COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1288 **Cir. Ct. No. 1998CF276**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Daniel Brown appeals an order denying him WIS. STAT. § 974.06 (2003-04)[1] relief from a first-degree intentional homicide conviction. He contends that trial counsel and postconviction counsel ineffectively represented him, the latter by failing to pursue trial counsel's ineffectiveness in Brown's WIS. STAT. § 974.02 postconviction proceeding. We affirm.

¶2 The State charged Brown with the shooting death of Barbara Heine. A jury found him guilty in 1998, and we affirmed his conviction on appeal. Brown commenced this proceeding in 2003. After denying Brown's motion to recuse herself, the presiding judge issued a decision denying Brown's motion without a hearing. The court concluded that Brown could not establish ineffective assistance of postconviction counsel because the record conclusively showed that he received effective trial counsel representation.

¶3 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that trial counsel performed deficiently, and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant fails to show prejudice, we need not address the "deficient performance" component of ineffectiveness. *See* ***id***. at 697. The circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Brown contends that trial counsel should have moved for the presiding judge's recusal. Brown failed to show, however, that doing so would have benefited him. The judge's husband, a detective, had a limited involvement in the investigation of Heine's death. The judge disclosed that fact to the parties and neither objected. Now, Brown contends that the judge's husband's investigative role provided mandatory grounds for recusal under WIS. STAT. § 757.19(2)(f), because it gave the judge a significant personal interest in the case, and under § 757.19(2)(g), because it prevented her from acting impartially in the matter. The test for significant personal interest is whether a reasonable judge would have a significant interest under the facts of the case. *See* ***Dressler v. Circuit Court for Racine County***, 163 Wis. 2d 622, 643, 472 N.W.2d 532 (Ct. App. 1991). Using that test, we conclude that a reasonable judge in the presiding judge's position would not have had a significant personal interest in the outcome of the case. The judge's husband did not testify, nor does the record show that his investigation produced any evidence used at trial. His role in the case was, at best, peripheral. The reports and documents Brown attached to his WIS. STAT. § 974.06 motion underscore the detective's insignificant role in the case.

¶5 The test for impartiality under WIS. STAT. § 757.19(2)(g) is subjective. In other words, it mandates a judge's disqualification only when the judge himself or herself makes the determination that he or she cannot act impartially. ***State v. Santana***, 220 Wis. 2d 674, 686, 584 N.W.2d 151 (Ct. App. 1998). Here, the judge declared herself impartial and unaffected by her husband's role, and we accept that determination. *See* ***id.*** (appellate review limited to whether judge made the necessary subjective determination).

¶6 Arguably, Brown could contend that counsel could have pursued a viable due process challenge because the situation created an appearance of

impartiality even if the judge was impartial in fact. A recent federal decision so holds. ***Franklin v. McCaughtery***, 398 F.3d 955, 960-61 (7th Cir. 2005). However, at the time of Brown's trial in 1998 counsel would not have had the benefit of the ***Franklin*** decision or the legal theory it presents. The law in Wisconsin unequivocally required actual bias, and Brown cannot contend that counsel acted unreasonably by failing to move for recusal on appearance grounds, when he lacked any basis in the law of the time to do so.

¶7 Brown next contends that counsel should have investigated and presented an NGI defense of drug induced psychosis. At best, the record shows that Brown was a heavy cocaine user and experienced withdrawal symptoms after his arrest. There was no evidence that Brown was in a psychotic state at the time of the killing, or any other time. The record conclusively shows that counsel acted reasonably by not pursuing a theory without supporting evidence.

¶8 In opening and closing arguments, Brown's attorney conceded that Brown shot Heine. Brown contends that counsel unreasonably prejudiced him by making these concessions. However, Brown's defense was his lack of intent to kill Heine with the shots he fired. Counsel's statements were consistent with that defense, which the record indicates Brown approved. In any event, the State's evidence overwhelmingly showed that Brown shot Heine. Counsel's concession of the obvious was not prejudicial, but was a reasonable strategy under the circumstances.

¶9 Brown next contends that counsel should have moved to strike four jurors for cause. The four jurors were: juror Buonincontro, who knew one of the testifying police officers; juror Swatek, who expressed the opinion that a heavily intoxicated person could still form an intent to do a specific act; juror Weilbacher,

who knew another police witness; and juror Garcia, whose husband worked with Heine's cousin. A juror's bias can be subjective, as revealed through his or her words and demeanor, or objective in that a reasonable person in the juror's position could not set aside an opinion or bias despite the best intention to do so. ***State v. Faucher***, 227 Wis. 2d 700, 717, 733, 596 N.W.2d 770 (1999). Juror Buonincontro's acquaintance with a police witness was casual and distant. So was Weilbacher's. Neither indicated that his acquaintance with a witness would affect his impartiality, and a reasonable person in either juror's position would remain impartial as well, given the minimal nature of the relationship in question. While juror Swatek expressed a strong opinion about the relationship between intoxication and intent, Brown did not contend at trial that intoxication interfered with his ability to form an intent. There was no reason, objectively or subjectively, to strike a juror for an opinion that was irrelevant to the case. Finally, juror Garcia's relationship to the victim was so attenuated that Brown cannot reasonably contend that she was objectively biased. Furthermore, nothing in her demeanor or statements showed subjective bias. In fact, she denied any knowledge of Heine before learning of her murder. Counsel's objection to any of the four jurors would not have succeeded.

¶10 Brown contends that trial counsel ignored ballistics evidence that suggested someone else shot Heine. The circuit court found that some evidence relating to bullets and casings was inconclusive, rather than exculpatory, and did not suggest another shooter. The reports in question are not in the record and we have no basis to set aside this finding. In any event, Brown's defense was that he shot Heine accidentally, not that someone else shot her. Counsel could reasonably choose not to seek evidence inconsistent with the defense theory.

¶11 Finally, Brown contends that counsel ineffectively failed to impeach one of the State's witnesses by questioning him on prior felony convictions. However, Brown points to no evidence of record showing that the witness in question actually had a record of convictions. Nor does he demonstrate that he was prejudiced, even if there were convictions counsel could have used to impeach the witness. The witness's testimony was cumulative and only a small part of the overwhelming evidence of guilt the State presented.

By the Court.—Order affirmed.

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