangs that influenced the verdict.[2] Green's written motion acknowledged that his investigator had interviewed the excused juror and conceded that "[t]he result of her interview did not support the concerns raised by counsel." In the alternative, Green requested that the trial court preserve juror confidentiality by summoning the panel into court for an evidentiary hearing. The trial court denied Green's request, concluding that because his motion failed to allege any facts that

[2] Green also asserted a need to question the jurors about whether the court's provision of leftover Halloween candy during trial biased them against Green. The trial court determined that because it never had any direct contact with the jury, the propriety of its actions could be determined based on the record, without juror questioning. We agree with the trial court's assessment and will address the Halloween candy claim under the rubric of ineffective assistance of counsel.

would support a claim of juror bias, "the defense has failed to provide sufficient evidence of jury tainting requiring disclosure of sealed juror information to them to further their investigatory efforts."

¶8 Ordinarily, the voir dire process which occurs prior to the empaneling of a jury is the appropriate vehicle for ensuring juror impartiality. *See* ***State v. Shillcutt***, 119 Wis. 2d 788, 803, 350 N.W.2d 686 (1984). After a verdict has been reached, WIS. STAT. § 906.06(2) (2011-12)[3] provides that a juror may not testify concerning the deliberation process except "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." ***Shillcutt***, 119 Wis. 2d at 794 (quoting § 906.06). Subsection 906.06(2) renders incompetent not only testimony concerning what transpired during deliberations, but also evidence "of 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 verdict … or concerning the juror's mental processes in connection therewith." ***State v. Marhal***, 172 Wis. 2d 491, 495, 493 N.W.2d 758 (Ct. App. 1992) (quoting § 906.06). This rule reconciles two competing institutional interests: (1) ensuring that litigants receive fair trials so that truth prevails and (2) advancing the goal of finality in litigation. ***Id.*** at 495-96. In furtherance of the finality interest, the rule "discourages juror harassment by disappointed litigants; it furthers open and unhindered juror discourse; and, of course, it maintains the jury's viability as a judicial decision-making body." ***Id***. (citation omitted).

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶9 To be entitled to a hearing, the party seeking to set aside a verdict on grounds of prejudicial extraneous information or outside influence must make a preliminary showing by affidavit or nonjuror evidence. ***Id***. at 497-98. The preliminary showing must demonstrate that "the subject matter of the proposed hearing is within an exception to WIS. STAT. § 906.06(2) and must assert facts that, if true, would require a new trial." ***State v. Miller***, 2009 WI App 111, ¶62, 320 Wis. 2d 724, 772 N.W.2d 188 (citation omitted). Whether a preliminary showing is sufficient to require a hearing is a question of law we review de novo. ***Id***.

¶10 Green argues that he was entitled to the sealed records or an evidentiary hearing to find out whether the excused juror spoke about her gang-related concerns with other panel members.[4] While Green acknowledges that the excused juror denied discussing the case with anyone else, he asserts that the circumstances of the defense-initiated interview render her statement unreliable because it was conducted informally rather than at a court hearing. We disagree.

¶11 After voir dire, the trial court admonished the parties not to discuss the case with anyone and, in chambers, the excused juror testified that she had not even shared her concerns with her husband. Green's postconviction interview with the juror confirmed that she did not share any information with the panel, and Green has not presented any affirmative evidence to the contrary. We agree with the trial court's assessment: "The defense has interviewed the very individual who

[4] Green does not argue that he has an absolute right to access the juror records. He agrees that in order to gain access to the records or question the panel, he must first make the requisite preliminary showing. *See, e.g.*, ***State v. Marhal***, 172 Wis. 2d 491, 493 N.W.2d 758 (Ct. App. 1992).

could have theoretically 'tainted' the jury panel and concedes that the interview was not supportive of their position…. There is no support to the theory of the defense that Mrs. Patterson uttered any concern in front of her fellow jurors." Green has failed to show that he is entitled to an evidentiary hearing.

¶12 Green also asserts that the fact that one juror was excused due to gang-related concerns is sufficient reason in and of itself to permit questioning of the remaining panel members about their attitude toward gangs. Recognizing his failure to allege specific facts demonstrating juror bias, Green apparently argues that the standard for obtaining a hearing should be lower because he was not able to access the sealed records. In the alternative, he requests that the case be remanded to the trial court with an order allowing him access to the sealed juror information to permit further investigation.

¶13 We conclude that Green was not entitled to further question the jurors about their gang-related biases, either through informal interviews obtained pursuant to release of the sealed records or at an evidentiary hearing. WISCONSIN STAT. § 906.06 addresses what is required to impeach a verdict and is designed to prevent unwarranted intrusions into the sanctity of jury deliberations. ***Marhal***, 172 Wis. 2d at 497. The ***Marhal*** court explained:

> A rule that either permitted or required an evidentiary hearing without a preliminary showing would be a license for dissatisfied litigants to impermissibly rummage through jurors' thoughts, motives, and debates propelled by the hope, rather than the likelihood, of discovering something with which to overturn the jury's verdict.

Id. at 498. The voir dire in this case was sufficient to investigate and identify competent evidence of bias, and no bias was discovered. There is no affirmative evidence of juror misconduct or bias. Green has not provided any plausible reason

to believe that the voir dire process was so flawed as to warrant attempts to impeach the verdict. While the facts in ***Marhal***, ***Miller***, and ***Shillcutt*** did not appear to involve the litigant's lack of access to identifying juror information, this distinction is immaterial on the facts of Green's case, where the subject of gang bias was sufficiently raised in voir dire, and there is no indication that the jury was actually biased. As in ***Marhal***, Green's request for an evidentiary hearing in order to "form a factual basis" for a motion to impeach the verdict "put the proverbial cart before the horse." ***Marhal***, 172 Wis. 2d at 498.

Trial Counsel Did Not Perform Deficiently by Failing to Question the Prospective Jurors More Extensively During Voir Dire, or by Failing to Take Additional Action upon Learning that the Jury Sent a Thank-You Note to the Trial Court.

¶14 Green argues that trial counsel was ineffective for failing to: (1) question the jury more extensively to ferret out any possible prejudice against gang members and (2) perform further investigation or move for a mistrial after learning that the jury sent a thank-you note to the trial court. 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 v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id***. at 690. To satisfy the prejudice prong, the defendant must demonstrate 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.

¶15 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id***. at 698. 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 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id***.

¶16 At the ***Machner***[5] hearing, when asked why he did not probe the jurors more extensively, trial counsel testified that his strategy was to minimize Green's gang involvement and to characterize him as more of an outcast by demonstrating that "although he may have supposedly been a gang member, he really wasn't, in their eyes." Trial counsel's strategy was to persuade the jury that because Green had cooperated with the State in gang-related prosecutions and was "more of an associate … that's why it was so easy for all these [gang members] to lie on him, because they didn't give a damn about him." Trial counsel testified that he thought his limited voir dire was sufficient and that he was satisfied by the jurors' responses and demeanor: "I didn't see … anybody making faces like from anger or things such as that."

¶17 In its written decision, the court concluded that trial counsel's voir dire was not deficient because it adequately addressed any potential gang-related bias and because counsel's limited questioning comported with his trial strategy:

> It was conceded that the prospective jurors were alerted to the fact that the alleged crime was a gang-related retaliation and that Mr. Green was associated with members of the Gangster Disciples. Questions regarding prospective juror bias relating to gang affiliation, membership, or

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> victimization were addressed during voir dire by [both parties].
>
> [Trial counsel] indicated that his trial strategy, which was approved by the defendant, was to separate the defendant from the Gangster Disciples and that since he was not considered a "real" member of the Gangster Disciples, and he had cooperated with the State in prosecutions of known gang members of the Gangster Disciples, that the testimony of those at trial placing him as the shooter in this case who were actual members of the Gangster Disciples was based on vindictive retaliation rather than truth. The Court notes that this was, indeed, the primary thrust of the defense ably presented during the trial. It was planted by inference during voir dire, reconfirmed during opening statement, served as the basis for much of the cross-examination of witnesses testifying against the defendant and the thrust of the defendant's closing argument.

¶18 We conclude that trial counsel's performance was not deficient. Trial counsel's questions were sufficient to induce prospective jurors to contemplate whether they might be prejudiced by Green's gang affiliation and to facilitate the identification and removal of biased jurors. *Cf.* ***State v. Migliorino***, 150 Wis. 2d 513, 537, 442 N.W.2d 36 (1989) (asking general questions about abortion in voir dire, including whether anything about the subject would prevent jurors from being fair and impartial, was sufficient to ferret out juror bias or prejudice). That the voir dire questions were sufficiently probing is demonstrated by the fact that prior to trial, one juror further contemplated her ability to be fair and impartial in light of the allegations of gang violence and asked to be excused.

¶19 Additionally, trial counsel had a valid strategic reason for limiting his gang-related voir dire inquiry, which was to avoid highlighting Green's gang affiliation and instead characterize him as an outsider who had cooperated with the State. Based on the adequacy of trial counsel's voir dire and his strategic reasons for not probing further, we conclude that trial counsel's representation did not fall

below an objective standard of reasonableness and did not constitute deficient performance.[6]

¶20 We also reject Green's claim that trial counsel was ineffective for failing to move for a mistrial or request that the jurors be questioned based on the trial court's provision of leftover Halloween candy to the jury and their subsequent thank-you note. Green argues that this indirect contact may have caused the jury "to view Mr. Green's case as a 'we vs. them' matter," especially given the gang-related evidence. At the ***Machner*** hearing, trial counsel testified that though he was initially concerned about how to handle the thank-you note, he did not feel it necessary to pursue the matter further once he heard the judge's explanation. Trial counsel testified that he never felt an "us versus them" dynamic in the courtroom.

¶21 We conclude that trial counsel did not perform deficiently because there were no meritorious grounds on which to base an objection or move for a mistrial. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (counsel's failure to bring meritless motion does not constitute deficient performance). The record demonstrates that the trial court was well aware of the prohibition against ex parte communication with the jury and avoided any direct contact. There is nothing improper about a neutral body providing leftover candy to the jury through the bailiff. Further, the jury was told to base its verdict on the law and evidence presented, and to disregard entirely any impression they may have formed of the court's opinion as to the defendant's

[6] Having concluded that trial counsel did not perform deficiently, we need not reach the prejudice prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

guilt. Jurors are presumed to follow the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).

Green Is Not Entitled to a New Trial in the Interest of Justice.

¶22 Finally, Green argues that the he is entitled to a new trial in the interest of justice because the trial court's refusal to unseal the juror records denied Green "the opportunity to properly investigate whether the jury selection process and the Judicial contact, albeit of an innocent nature, resulted in a biased jury that considered itself part of a 'we vs. them' process." WISCONSIN STAT. § 752.35 allows this court to reverse a judgment by the trial court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citations omitted). To establish a miscarriage of justice, there must be "a substantial degree of probability that a new trial would produce a different result." ***Id***. (citations omitted). We will exercise our discretionary reversal power sparingly and only in the most exceptional cases. ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469.

¶23 We are not persuaded that discretionary reversal is warranted. Green has not alleged that important evidence bearing on his innocence or guilt was improperly presented to or kept from the jury, nor has he demonstrated a substantial probability that the jury was biased. Green has provided no basis for this court to conclude that undue bias contributed to the guilty verdicts in this case.

By the Court.—Judgment and order affirmed.

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