COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2813-CR **Cir. Ct. No. 2012CF691**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY P. LEPSCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Jeffrey Lepsch appeals a judgment of conviction and an order denying postconviction relief. Lepsch contends that he is entitled to a new trial because: (1) the administration of the oath to the jury venire by the clerk of the circuit court in the jury assembly room violated Lepsch's rights to be

present at critical stages of his trial, to a public trial, and to receive a trial by a jury sworn to be impartial; (2) Lepsch was denied his right to an impartial jury because the jury panel included biased jurors; and (3) Lepsch was denied due process when the circuit court failed to provide Lepsch with the proper number of peremptory strikes and failed to remove biased jurors for cause. Lepsch also contends that his trial counsel was ineffective by failing to correct those errors at trial. For the reasons set forth below, we reject these contentions. We affirm.

¶2 In October 2012, Lepsch was charged with two counts of first-degree intentional homicide, armed robbery with use of force, and possession of a firearm by a felon. Lepsch pled not guilty and proceeded to a jury trial.

¶3 Prior to the prospective jurors appearing in the courtroom for jury voir dire, the clerk of the circuit court administered the oath to the jury venire in a jury assembly room. Following voir dire, each side was allowed, and utilized, six peremptory strikes. Following trial, the jury returned guilty verdicts on all counts.

¶4 Lepsch filed a postconviction motion for a new trial, contending that Lepsch was denied his constitutional rights based on the manner in which the jury venire was sworn prior to jury voir dire, the presence of biased jurors on the jury panel, denial of the proper number of peremptory strikes, and ineffective assistance of counsel.[1] Following an evidentiary hearing, the circuit court denied Lepsch's motion for a new trial. Lepsch appeals.

[1] Lepsch also raised claims related to use of fingerprint evidence against him at trial, but has not pursued those arguments on appeal.

¶5 Lepsch contends that the administration of the oath to the jury venire by the clerk of the circuit court in the jury assembly room, outside of Lepsch's presence, violated Lepsch's constitutional rights. Lepsch contends that WIS. STAT. § 805.08 (2013-14)[2] requires that the court, not the clerk, administer the oath to the jury. *See* ***id.*** (providing that "[t]he court shall examine on oath each person who is called as a juror to discover whether the juror … has expressed or formed any opinion, or is aware of any bias or prejudice in the case"). He then contends that the clerk's administration of the oath in this case violated Lepsch's constitutional rights to: (1) be present during all proceedings when the jury is being selected, *see* ***State v. Harris***, 229 Wis. 2d 832, 601 N.W.2d 682 (Ct. App. 1999); (2) a public trial, *see* ***State v. Pinno***, 2014 WI 74, ¶40, 356 Wis. 2d 106, 850 N.W.2d 207; and (3) trial by a jury properly sworn to be impartial, *see* ***Oswald v. Bertrand***, 249 F. Supp. 2d 1078, 1103 (E.D. Wis. 2003). Lepsch acknowledges that, under ***Pinno***, 356 Wis. 2d 106, ¶7, a claim that the defendant was denied the right to a public trial may be deemed forfeited if the defendant was aware that the proceedings had been closed to the public and failed to object. Lepsch contends that the forfeiture rule recognized in ***Pinno*** does not apply here because Lepsch was never notified that the oath would be administered by the clerk in the jury assembly room. Lepsch also contends that the failure to properly administer the oath precludes a finding that the jurors were, in fact, impartial. We are not persuaded.

¶6 The ***Pinno*** court held that claims of constitutional errors, even structural errors such as denial of the right to a public trial, may be deemed

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

forfeited if a timely objection is not made. *See* ***id.***, ¶¶7–8. The court explained that "[i]t would be inimical to an efficient judicial system if a defendant could sit on his hands and try his luck" with trial despite the structural error "only to argue after his conviction" that his constitutional rights had been violated. *See* ***id.***, ¶7. A contemporaneous objection allows "both parties and courts [to] have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." ***State v. Agnello***, 226 Wis. 2d 164, 173, 593 N.W.2d 427 (1999). "The purpose of the contemporaneous objection is to allow the [circuit] court to correct any alleged error with minimal disruption." ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. We discern no basis to deviate from that rule here.

¶7 In reaching our conclusion that Lepsch has forfeited his claims of constitutional error, we reject Lepsch's assertion that he had no notice as to the manner in which the oath had been administered. Clearly, Lepsch was aware at the time of the jury voir dire that the oath had not been administered to the jury venire in his presence in open court. Lepsch has not provided any support for his assertion that he was unaware of the manner in which the oath had been administered to the jury venire at the time of voir dire. Moreover, Lepsch does not dispute that the jury venire was, in fact, properly administered the oath; his actual argument, then, is limited to a claim that his rights were violated because the oath was not administered in his presence in an open courtroom. Lepsch has not developed a persuasive argument that these claims of constitutional violations are not subject to forfeiture under the reasoning set forth in ***Pinno***. Accordingly, we deem those arguments forfeited.

¶8 Lepsch also contends that his trial counsel was ineffective by failing to raise the proper objections to the administration of the oath. *See* ***Strickland v.***

Washington, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). However, Lepsch does not develop any argument that he was actually prejudiced by his counsel's failure to object; rather, he contends that the errors were structural and thus prejudice should be presumed. *See* ***Hughes v. United States***, 258 F.3d 453, 463 (6th Cir. 2001). However, again, Lepsch has not developed an argument distinguishing the claimed structural errors in this case from the errors in ***Pinno***, 356 Wis. 2d 106, ¶¶83-86, which were deemed not to give rise to a presumption of prejudice. *See* ***id.*** (explaining that "the circumstances in which prejudice is presumed are rare," and that "an error does not automatically receive a presumption of prejudice merely because it is deemed structural…. Indeed, a rule that prejudice must be presumed when counsel fails to object …would effectively nullify the forfeiture rule"). We decline to extend the rare presumption of prejudice to the claimed errors in this case.

¶9 Lepsch contends next that he was denied his Sixth Amendment right to an impartial jury because the circuit court seated jurors who were both

subjectively and objectively biased.[3] *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999) (prospective juror must be removed for cause if the juror is: (1) statutorily biased; (2) subjectively biased; or (3) objectively biased). Lepsch contends that nine of the jurors on the jury panel displayed subjective bias by answering pre-voir dire jury questionnaires indicating beliefs that law enforcement witnesses were more credible than non-law enforcement witnesses; that they had made up their minds as to Lepsch's guilt; and stating a disagreement with the presumption of innocence. He contends that the voir dire of each of those nine jurors failed to support a finding that those jurors could set aside the belief suggested in the questionnaire answers, and thus the record shows the jurors were objectively biased. We conclude that none of the jurors were objectively or subjectively biased.[4]

[3] Lepsch also contends that the Sixth Amendment to the United States Constitution requires that jurors establish impartiality by "unequivocal assurances" that they can set aside prior beliefs and decide a case solely on the evidence, citing ***Oswald v. Bertrand***, 249 F. Supp. 2d 1078, 1104 (E.D. Wis. 2003). Lepsch concedes that Wisconsin case law does not require unequivocal assurances, *see* ***State v. Erickson***, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999), and that this court is not bound by federal district court interpretations of the United States Constitution, *see* ***State v. Beauchamp***, 2010 WI App 42, ¶17, 324 Wis. 2d 162, 781 N.W.2d 254. Nonetheless, Lepsch contends that ***Oswald*** sets forth a higher standard for jury impartiality under the Sixth Amendment than recognized by current Wisconsin law, and argues that this court should adopt that higher standard. We may not disregard Wisconsin Supreme Court case law. Accordingly, we apply the test for juror impartiality set forth in Wisconsin case law.

[4] Lepsch also contends that he was denied due process because the jurors' answers to the pre-voir dire jury questionnaires and the pre-trial media publicity of the case created at least the appearance of bias. *See* ***Peters v. Kiff***, 407 U.S. 493, 502 (1972) (holding that "due process is denied by circumstances that create the likelihood or the appearance of bias" by jurors). Lepsch contends that, to avoid the appearance of bias, the circuit court should have either dismissed the nine jurors who provided answers on the questionnaires indicating bias, or questioned them more fully as to their beliefs, opinions, and exposure to pre-trial publicity. As explained below, we conclude that the record does not indicate any juror was subjectively or objectively biased; because each of the jurors expressed the ability to remain impartial at trial, we conclude that none of the jurors exhibited the appearance of bias.

¶10 "If a juror is not indifferent in [a] case, the juror shall be excused." WIS. STAT. § 805.08(1). Types of juror bias include subjective and objective bias. *See* ***State v. Mendoza***, 227 Wis. 2d 838, 848, 596 N.W.2d 736 (1999). Subjective bias "'is revealed through the words and the demeanor of the prospective juror' and 'refers to the prospective juror's state of mind.'" ***State v. Lindell***, 2001 WI 108, ¶36, 245 Wis. 2d 689, 629 N.W.2d 223 (quoted source omitted). "A prospective juror is subjectively biased if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have." ***Mendoza***, 227 Wis. 2d at 849. Because the circuit court is in the best position to evaluative subjective bias, we review its findings under a clearly erroneous standard. ***Lindell***, 245 Wis. 2d 689, ¶36. Additionally, "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." ***State v. Erickson***, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999).

¶11 Objective bias looks to the circumstances surrounding the juror's answers, even if the prospective juror pledges impartiality. ***Lindell***, 245 Wis. 2d 689, ¶38. Whether a juror is objectively biased "'turns on whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge.'" ***Id.*** (quoted source omitted). We review a claim of objective bias as a mixed question of fact and law. ***Id.***, ¶39. We will uphold the circuit court's factual findings unless clearly erroneous. ***Id.*** Whether those facts establish objective bias is a question of law. ***Id.*** While questions of law are ordinarily reviewed de novo, we give weight to a circuit court's decision on a claim of objective bias; we will reverse the court's decision as to objective bias only if a reasonable judge could not have reached the same conclusion. ***Id.***

¶12 Our review of the individual voir dire of each of the challenged jury members does not support Lepsch's claims of subjective or objective bias. As to the seven jury members who had stated a belief that law enforcement officers are more credible than non-law enforcement officers, five were questioned further as to that belief during individual voir dire. They each stated that they would be able to judge the credibility of all witnesses equally at trial. As to the two jurors who were not questioned specifically on that subject, one stated during voir dire that he would be able to listen to the evidence in the courtroom and base his decision on that evidence; the other stated elsewhere on his questionnaire that he believed in facts, not people. Both also indicated on their questionnaires that there was no reason they could not be impartial in this case.[5]

¶13 As to the four jurors who stated in the jury questionnaire that he or she had an opinion as to Lepsch's guilt and/or that he or she had made up his or her mind as to Lepsch's guilt, each stated during voir dire that he or she had the ability to put that opinion out of his or her mind, listen to the evidence, and make a decision based on the evidence.

¶14 Finally, as to the juror who stated a disagreement with the presumption of innocence, that juror was reminded in voir dire that, under the presumption of innocence, jurors had to start out looking at Lepsch as innocent, and that Lepsch was innocent as he sat there that day. The juror was asked if he "was okay with" that principal, and the juror responded in the affirmative.

[5] The jury questionnaires do not appear in the record. Lepsch has provided the questionnaires in his appendix, and the State cites to the questionnaires in Lepsch's appendix in its brief. We accept the parties' stipulation as to the contents of the jury questionnaires.

¶15 We note that Lepsch's claims of juror bias are premised on the jurors' initial statements of opinions or bias in their questionnaires, and Lepsch's perception that the jurors did not give sufficiently strong assurances of their abilities to set aside those prior opinions. However, as our supreme court has explained:

> "In almost every serious felony case, honest prospective jurors express concerns about the heinous factual allegations, the presumption of innocence, a prior record, other acts testimony, a defendant's option not to testify, evaluating a police officer's testimony in the same manner as other witnesses, or the victimization of a child, elderly or disabled person. We encourage trial judges to explore those fears, biases, and natural reactions with the members of the prospective jury panel. Few people can honestly tell the court that they are bothered by some of these factors in the case and then absolutely, without equivocation, reassure the judge that they are certain they can disregard their concerns. Most honest people can only commit that they will do their best to be fair. The trial judge must then, based upon his or her own assessment of that person's sincerity and ability to be fair, decide whether that person is qualified to sit on that particular case."

Id., ¶101 (quoted source omitted).

¶16 In its decision denying Lepsch's postconviction claim of juror bias, the circuit court explained that, based on its position of observing the jurors, it was convinced that each juror was able to put aside any potential subjective bias and decide the case based solely on the evidence. The court also found that none of the jurors were objectively biased based on their responses to jury voir dire, taking into account the court's ability to assess each juror's demeanor. Because the court's determination as to subjective bias was not clearly erroneous, and its determination as to objective bias was reasonable, we will not disturb those determinations.

¶17 Lepsch also contends that his trial counsel was ineffective by failing to further question the nine challenged jurors as to their biases and failing to challenge those jurors for cause. However, as explained above, we have no basis to disturb the circuit court's determination that none of the jurors was subjectively or objectively biased. Lepsch does not develop an argument that further inquiry of the jurors by trial counsel would have led to a different result. Because Lepsch has not shown that any juror on the jury panel was biased, or that further questioning would have revealed bias, we reject his claim of ineffective assistance of counsel on this basis.

¶18 Next, Lepsch argues that he was denied due process and the right to an impartial jury because the circuit court denied him the seventh peremptory strike to which he was entitled under WIS. STAT. § 972.03. Because Lepsch did not object to the loss of one peremptory strike at trial, the issue of whether the insufficient number of peremptory strikes entitles Lepsch to a new trial is analyzed under the rubric of ineffective assistance of counsel. *See* ***Erickson***, 227 Wis. 2d at 765-68. Assuming without deciding that Lepsch's trial counsel's performance was deficient by failing to obtain the additional peremptory strike, we conclude that counsel's deficient performance did not prejudice the defense.

¶19 In ***Erickson***, the supreme court rejected Erickson's claim that prejudice should be presumed whenever counsel's deficient performance deprived the defendant of a peremptory strike. ***Id.*** at 769-73. The court explained that the circumstances did not warrant the rare presumption of prejudice, noting that "[t]here is little doubt that Erickson was judged by an impartial jury" and that "both sides equally lost out on the use of peremptory strikes." ***Id.*** at 771-72. Turning to the question of actual prejudice, the court explained that Erickson would have to show "that but for his trial attorney's error there is a reasonable

probability—a 'probability sufficient to undermine confidence in the outcome'—that the result of his trial would have been different." ***Id.*** at 773 (quoted source omitted). In concluding that Erickson had not met that burden, the court noted that any benefit Erickson may have received from the additional strikes would have potentially been offset by the State receiving the same additional strikes. ***Id.*** at 773-74. The court explained that Erickson had offered only rank speculation as to how the outcome of his trial would have been different had his counsel not erred, which was insufficient to show prejudice. ***Id.*** at 774.

¶20 Here, as in ***Erickson***, Lepsch and the State received an equal number of peremptory strikes, and Lepsch has not shown that a biased juror actually sat on the jury panel. Lepsch contends that this case is distinguishable from ***Erickson*** because here, unlike Erickson, Lepsch has argued that his jury was not impartial and that he needed his full extent of peremptory strikes to strike biased jurors from the panel. However, we have rejected Lepsch's argument as to biased jurors on his jury panel. Because we have determined that Lepsch was not denied an impartial jury, we reject Lepsch's claim that his counsel was ineffective by failing to obtain the additional strike to which Lepsch was entitled.

¶21 Lepsch also contends that the circuit court denied him his full use of peremptory strikes by failing to strike five potential jurors for cause under WIS. STAT. § 805.08(1), forcing Lepsch to use five of his six peremptory strikes to remove those jurors. Lepsch cites ***United State v. Torres***, 128 F.3d 38, 43 (2d Cir. 1997), for the proposition that a trial court has the duty to sua sponte remove jurors for cause. However, we have held that a defendant forfeits the argument that a circuit court should have removed a juror for cause by failing to move to strike the juror for cause in the circuit court; we review such claims in the limited context of ineffective assistance of counsel. *See* ***State v. Williams***, 2000 WI App

123, ¶¶19-21, 237 Wis. 2d 591, 614 N.W.2d 11. Accordingly, we limit our review of Lepsch's claim of error based on the court's failure to strike the five potential jurors for cause to whether Lepsch's trial counsel was ineffective by failing to move to strike those prospective jurors for cause.[6]

¶22 We turn, then, to Lepsch's claim that he was denied the effective assistance of counsel because his counsel failed to move to strike five prospective jurors for cause. Lepsch contends that his trial counsel was deficient by failing to move to strike those potential jurors for cause based on their stated biases. Lepsch contends that he was prejudiced by that error because he was forced to use five of his six peremptory challenges to strike those jurors, leaving him with the nine biased jurors on the panel discussed above. We are not persuaded that Lepsch was prejudiced by any error in failing to move to strike the five prospective jurors. As

[6] Lepsch contends that his trial counsel was ineffective by failing to move to strike any of the five prospective jurors for cause based on their displayed biases. We note that the record reveals that trial counsel did move to strike one of the prospective jurors for cause based on her interaction with one of the victims, as a customer in the victim's family's store. The prospective juror stated she had a one-time interaction with the victim in the store, and that the victim was "very nice, very accommodating." The circuit court denied the motion to strike that prospective juror based on the one-time interaction, noting that the prospective juror also stated that she could set that interaction aside in deciding the case. Lepsch argues that the circuit court should have sua sponte dismissed that prospective juror based on her juror questionnaire responses indicating her belief that Lepsch was guilty and that she had made up her mind as to his guilt, and her failure to give an unequivocal assertion that she could set aside her prior interaction with the victim in deciding this case. He then contends that his trial counsel was ineffective by failing to challenge that juror based on her biases. We understand Lepsch's argument to be that counsel was ineffective by failing to raise the proper argument to strike that prospective juror for cause, rather than a claim that the circuit court erred by denying the motion to strike as agreed by counsel. In any event, to the extent that Lepsch is arguing that he is entitled to a new trial because the court erred by denying his motion to remove the juror for cause, we reject that argument. "[I]t is not prejudicial error to overrule a challenge for cause, unless it is shown that an objectionable juror was forced upon the party, and sat upon the case after such party had exhausted his peremptory challenges." ***State v. Sellhausen***, 2012 WI 5, ¶17, 338 Wis. 2d 286, 809 N.W.2d 14. As explained above, Lepsch has not shown that any juror on the jury panel in this case was subjectively or objectively biased.

explained above, we determine that Lepsch has not shown that any juror on his jury panel was biased. Accordingly, Lepsch has not shown he was prejudiced when his counsel failed to move to strike the prospective jurors for cause. *See* ***State v. Traylor***, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992) (rejecting a claim of ineffective assistance of counsel for failing to move to strike potential jurors for cause, which resulted in use of peremptory strikes against those jurors, because a defendant "cannot prove prejudice unless he can show that the exhaustion of peremptory challenges left him with a jury that included an objectionable or incompetent member," and citing "Wisconsin's longstanding rule … that where a fair and impartial jury is impaneled, there is no basis for concluding that a defendant was wrongly required to use peremptory challenges").

By the Court.—Judgment and order affirmed.

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