

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1789-CR

Cir. Ct. No. 2006CF6

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON RICHARD BORELLI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Jason Borelli appeals a judgment of conviction for first-degree intentional homicide and an order denying his motion for a new trial. Borelli asserts numerous claims of trial court error and ineffective assistance of counsel. We reject Borelli's arguments and affirm the judgment and order.

BACKGROUND

¶2 This case involves Borelli's murder of Lisa Gustafson. Brandi Johnson lived across the hall from Gustafson, upstairs in a house that was divided into several apartments. Johnson testified Borelli lived across the street and had been to her apartment a couple of times with other people. Johnson saw Borelli intoxicated at a local tavern the night of the homicide and later observed him arrive home around 2 a.m. The doorbell for Johnson's apartment rang at about 4:30 a.m. Shortly after, Johnson thought she heard Gustafson's apartment door open and close.

¶3 Johnson subsequently heard noises and then Gustafson yelling for help. After she and a friend, Henry Harkreader, beat on Gustafson's door and yelled for her, they returned to Johnson's apartment and called police. Gustafson also called 911, but apparently lost control of the phone. The line, however, remained open during the attack. Johnson heard Gustafson's door close and ran to the window, where she observed a person running across the street. Harkreader and Johnson found Gustafson laying face down on the floor bleeding. Harkreader, who testified consistent with Johnson's testimony, also described Gustafson's injuries and stated the apartment was in shambles.

¶4 The jury learned Borelli beat Gustafson with a heavy ashtray and stabbed her multiple times with both a knife and a samurai sword.¹ Borelli

¹ Borelli presents this and other evidence as accepted fact, without citation to the record. In addition, he inaccurately presents other testimony when he does provide citation. WISCONSIN STAT. RULES 809.19(1)(d)-(1)(e) require appropriate citation to the record. We remind counsel that noncompliance with the rules may result in penalties. *See* WIS. STAT. RULE 809.83(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

returned to his apartment, where the police found him and his blood-stained clothing after following a blood trail in the snow. After his arrest, Borelli provided a videotaped statement. He told police he was drinking beer and using crack cocaine in the hours preceding the attack. Borelli said he did not know why he went across the street, except it was possibly because he knew Johnson and had been to her apartment previously.

¶5 Borelli was charged with first-degree intentional homicide and pled not guilty and not guilty by reason of mental disease or defect. In opening statements, Borelli's counsel stated the homicide was the result of a senseless act involving drugs and alcohol and it would be the jury's duty to determine whether Borelli's conduct evinced an intent to kill. Borelli did not testify at the guilt phase of the trial. The jury found Borelli guilty, rejecting a lesser-included offense of second-degree intentional homicide based on adequate provocation. The jury then found Borelli mentally responsible at the second phase of trial. The circuit court denied Borelli's postconviction motion, which requested a new trial or, in the alternative, a sentence modification.

DISCUSSION

¶6 Borelli first argues the circuit court erred by admitting the tape recording of Gustafson's 911 call. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03.

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Sullivan, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). A circuit court's decision to admit evidence is discretionary and will be upheld if there is a rational basis for the decision. *Martindale v. Ripp*, 2001 WI 113, ¶¶28-29, 246 Wis. 2d 67, 629 N.W.2d 698.

¶7 Borelli argues the recording had no probative value because it provided no information as to the killer's identity or Gustafson's cause of death, and because those issues were not contested at trial. He asserts, "With the State's overwhelming evidence of Borelli's guilt, the tape was simply unnecessary." Thus, according to Borelli, the only purpose of the recording was to appeal to the jurors' emotions.

¶8 The trial court set forth the applicable legal standard in its decision. It then summarized the parties' positions and concluded the recording had sufficient probative value because the call occurred during the commission of the crime, and the State intended to use the recording to support the medical examiner's testimony concerning the sequence of injuries.

¶9 We agree with the trial court and the State that the live audio recording of the assault, including noises and spoken words, is highly relevant to the State's case. This is a real-life event that can only be sanitized so much. Gustafson can be heard repeatedly asking, "Why are you doing this?" These questions and the noises, individually, and in context of timing, and the duration of the attack bear on Borelli's intent to kill and are also relevant to the adequate provocation defense. Thus, the circuit court did not erroneously exercise its discretion in admitting the recording.

¶10 Further, we agree with the State that even if the recording's admission was erroneous, it would constitute harmless error. By his own

admission, the evidence against Borelli was overwhelming and his only possible defense was one based on diminished mental responsibility. Indeed, the horrific nature of the crime, conveyed in real-time, might have conceivably supported his not guilty by reason of mental disease or defect claim.

¶11 Borelli next argues the court should have ordered a mistrial “after two jurors were physically affected by the 51 gruesome and inflammatory autopsy photos.” Closer review of the record and briefs, however, reveals there were actually forty-five photos, and Borelli contends only seventeen of them are objectionable. In any event, the decision whether to grant a mistrial is left to the sound discretion of the trial court. *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *Id.* Where, as here, a mistrial request is not based on the State’s conduct, the trial court’s ruling is entitled to great deference. *Id.* at 507.²

¶12 The forensic pathologist/medical examiner used a PowerPoint slide presentation during her testimony regarding the nature, extent, and cause of Gustafson’s injuries and death. While describing the physical evidence in photographs indicating Gustafson had been strangled prior to infliction of the other, and fatal, injuries, the court interrupted and took a recess. The court subsequently stated one of the jurors felt ill and had been dismissed from the jury following a discussion with counsel. Neither party objected. Later, as the

² Borelli asserts a different standard of review based on two wholly irrelevant cases. *See State v. Hajicek*, 2001 WI 3, ¶¶14-15, 240 Wis. 2d 349, 620 N.W.2d 781 (determination of whether a search is a police or probation search); *Vocational, Tech. & Adult Educ. v. DIHLR*, 76 Wis. 2d 230, 239-40, 251 N.W.2d 41 (1977) (review of administrative agency decision). He then substantially misstates the standard presented in both cases.

pathologist began describing the knife and sword injuries, the court interrupted again and took another recess after a juror stated, “I think I need to leave for a minute.”

¶13 Following the recess, Borelli moved for a mistrial. Borelli noted his previous objection to the graphic 911 audio tapes, the fact one juror had already been excused during the pathologist’s presentation, and now another juror expressed discomfort from the same source, observing the second juror had been looking away from the presentation. The court concluded, “I don’t think those circumstances rise to the level of warranting a mistrial.” The court explained the juror was getting hot, but was feeling better now, and they had cooled down the courtroom. The juror was moved to the other end of the panel, furthest away from the monitor, and was willing to continue.

¶14 Borelli argues the trial court erred by denying the motion without first conducting a voir dire of all jurors to ensure they could proceed impartially. Borelli, however, did not request a voir dire during the trial. He therefore forfeited the right to appellate review of that issue. *See State v. Huebner*, 2000 WI 59, ¶¶10-13, 235 Wis. 2d 486, 611 N.W.2d 727. Borelli also argues some or all of the autopsy photographs should have been excluded as unduly prejudicial. Again, Borelli did not object to any of the photographs at trial. Further, he arguably invited any error regarding admission of the photographs. Pursuant to the trial court’s request, counsel for both parties met with the pathologist prior to trial and agreed which photos would, and would not, be presented. We generally will not review invited error. *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).

¶15 The trial court took appropriate steps to address the concerns of both jurors who exhibited problems during the trial testimony. Both were provided a recess; one was excused. The second juror wished to proceed, and the court adjusted the temperature in the courtroom and moved her away from the monitor. None of the twelve other jurors complained of any difficulties, and any claim they were biased is pure speculation.³ We conclude the trial court did not erroneously exercise its discretion in denying the mistrial motion.

¶16 Borelli next argues he received ineffective assistance of trial counsel, in several respects. To demonstrate ineffective assistance, Borelli must show both that counsel's performance was deficient and that he was prejudiced thereby. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). An attorney's performance is not deficient unless the defendant proves the attorney's challenged acts or omissions were objectively unreasonable under all of the circumstances of the case. *State v. Oswald*, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207 (Ct. App. 1999). Prejudice exists if there is a reasonable probability that the verdict would have been different, but for counsel's errors. *Id.*, ¶50. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

¶17 Borelli first claims his attorney should have objected to the PowerPoint presentation of the autopsy photographs. In order to succeed on a claim that counsel should have brought a particular motion, the defendant must demonstrate the motion was likely to succeed. See *State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). At the postconviction hearing, the trial

³ The trial began with two alternate jurors on the panel.

court conducted a WIS. STAT. § 904.03 analysis, balancing the probative value of the photographs against the danger of unfair prejudice. The court applied the proper legal standard, explained its rationale, and ultimately concluded the photos were admissible and it would not have excluded them even if Borelli's counsel had requested. We therefore agree with the trial court that counsel's performance was not deficient, especially when counsel got the State to agree not to use some photos of Gustafson's head injuries.

¶18 Borelli next summarily argues his attorney should have requested a voir dire of the entire jury to investigate the impact of the autopsy slides on the other twelve jurors. There are two essential problems with this argument. First, Borelli's concerns about inappropriate "bias" are properly addressed by the WIS. STAT. § 904.03 balancing analysis. Second, there was no indication any of the remaining jurors were adversely affected by the photos. Thus, there was no reason to voir dire the entire jury, and it was not objectively unreasonable for counsel to fail to request it.

¶19 Next, Borelli claims counsel's first-phase trial strategy was unreasonable. "If tactical or strategic decisions are made on [a rational] basis, [we] will not find that those decisions constitute ineffective assistance of counsel, even though by hindsight we are able to conclude that an inappropriate decision was made or that a more appropriate decision could have been made." *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Rather, the court will second-guess counsel's strategic decision only if it is shown to be an irrational trial tactic or if it was based upon caprice rather than judgment. *Id.* at 503.

¶20 Borelli argues his attorney should have requested submission of first-degree reckless homicide as a lesser-included offense, instead of second-degree intentional homicide, adequate provocation. He asserts there was no evidence supporting the adequate provocation claim. The trial court, however, observed “there was testimony suggesting that the defendant may have been provoked while in the victim’s residence by her rejecting him in some fashion, evidence which was provided in part through the testimony of Mr. Markula, an inmate ... who overheard statements from Mr. Borelli.”

¶21 Borelli’s counsel explained his reasoning for submitting the lesser-included offense:

It was really a matter of the absence of information. There was no evidence in the record of a sexual assault. There was no evidence in the record of a robbery. There was no evidence in the record of any sort of prior animosity or connection. There was really nothing that would indicate or explain the homicide. However, there was ... detail regarding the extensive nature and severity of the injuries. ... [T]he only reasonable way of explaining it was there had to be something that was done or said that provoked it Strategically, I was also requesting it because I knew we were ... going to be pursuing the second phase of the trial, and I wanted the jury to have been advised ... of some options. I felt that the jury would not be able to come up with any reasonable options, which ultimately would lead to the conclusion that since there was no reason for this to have occurred, he must have been crazy.

We conclude counsel’s approach was rationally based on the law and the facts of the case. The evidence against Borelli was overwhelming. Trial counsel’s approach both gave the jury an option of convicting of a less severe crime and, as the court concluded, “helped set up and fortify the NGI defense.” Borelli asserts that the notion Gustafson provoked Borelli, who then rationally killed her in response, was grossly inconsistent with the NGI defense that he was mentally ill

and not rationally responsible for her death. Aside from somewhat inaccurately describing the adequate provocation standard, *see* WIS. STAT. § 939.44(1), Borelli's assertion merely confirms trial counsel's strategy of offering alternatives. The inconsistency would not have undermined Borelli's credibility, because a jury is not told who requested submission of a lesser-included offense. *See State v. Neuser*, 191 Wis. 2d 131, 137-38, 528 N.W.2d 49 (Ct. App. 1995).

¶22 Borelli further argues, however, that it was unreasonable to forego a first-degree reckless homicide instruction in favor of the adequate provocation approach. Borelli theorizes a reckless homicide instruction was appropriate because it was reckless behavior to consume cocaine and alcohol given his history of mental health issues.

¶23 We reject Borelli's argument. It begins with the flawed premise that the adequate provocation instruction was inappropriate. Further, we question whether Borelli would have been entitled to a recklessness instruction based on the reason asserted.⁴ Borelli cites no case law demonstrating his theory was viable. Indeed, the trial court concluded the proposition was "too far a stretch for this court to have accepted." Trial counsel's decision to forego the approach, believing it was unsupported by the facts and that the court would therefore probably not give the instruction, was not deficient performance. Under the circumstances, the decision to instead pursue the adequate provocation theory was not an irrational trial tactic. *See Felton*, 110 Wis. 2d at 503.

⁴ Moreover, Borelli testified at the mental responsibility phase of the trial and denied that he has less control over himself or becomes more impulsive when he uses alcohol and illegal drugs.

¶24 Borelli next argues his life sentence without the possibility of extended supervision was harsh and excessive, and the court erroneously exercised its discretion in declining to modify his sentence. As to the first claim, Borelli provides no citation to the record or any supporting law. Rather, he baldly asserts the trial court “failed to acknowledge and reasonably credit” a number of mitigating sentencing factors. Essentially, Borelli claims the court should have considered his inability to afford, prior to the homicide, the medications he needed to treat his mental illness. The court did, however, specifically address that issue at sentencing. The sentencing court has the discretion to balance the various factors as it sees fit. *State v. Russ*, 2006 WI App 9, ¶14, 289 Wis. 2d 65, 709 N.W.2d 483. Further, Borelli failed to argue the sentence was excessive under the standard set forth in *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶25 Regarding the trial court’s denial of sentence modification, Borelli merely claims the court “failed to consider the lessons of *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, in attempting to re-invigorate *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), and was erroneous.” That is the extent of Borelli’s argument. We will not decide issues that are not, or inadequately, briefed. *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶26 Finally, Borelli requests a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. He asserts that when evaluating whether a case should be retried in the interest of justice, we consider the totality of the circumstances. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Borelli then argues he suffered prejudice that was produced incrementally from different sources, referring to the combined effect of his previous arguments, and asks for a retrial to

allow a jury to determine whether the homicide was committed recklessly or intentionally. But, once again, Borelli fails to even set forth the applicable legal standard.

¶27 A new trial may be ordered for either of two reasons: (1) when the real controversy has not been fully tried; or (2) when it is probable that justice has for any reason miscarried. *Id.* at 159-60. Separate criteria exist for determining each of these two distinct situations. *Id.* at 160. In the first situation, a defendant need not demonstrate the probability of a different result on retrial. *Id.* Nonetheless, there was overwhelming evidence of Borelli's guilt, and he has failed to demonstrate entitlement to a reckless homicide instruction. We therefore reject Borelli's argument.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

