COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1028-CR **Cir. Ct. No. 99 CF 5019**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Charles Wilson appeals from the judgment of conviction for first-degree intentional homicide while armed with a dangerous weapon, following a jury trial, and from the order denying his postconviction motion seeking both an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and a new trial. He argues that the

trial court erred in impaneling an anonymous jury without: (1) either party requesting one; (2) allowing him to be present at the hearing during which the court announced its decision to impanel an anonymous jury; (3) making proper legal findings, under ***State v. Britt***, 203 Wis. 2d 25, 553 N.W.2d 528 (Ct. App. 1996); and (4) allowing defense counsel to inform him of the basis for impaneling an anonymous jury or to share the jury list with him. Wilson also argues that the trial court erred when, on its own motion, it allowed jurors to ask questions.

¶2 Additionally, Wilson argues that trial counsel was ineffective for failing to: (1) object to the court's anonymous-jury rulings; (2) object or move for a mistrial when the State allegedly violated the court's ruling pursuant to a pretrial motion regarding the admissibility of information about his House of Correction incarceration and Huber-release privileges at the time of the homicide; and (3) impeach Rockie Carney, a State's witness, with two prior convictions. We affirm.

I. BACKGROUND

¶3 Wilson was prosecuted for killing the live-in boyfriend of his ex-girlfriend. The first trial resulted in a hung jury; the second in a conviction for first-degree intentional homicide while armed with a dangerous weapon. The State's case rested on substantial circumstantial evidence and on what the trial court, in its decision denying postconviction relief, termed "the extremely strong evidence of identification by four eyewitnesses to the shooting."

¶4 While Wilson does not challenge the sufficiency of the evidence, he presents numerous issues in this appeal. As the State points out, however, Wilson never contemporaneously objected to the rulings he now challenges. "Consequently," the State argues, "these claims can only be reviewed in the

context of an ineffective assistance challenge." In reply, Wilson, quite understandably, protests that because he was excluded from the hearing where the anonymous jury decisions were made, his challenges to the anonymous-jury rulings should not be relegated to the ineffective-assistance-of-counsel context. Here, however, even evaluating Wilson's anonymous-jury arguments as he requests, we conclude that the trial court did not err. On all other issues, because Wilson did not contemporaneously object to the rulings he now challenges, we consider his claims under the standard of review governing allegations of ineffective assistance of counsel.

II. DISCUSSION

A. Anonymous Jury Rulings

¶5 Wilson first argues that the trial court erred by impaneling an anonymous jury in the absence of a request from either party to do so, and without his presence at the hearing where the court made that decision. "We examine the trial court's decision regarding voir dire," including its decision to impanel an anonymous jury, "for a misuse of discretion, keeping in mind that the court's broad discretion 'is subject to the essential demands of fairness.'" ***Britt***, 203 Wis. 2d at 32-33. Here, we see no misuse of discretion.

¶6 Wilson's first factual premise—that neither party requested an anonymous jury—is incomplete. It was defense counsel who raised concerns that led the court to order certain special protections for the jury. Prior to jury selection for the first trial, defense counsel stated:

> The last thing I want to bring up … sometimes there are jurors that are in the hallway prior to court starting, and I would just with this case in particular ask that the Court be sure that there is special caution taken to make sure the

> jurors do not have contact with other people[,] family members or witnesses in this case.

In response, the court announced that it would "have extra security" and then commented that the courtroom was poorly designed.

¶7 Prior to the second trial, the court again commented on the unfortunate configuration of the courtroom in relation to the hallway, where jurors could be in close contact with people involved in the case, and acknowledged that "[j]urors in past cases have said that they feel real uncomfortable when they seem to be getting the evil eye or being eyed over by people who have a connection to the case." The court continued:

> And also recently in a couple of cases[,] … defendants have asked their lawyers for copies of the juror list. And that concerns me, that there is possibly defendants [sic] out there or people out there who might want to intimidate jurors, and that doesn't come with the territory of being a juror.
>
> So I indicated to the lawyers off the record, and I'm indicating now on the record, that they must refer to jurors by their numbers, not by their names.…
>
> And I'm also going to enter an order that [defense counsel] may not share his jury list with the defendant or give it to him. [The prosecutor] can only share it with whatever court officer is sitting at the table. And then after that the lawyers, when voir dire is done, must keep their jury list confidential. And I'm doing that so that there won't be even the specter of any potential problem. And this way [defense counsel] if his client should ask can I have the list, he can say I'm under a court order that I can't do that.…
>
> I'm doing it now just with the lawyers and not with [the defendant], because if I say in his presence I have these concerns, I could be putting an idea in his mind, and I don't want to do that. So this is one thing that I think I can do outside the presence of the defendant. This really is a trial procedure matter, it's not something of super substance.

In its postconviction motion decision, however, the court commented that it had "believed it necessary to take preventative safety measures with the jurors based on concerns with *both* the defendant *and* the victim's family."

¶8 In ***Britt***, this court concluded that a trial court may exercise discretion to take "reasonable steps to protect the identity of potential jurors in a criminal case." ***Britt***, 203 Wis. 2d at 34. Further, "a trial court should have the power to take necessary steps to assure the protection of the jurors so that they may perform their role without distraction, interference or concern." ***Id.*** Therefore, a trial court may allow the impaneling of an anonymous jury if there is "strong reason to believe the jury needs protection," and if the court takes "reasonable precautions to minimize any prejudicial effect to [the defendant] and to ensure that his [or her] fundamental rights to a fair and impartial jury [are] protected." ***Id.*** at 34-36.

¶9 Wilson argues that the trial court failed to make any finding of any need for jury anonymity. Clearly, however, the trial court's finding was implicit. The court had referred to the poor layout of the courtroom in relation to the hallway. The court had been aware of an attack on Wilson by the victim's brother while deputies were escorting Wilson from the courtroom during the first trial. Additionally, the court had been informed by a defaulting witness in the first trial that she had failed to appear to testify because "the family" had threatened to kill her and her children. Thus, the record reflects a case-specific finding of the need for the protections the court ordered. *See* ***id.*** at 35 ("pattern of victim intimidation presented sufficient grounds to reasonably believe that the jury might also be subject to tactics of fear and intimidation").

¶10 Moreover, as the postconviction court pointed out, the trial court ruling "did not prevent the parties from obtaining relevant and adequate information from the jurors." Rather, "[t]he only information withheld from the defendant, but not from the lawyers, was the specific name of each juror." Thus, Wilson, through defense counsel, had access to all substantive information about the prospective jurors and, therefore, the defense's opportunity to pose questions to the jury panel was not restricted.

¶11 Further, as the postconviction court concluded, Wilson never established how jury selection would have been different if he, in addition to his lawyer, had known the names of the jurors. Indeed, even on appeal, Wilson only argues that "[l]ogically, if defense counsel was permitted to share this list of names with [him,] counsel would have asked him if he knew anyone on the list[,] good or bad, which almost always leads to directed questions pertaining to issues unknown to everyone else, except the defendant." Presumably, however, Wilson, able to observe the jurors, would have been able to inform counsel if he knew any of them. As the postconviction court commented:

> [Wilson] cannot show how or why it would have made a singular difference had ***he*** known the names of the jurors rather than his lawyer. He was able to see the prospective jurors, listen to their answers, submit questions to his lawyer, and address any concerns about the various jury candidates to counsel. The absence of the jurors' names did not limit the defendant in his ability to assess the potential jurors or limit the defense's ability to strike undesirable or unfavorable jurors. The court therefore concludes that no prejudice attached to the defendant's case when the court limited knowledge of the jurors' identities to the lawyers.

¶12 Although the court's comments were framed within an ineffective-assistance-of-counsel context, the court's essential analysis was correct and would stand just as firmly, were we to find error, in a harmless-error analysis as well.

See ***State v. Dyess***, 124 Wis. 2d 525, 544 n.11, 370 N.W.2d 222 (1985).[1] But we see no error. Given the specific history of threats and violence surrounding the first trial, and given the court's understandable concern about the close proximity of the jurors to others involved in the case, we conclude that the trial court correctly exercised discretion and took "reasonable steps to protect the identity of potential jurors." *See* ***Britt***, 203 Wis. 2d at 34.[2]

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[1] In ***State v. Dyess***, 124 Wis. 2d 525, 370 N.W.2d 222 (1985), the supreme court explained:

> We note, however, that there is a significant difference between the application of the ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984),] test of prejudice in the context of a claim of attorney error and in the instant context of a claim of trial court error. In the ineffective assistance of counsel claim, the burden of proof of prejudice is on the defendant raising the claim. In the context of trial court error, such as is present here, the burden of proof is on the beneficiary of the error, the [S]tate, to establish that the error was not prejudicial.

Id. at 544 n.11 (citation omitted).

[2] We do note, however, that the trial court commented that "starting with this trial" and in all future cases it would be utilizing "a blanket court order" providing for the procedures it employed in this case. Whether such a "blanket" order would be proper, absent specific findings establishing the need for such special protections, is an issue we do not address in this appeal.

Of particular concern could be a "blanket" order, absent such findings, precluding the presence of a defendant at the hearing addressing the propriety of such procedures. *See* WIS. STAT. § 971.04(1)(c) (1999-2000) (With certain exceptions, "the defendant shall be present … [d]uring voir dire of the trial jury."). Whether such a hearing, generally, does not require a defendant's presence because it "deals solely with a question of law or procedure," *see* ***May v. State***, 97 Wis. 2d 175, 186, 293 N.W.2d 478 (1980), as the trial court believed, also is an issue we need not address in this appeal.

In this case, however, we do note that while Wilson was not present for the hearing at which the anonymous-jury rulings were made, he was present throughout the subsequent voir dire. The jurors' names were not provided to Wilson, but, in all other respects, he had the usual opportunity for full participation in jury selection.

B. Juror Questioning

¶13 Wilson next argues that the trial court erred when, *sua sponte*, it allowed jurors to ask questions of witnesses at trial. He acknowledges, however, that defense counsel and the prosecutor, *at the second trial*, asked that the jurors be allowed to submit questions for the witnesses. Nevertheless, he argues that defense counsel and the prosecutor "knew what the court['s] prior ruling was and the law of the case" and were therefore "bound by the court['s] previous ruling."[3] We conclude that Wilson waived any objection to the trial court's decision to allow jurors to submit questions. *See*, *e.g.*, ***State v. Davis***, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996) (explaining contemporaneous-objection rule regarding waiver).

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[3] Prior to the first trial, after announcing that it liked to provide jurors with the opportunity to submit questions for the witnesses, the court explained its belief that it had the authority to allow questions from jurors. In spite of objections from both the prosecution and the defense, the court allowed jurors to submit written questions for witnesses under the procedures it had discussed with the attorneys.

The second trial involved a different prosecutor and a different defense attorney. In a status conference prior to the second trial, defense counsel discussed with the court rulings from the first trial:

> [DEFENSE COUNSEL]: … I believe looking at any of the pretrial motions that have been filed, I assume most of them have been decided in the original case?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: And in pretrial it is usually not my practice to re-litigate those matters which have been previously ruled.
>
> THE COURT: Yes. Those rules would be the law of the case as they say.

Appellate counsel does not, however, cite any portion of the record indicating that there had been a pretrial motion addressing the issue of jurors submitting questions for witnesses; nor does our independent review of the record reveal such a motion. The record, in fact, reveals that both the prosecutor and the defense for the second trial expressed a preference that jurors be allowed to submit questions.

¶14 Moreover, Wilson does not dispute the State's representation that the trial court's instructions to the jury, on the subject of submission of questions for witnesses, were "closely in line with the procedure recommended for submission of juror questions at trial in [WIS JI—CRIMINAL] SM-8 (1992)." Once again, we see no error. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 668-71, 581 N.W.2d 567 (Ct. App. 1998) (explaining safeguards to be employed by criminal trial court when allowing jurors to submit questions for witnesses).

C. Ineffective Assistance of Counsel

¶15 Our standard of review for ineffective-assistance-of-counsel claims is well known and need not be detailed here. To prevail on such a claim, a defendant must establish that counsel's performance was both deficient and prejudicial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A trial court has discretion to deny a motion for an evidentiary hearing on an ineffective-assistance claim if the motion fails to allege sufficient facts to raise a question of fact regarding whether counsel's performance was deficient and prejudicial, or if the motion presents only conclusory allegations, or if the record establishes that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996).

¶16 Wilson argues that trial counsel was ineffective for failing to object or move for a mistrial when the State allegedly violated the court's ruling pursuant to a pretrial motion regarding the admissibility of the fact that he was serving time at the House of Correction and was out on Huber-release privileges at the time of the homicide. Wilson explains:

> The State … called Sergeant [Cheryl] Gmach from the House of Correction who testified to Mr. Wilson's

> House of Correction[] status, his [H]uber privileges, the fact that he was out on [H]uber at the time this crime was committed and had not gone to work, the length of Mr. Wilson's sentence and when it began. The sergeant was also allowed to testify, with records, detailing the process, the various places an inmate on a misdemeanor charge could serve their [sic] sentence, the difference between straight time and [H]uber, and even submitted his personal log sheets and cards into evidence.

¶17 Wilson further explains that the trial court initially had precluded the introduction of evidence regarding his incarceration at the House of Correction. Following the ***Miranda-Goodchild*** hearing,[4] however, the court changed its ruling, concluding that Wilson's Huber-release hours, as well as his failure to appear at his place of employment—both three days before the murder (when Wilson had a problem with the victim) and on the day of the murder—were relevant.[5]

¶18 Wilson maintains that "a liberal interpretation of the court's ruling" did not allow Sergeant Gmach to testify "with records detailing the process, the various places an inmate on a misdemeanor charge could serve his sentence, the difference between straight time and [H]uber, submitting his personal log sheets and cards into evidence, or testifying as to the length of his sentence and when he began his time." Wilson fails to explain, however, how such details prejudiced the

[4] See ***State v. Bond***, 2000 WI App 118, ¶7 n.5, 237 Wis. 2d 633, 614 N.W.2d 552, *aff'd*, 2001 WI 56, 243 Wis. 2d 476, 627 N.W.2d 484, *reconsideration denied*, 2001 WI 117, 247 Wis. 2d 1039, 635 N.W.2d 786, for the definition of a ***Miranda-Goodchild*** hearing.

[5] Wilson does not challenge the trial court's ruling. He also acknowledges that he accepted the trial court's offer to instruct the jury that he was incarcerated at the House of Correction for failure to pay child support, not for a violent crime. The trial court thoroughly instructed the jury on the extent to which it could, and could not, consider the House of Correction/Huber-release evidence. Wilson does not dispute the accuracy or completeness of that cautionary instruction.

outcome of his case.[6] And, as the postconviction decision also noted, even if defense counsel had objected to Sergeant Gmach's testimony, the objection would have been overruled.

¶19 Wilson offers nothing to counter the postconviction court's conclusion that the evidence was relevant and admissible. Wilson's argument is largely undeveloped; he has failed to establish that counsel's performance was either deficient or prejudicial. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" argument).

¶20 Finally, Wilson argues that counsel was ineffective for failing to impeach Rockie Carney, one of four eyewitnesses to the homicide, with his two prior convictions. In cross-examining him, however, defense counsel did expose that Carney was on probation at the time of the homicide. Thus, the jury may have understood that he had at least one criminal conviction. Even assuming that defense counsel's performance was deficient for failing to specifically expose the fact of Carney's two convictions, Wilson has not established that this performance prejudiced the outcome of his case; he has not shown that the jury's lack of such specific information deprived him of a fair trial or undermines confidence in its outcome. *See* ***Johnson***, 153 Wis. 2d at 129 (citing ***Strickland***, 466 U.S. at 694).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

[6] In part, Wilson even misstates Sergeant Gmach's testimony. As the postconviction court's decision noted, "the length of the sentence was not divulged to the jury."