COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1451-CR **Cir. Ct. No. 00 CF 5208**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTRELL A. LEFLORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: KITTY K. BRENNAN and JOHN FRANKE, Judges. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Dontrell A. Leflore appeals from a judgment entered on a jury verdict finding him guilty of first-degree reckless homicide, first-degree recklessly endangering safety, fleeing an officer, and fleeing the scene of an accident. *See* WIS. STAT. §§ 940.02(1), 941.30(1), 346.04(3), and 346.67(1)

(1999–2000).[1] He also appeals from an order denying his postconviction motion for a new trial, and from an order denying his postconviction motion for sentence modification.[2] Leflore claims that: (1) his trial counsel was ineffective when the attorney, according to Leflore, did not ask follow-up questions to an allegedly biased juror, and did not move to strike the juror for cause; and (2) the trial court erroneously exercised its sentencing discretion. We affirm.

I.

¶2 This case began with a car chase, which started shortly before 6:00 p.m. on September 25, 2000. At that time, two City of Milwaukee police officers saw Dontrell A. Leflore driving a blue Chevrolet Impala. He was driving fast. When Leflore did not stop at a stop sign, the officers tried to pull him over. Leflore did not stop for the officers.

¶3 The officers chased Leflore with their squad car. Leflore, however, continued to flee, driving at least fifty miles per hour at times and through several stop signs. When Leflore drove through a stop sign at the intersection of Buffum and Burleigh Streets, he hit Diane Harvey's car. Harvey was severly injured and later died. Her daughter, who was also in Harvey's car, was injured. Leflore then got out of his car and ran away. The officers captured him after a short chase on foot.

[1] All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

[2] The Honorable Kitty K. Brennan presided over the jury trial and issued the judgment of conviction. The Honorable John Franke issued the orders denying the postconviction motions.

¶4 Leflore pled not guilty and was tried to a jury. During *voir dire*, the trial court asked the prospective jurors whether any of them had been the victim of an "injury accident." Juror number three told the court that "a couple of guys" had attacked him on a city bus about five years earlier, which he later indicated during follow-up questioning was ten years. When the trial court asked juror number three if he thought the incident would make him biased against Leflore, he responded: "It's hard to say. I don't know whether it would or not. I suppose I couldn't say until--." The trial court then told juror number three: "Okay. I'm sure the lawyers will follow up. That's it for now. Thank you, sir."

¶5 When the State questioned the prospective jurors, it asked them if they had a close friend or relative who was a law enforcement officer. Juror number three responded that he did. When the State asked juror number three if this would influence him as a juror, he responded: "I don't think so."

¶6 The jury found Leflore guilty on all counts. The trial court sentenced Leflore to: sixty-two years in prison on the reckless-homicide charge, with forty-two years of initial confinement and twenty years of extended supervision; twelve years in prison on the recklessly-endangering-safety charge, with seven years of initial confinement and five years of extended supervision; nine and one-half years in prison on the fleeing-an-officer charge, with seven years and six months of initial confinement and two years of extended supervision; and nine and one-half years in prison on the fleeing charge, with seven years and six months of initial confinement and two years of extended supervision. The trial court imposed the sentences to run consecutive to each other.

¶7 Leflore filed two postconviction motions. In the first motion he sought a new trial, alleging that his right to an impartial jury had been violated

because juror number three was biased. He also claimed that his trial counsel was ineffective when he did not ask juror number three follow-up questions or move to strike the juror for cause.

¶8 In the second postconviction motion, Leflore sought a modification of his sentence. He alleged that the trial court misused its sentencing discretion when it failed to address the need to protect the community. Leflore also claimed that consecutive sentences were unwarranted because three of his four charges involved the death of the same person. The trial court denied both motions.

II.

¶9 Leflore's first allegation is that he was denied the right to an impartial jury because juror number three was biased. Leflore never moved to strike juror number three during *voir dire*. A claim of juror bias is waived if it is not timely presented to the trial court. ***State v. Brunette***, 220 Wis. 2d 431, 442, 583 N.W.2d 174, 179 (Ct. App. 1998). Thus, we will not review Leflore's allegation in the context of a juror-bias claim. We can review a juror-bias claim, however, if the defendant alleges ineffective assistance of trial counsel. ***Id.***, 220 Wis. 2d at 445, 583 N.W.2d at 180. Leflore does so here. Thus, we review his juror-bias argument in the context of his ineffective-assistance-of-counsel claim.

¶10 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶11 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶12 Our standard for reviewing this claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present a question of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶13 The Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution guarantee a defendant an impartial jury. ***Hammill v. State***, 89 Wis. 2d 404, 407, 278 N.W.2d 821, 822 (1979). To ensure an impartial jury, WIS. STAT. § 805.08(1) provides for juror disqualification if a prospective juror "is not indifferent in the case." A prospective juror is biased and should be removed for cause only if the prospective juror is: (1) statutorily biased; (2) subjectively biased; or (3) objectively biased. ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770, 777 (1999).

¶14 Leflore alleges that juror number three was subjectively biased. Subjective bias "is revealed through the words and the demeanor of the

prospective juror" and "refers to the prospective juror's state of mind." ***Id.***, 227 Wis. 2d at 717, 596 N.W.2d at 778.

> This category of bias inquires whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon that juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those responses. These observations are best within the province of the [trial] court.

State v. Kiernan, 227 Wis. 2d 736, 745, 596 N.W.2d 760, 764 (1999) (citations omitted). Thus, we will uphold the trial court's finding regarding a prospective juror's subjective bias unless it is clearly erroneous. ***Id.***

¶15 During *voir dire*, the trial court and juror number three had the following discussion:

> THE COURT: You've just heard a brief introduction to the case. My next question goes to the type of offenses that it involves. Is there anybody who has themselves been the victim in any auto accident, injury accident? Anybody been the victim in an injury accident? Juror No. 3, you have your hand up.
>
> JUROR 3: Yes. About five years ago I was attacked by a couple of guys in a car on a city bus.
>
> THE COURT: On a city bus. Okay. Did you report it to the police?
>
> JUROR 3: Yes.
>
> THE COURT: And did it go to the D.A.'s office?
>
> JUROR 3: Yes.
>
> THE COURT: Did it go to court?
>
> JUROR 3: Yes.
>
> THE COURT: Did you have to testify?

> JUROR 3: No.
>
> THE COURT: No?
>
> JUROR 3: No.
>
> THE COURT: Based on that experience that you had do you believe that that's going to bias you one way or another in this case?
>
> JUROR 3: *It's hard to say. I don't know whether it would or not. I suppose I couldn't say until --*
>
> THE COURT: Okay. I'm sure the lawyers will follow up. That's it for now. Thank you, sir. Anybody else?
>
> (No response)

(Emphasis added.) When Leflore's trial counsel questioned the prospective jurors, he asked juror number three questions about the bus incident:

> [DEFENSE COUNSEL]: [Juror number three], you testified that you were attacked by a couple of guys on a bus. What did these guys look like?
>
> JUROR 3: Well, at the time they were a couple years older than me. They were black. They-- Other than that, I suppose, you know, pretty nondescript.
>
> [DEFENSE COUNSEL]: How did that make you feel when you were attacked?
>
> JUROR 3: Well, I was intimidated by them and I guess I felt vulnerable, scared. I don't know, the way most people I suppose would feel in that situation.
>
> [DEFENSE COUNSEL]: Have you changed the way you do things because of this incident?
>
> JUROR 3: Well, I'm definitely more cautious back then when I had to ride the bus, yeah.
>
> [DEFENSE COUNSEL]: How long ago did this happen?
>
> JUROR 3: It was actually about ten years ago.

> [DEFENSE COUNSEL]: Okay. Ten years ago. Do you still ride the bus now?
>
> JUROR 3: No.
>
> [DEFENSE COUNSEL]: Thanks.

Leflore claims that juror number three's "incomplete answer" demonstrates that juror number three "d[id] not know" if he could remain impartial.[3] Thus, Leflore claims that his trial counsel was ineffective because "trial counsel's failure to … move to strike juror #3 for cause demonstrate[s] deficient performance." We disagree.

¶16 A prospective juror need not give unequivocal assurances of his or her ability to remain completely impartial:

> [A] prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality. Indeed, we expect a circuit court to use voir dire to explore a prospective juror's fears, biases, and predilections *and fully expect a juror's honest answers at times to be less than unequivocal.*

State v. Erickson, 227 Wis. 2d 758, 776, 596 N.W.2d 749, 759 (1999) (emphasis added). In this case, the record shows that Leflore's trial counsel performed exactly as proficient counsel should. He asked juror number three detailed follow-up questions to get more information about the incident and to determine how juror number three was affected by it. At no time during the follow-up questions did juror number three indicate that he would be unable to remain impartial.

[3] Leflore alleges, in a brief discussion, that, in addition to juror number three, "[f]ive jurors gave answers that established subjective bias." Those five potential jurors were struck from the jury. Accordingly, we will not address this claim. *See* ***State v. Lindell***, 2001 WI 108, ¶¶50, 113, 245 Wis. 2d 689, 629 N.W.2d 223 (a struck juror eliminates the claim that the juror was biased); ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶17 Moreover, the bus incident occurred ten years before the trial and the facts of the incident were different than the facts of this case. Accordingly, given juror number three's responses to the follow-up questions and the information known to Leflore's trial counsel at the time of *voir dire*, Leflore's trial counsel's decision not to move to strike juror number three was reasonable. *See* ***State v. Oswald***, 232 Wis. 2d 62, 95, 606 N.W.2d 207, 223 (Ct. App. 1999) ("Whether defense counsel should move the court to strike a juror for cause is his or her tactical decision to make."). Accordingly, Leflore fails to show deficient performance.

¶18 Leflore further alleges that juror number three exhibited subjective bias during the following discussion with the State:

> [STATE]: Is there any member of the panel who has a close friend or a relative who is a member of law enforcement? … Juror No. 3, what jurisdiction does that person work for?
>
> JUROR 3: I think Waukesha County.
>
> [STATE]: Police or sheriff?
>
> JUROR 3: He's in corrections. I think he works as a jailor.
>
> [STATE]: Do you ever talk to the person about his experiences as a correctional officer?
>
> JUROR 3: Sometimes.
>
> [STATE]: Have you ever discussed any of the charges that brought people into custody that you remember?
>
> JUROR 3: Nothing specific.
>
> [STATE]: Anything about your acquaintance with that person that would influence you as a juror?
>
> JUROR 3: *I don't think so.*

(Emphasis added.) Again, Leflore relies on juror number three's response — "I don't think so" — to argue that juror number three was subjectively biased. Again, we disagree.

¶19 Juror number three's response does not suggest bias. There is nothing inherent in "I don't think so" that suggests that juror number three was not a reasonable person who was sincerely willing to set aside any views he might have brought with him into the trial. As the postconviction court cogently pointed out: "'I don't think so' is not only an answer which reflects a careful and conscientious juror struggling with unfamiliar concepts, it is an accurate answer for a completely unbiased person who has yet to hear the evidence and has yet to participate in deliberations with eleven other citizens." Accordingly, Leflore again fails to show that his trial counsel's performance was deficient.

¶20 Leflore also alleges that his trial counsel was ineffective when he did not ask juror number three follow-up questions. As we have seen, Leflore's trial attorney did in fact ask juror number three follow-up questions about the attack on the bus, and elicited pertinent information about the attack that revealed how that earlier incident might affect the juror's views about the charges against Leflore.[4] Accordingly, this claim is without merit.

[4] In his brief, Leflore claims "nobody followed up on the equivocations – not the court, not the prosecutor, and most relevantly, not the defense attorney." (Footnote omitted.) In a footnote, Leflore acknowledges that "[t]here was cursory follow-up on juror #3 by defense counsel." Despite the evidence, as pointed out by the State, that Leflore's attorney *did* ask juror number three follow-up questions about the bus incident, Leflore continues to insist in his reply brief that "nobody followed up on juror #3's equivocation and incomplete answer." While Leflore's appellate counsel referred to the evidence of follow-up questions in a footnote, his depiction of the evidence in the main text of the briefs was not accurate. In the future, we trust counsel will be more accurate when discussing record evidence.

¶21 Finally, Leflore claims that the trial court erroneously exercised its sentencing discretion. We will find an erroneous exercise of sentencing discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶22 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[5] ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984). The weight to be given to each of the primary factors is within the discretion of the trial court. ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871, 873 (Ct. App. 1981). "The sentence may be based on any or all of the three primary factors after all relevant factors have been considered." ***Id.***

[5] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989).

¶23 First, Leflore alleges that the trial court erroneously exercised its sentencing discretion because it did not address whether or not Leflore "posed a future danger to the community." We disagree. The trial court considered the appropriate factors. First, the trial court considered the gravity of the offense. It noted that Leflore's conduct resulted in the death of Diane Harvey and had a traumatic effect on Harvey's daughter, Monique Wilhite:

> I look at the impact on Monique. Now, she is the victim in Count 2 of this case, the reckless endangering safety. The description at trial of what this child went through and the drama of this accident just breaks my heart. She was so shattered by what happened on the streets she couldn't talk when the police came up. It wasn't that she was physically incapacitated from her injuries. She was in such terrible shock, as you could imagine, that her mom was in a devastated condition in the seat next to her in the car.
>
> You had run away abandoning her on the street there. The impact to the child at that moment and for the rest of her life is so huge I can't even put it in words.

The trial court also considered Leflore's character, including Leflore's: failure to show remorse; poor educational background and employment record; failure to respond to treatment; probation violations; age; and prior convictions, including operating a firearm while intoxicated and possession of cocaine. Implicit in these factors is the trial court's consideration of the need to protect the public. As the postconviction court noted:

> [T]he court did not *explicitly* reference the future risk the defendant presented to the community, but such risk so obviously followed from the nature of the defendant's crimes and his prior record that there can be no doubt that this was a part of the court's sentencing rational. The exercise of discretion does not require explicit mention of things which are beyond dispute.

(Emphasis by trial court.) We agree. The trial court did not erroneously exercise its sentencing discretion.

¶24 Leflore also claims that the trial court erroneously exercised its discretion when it imposed consecutive sentences because "three of the four charges involved causing a death, yet there was only one death in the series of events." This claim also lacks merit. A trial court has the discretion to determine whether sentences are to run concurrently or consecutively. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987). For the reasons stated above, the trial court adequately explained why it imposed a lengthy cumulative sentence.

By the Court.—Judgment and orders affirmed.

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