COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2085-CR **Cir. Ct. No. 2007CF3288**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PRECIOUS M. WARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Precious M. Ward appeals from a judgment of conviction entered after a jury found him guilty of first-degree reckless homicide while armed and felon in possession of a firearm, contrary to WIS. STAT.

§§ 940.02(1), 939.63, and 941.29(2) (2007-08).[1] He also appeals from the trial court's order denying his postconviction motion for a new trial. Ward argues: (1) the trial court erred in seating a hearing-impaired juror; (2) his trial counsel was ineffective for not moving to strike or remove the juror; and (3) the trial court violated his right to an appeal when it concluded that the lack of a record of its ruling on a motion *in limine*, which precluded Ward from presenting evidence that another person was responsible for the homicide, was not grounds for a new trial. We conclude that the trial court's findings that the juror in question was able to comprehend the testimony during Ward's trial are supported by the record and that consequently, his trial counsel was not ineffective. In addition, we hold that Ward's right to an appeal was not violated when the trial court denied his postconviction motion. Accordingly, we affirm.

I. BACKGROUND.

¶2 A criminal complaint was filed charging Ward with first-degree reckless homicide while armed arising out of an incident that occurred on July 1, 2007. The complaint was based on a shooting that took place during an altercation at a clothing store in the City of Milwaukee. When police arrived at the scene, they found the victim, Willie McCollum, lying in front of the store with a bullet wound to his neck.

¶3 Prior to trial, the State filed a third-amended information charging Ward with first-degree intentional homicide while armed as a party to the crime and possession of a firearm by a felon. A jury found Ward guilty of the lesser

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

charge of first-degree reckless homicide while armed and of being a felon in possession of a firearm.[2] Ward filed a postconviction motion for a new trial, which the trial court denied without holding a hearing. Ward now appeals. Additional facts relevant to the issues he raises are included below.

II. ANALYSIS.

A. Hearing-impaired juror.

¶4 Ward asserts that the seating of a hearing-impaired juror, who he contends could not comprehend the testimony, violated his constitutional right to an impartial jury and to a unanimous verdict. Our review of the record belies Ward's assessment that the juror in question was unable to comprehend the trial testimony.

¶5 "[A]rticle I, section 7 of the Wisconsin Constitution, which guarantees an 'impartial jury,' and the Sixth and Fourteenth Amendments to the United States Constitution, which guarantee an 'impartial jury' and 'due process of law,' require that a criminal defendant not be tried by a juror who cannot comprehend testimony." ***State v. Turner***, 186 Wis. 2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994). We independently determine the constitutional question of whether a criminal defendant has received a fair trial. *See* ***id.*** "But we review underlying findings of fact by the trial court deferentially, and reverse only if they

[2] The record is silent as to what happened to the party to a crime component. It was included in the third-amended information, and the trial court informed the jury that the charge was as a party to the crime. However, there is no reference to party to a crime on the verdict form; judgment of conviction; or in the sentencing transcript. Presumably Ward's testimony that he shot the victim, although he claimed it was an accident, eliminated the need for a party to a crime instruction.

are clearly erroneous." ***Id.*** "This is particularly important in cases asserting the presence of a hearing-impaired juror because it will almost always be the case that a juror will not be totally deaf. The trial court will always have to determine … the extent of testimony not heard." ***Id.***

¶6 During voir dire, in response to the prosecutor's inquiry as to whether any juror has a "health problem of any type," the following exchange with Juror Johnson took place:

> [Juror Johnson]: I have a severe hearing loss. I wear hearing aids. I do okay when I'm lip-reading. If somebody's talking, I can't see them, I probably miss much of what they say.
>
> [Prosecutor]: Have you followed what I said?
>
> [Juror Johnson]: Yes.
>
> [Prosecutor]: And the judge too?
>
> [Juror Johnson]: Very well. When some of the people were talking I had no idea what they were saying. I have to look at people.
>
> [Prosecutor]: Would it help if you sat where Juror Number 8 is so you could listen to the witness?
>
> [Juror Johnson]: I was on a jury before. I followed the case very well, so I do compensate for that. I'm just making you aware of that. I could miss something.
>
> [Prosecutor]: If you do miss something would you maybe raise your hand, let us know during the trial, we can maybe repeat it?
>
> [Juror Johnson]: Yes.

¶7 Ward agrees with the trial court's assessment, when ruling on his postconviction motion, that "Juror Johnson was admittedly hearing impaired; however, he did not have a total hearing loss and indicated that he could lip read proficiently and could understand most of what was being said." What Ward finds

problematic "is the court's reliance on *lip reading* as a sufficient instrument of comprehension, and the court's failure to find that 'most of what was [being] said' was insufficient to demonstrate comprehension of the testimony." *See, e.g.*, ***Strook v. Kedinger***, 2009 WI App 31, ¶27, 316 Wis. 2d 548, 766 N.W.2d 219 (identifying limitations of "lipreading").

¶8 The record reflects that the trial court took precautions during trial to ensure that Juror Johnson heard everything, including an in-chambers discussion with him to make sure he was able to hear. In addition, Juror Johnson committed to letting the court know when he could not hear something and did so on at least one occasion.[3] In its written decision denying Ward's postconviction motion for a new trial, the court relayed the following:

> During a meeting with the court and the parties in the morning of March 11, 2008, [Juror Johnson] said he learned lip reading at a young age and that he did not use sign. He stated that if he couldn't follow the case, he would put his hand up; he asked if people could speak a little louder; and he said he had followed everything up to that point. He assured the court that he would raise his hand if someone wasn't speaking loud enough. The parties and the court were satisfied that the juror could comprehend the testimony.
>
> The court and the parties had a firsthand opportunity to observe the juror and speak with him about his hearing impairment. He was very confident that he could participate as a juror, and based on his answers to the questions he was asked in this case, the court … was unable to find that he should be struck as a juror due to his hearing impairment.

[3] We acknowledge that the record is not entirely clear as to whether Juror Johnson was the individual who stated that he had trouble hearing. However, in at least one instance there is a clear inference that it was him because Johnson was called into chambers to discuss with counsel and the trial court whether he heard the questions asked and the responses given.

These findings are not clearly erroneous; consequently, we accept them.

¶9 Furthermore, we, like the trial court, are not convinced that ***Kedinger*** "stands for the proposition that anyone with a hearing impairment who lipreads could never qualify as a juror," which is what Ward seems to imply. Additionally, we are unpersuaded by Ward's argument that Juror Johnson was objectively biased simply because he engaged in lipreading.

¶10 Because the trial court did not err in allowing Juror Johnson to serve, it properly denied Ward's claim that his trial counsel was ineffective in not moving to strike or remove this juror. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 ("Trial counsel's failure to bring a meritless motion does not constitute deficient performance.").

B. Record reconstruction.

¶11 The State filed a motion *in limine* to "[p]rohibit the defense from introducing any evidence of a 3rd party defense as notice has not been given under ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)[,] and [WIS. STAT. §] 904.01(2) [sic]." It is undisputed that there is no ruling on the motion in the record. According to Ward, the lack of a record on this issue denies him his constitutional and statutory right to appeal.

¶12 The right to appeal is absolute under the Wisconsin Constitution: "Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law." WIS. CONST. art. I, § 21(1). "We have interpreted the right to appeal to require that the appeal be meaningful." ***State v. Raflik***, 2001 WI 129, ¶30, 248 Wis. 2d 593, 636 N.W.2d 690 (citations omitted). "Stemming from the right to a meaningful appeal is a criminal defendant's right to a full

transcript of the proceedings. Providing a defendant with a full transcript guarantees that the defendant has the opportunity to analyze the proceedings of the trial court and to challenge any errors." ***Id.***, ¶31 (citation omitted).

¶13 It is Ward's burden to show a "'colorable need'" for the missing ruling on the motion *in limine*. *See* ***id.***, ¶40 (explaining that "when challenging the sufficiency of a record, the appellant has the burden to demonstrate that there is a 'colorable need' for the missing portion of the record") (citation omitted). In this regard, Ward "is not required to show prejudice, but the error cannot be so trivial that it is clearly harmless." *See* ***id.*** The decision as to whether the defendant's right to a fair and meaningful review is frustrated by transcript errors or omissions is a discretionary one, which we "will support if due consideration is given to the facts then apparent, including the nature of the claimed error and the colorable need for the missing portion—and to the underlying right under our constitution to an appeal." ***State v. Perry***, 136 Wis. 2d 92, 109, 401 N.W.2d 748 (1987).

¶14 Ward claims that he wanted to introduce evidence that a man named Edtwon Maggett shot McCollum.[4] Ward testified that Maggett, his uncle, was with him when he arrived at the store and was involved in the altercation. In addition, Ward testified that Maggett gave Ward a gun right before they went inside the store.[5]

[4] Maggett was dead at the time of Ward's trial.

[5] In his testimony, Ward referred to Maggett as "Rico." It is undisputed that the names Rico and Maggett refer to the same person; therefore, we refer to him as Maggett. Maggett was identified as an individual who was wearing orange pants on the videotape of the incident.

¶15 In his postconviction motion, Ward alleged that there were witnesses he wanted to call who identified Maggett as the shooter. Ward further asserted there were two witnesses, Michael Harris and Dennis Ward, who "would have testified that Mr. Maggett made statements to them implicating himself in the shooting of Mr. [McCollum]." Ward's postconviction counsel stated in an affidavit submitted in support of Ward's postconviction motion:

> 10. Mr. Ward had a copy of the discovery, and knew that there were witnesses who would say that it was the guy (Mr. Maggett) with the braids and the orange golf shorts [who] shot Mr. McCollum. Mr. Ward told [his trial attorney] that he wanted those witnesses called. Those witnesses were Shirley Wilburn, Shirishea Blain-Trotter, Kenya Blain, Tashawna Davis, Nestor Gandia. But Mr. Ward was told by [his trial attorney] that the court's ruling was that he could not call those witnesses, that he could not present evidence that Mr. Maggett was the shooter and not him. Mr. Ward wanted Mr. Harris and Mr. Dennis Ward called, but was told he could not present their testimony because of the court's ruling;
>
> 11. Mr. Ward wanted to testify that it was Mr. Maggett who came up from behind Mr. McCollum and shot him, but he was told by [his trial attorney] that the court's ruling was that he could not say that, so he and [his trial attorney] decided that Mr. Ward would have to say that the shooting was an accident because he could not say that it was Mr. Maggett [who] shot Mr. McCollum. Mr. Ward did not want to testify at all, but felt he had to because he could not present any of his witnesses' testimony.

Ward argued in his postconviction motion that the court's ruling "was the reason that he was obligated against his own better judgment to testify that the shooting of Mr. McCollum was an accident, or that it was in self[-]defense."

¶16 Ward has not submitted affidavits from any of the individuals he referenced, nor has he submitted the discovery materials his postconviction attorney referenced in the affidavit. Consequently, we agree with the State's assessment:

> The [trial] court was under no obligation to reconstruct the record of its ruling on the State's motion *in limine* because Ward's motion failed to demonstrate that there was any substance to his claim that the court's ruling violated his right to present a defense. Ward's motion and counsel's supporting affidavit offered nothing but conclusory allegations that several witnesses would identify Maggett as the shooter. Ward offered nothing concrete to demonstrate what any of these witnesses might have been able to testify to at trial, such as police reports containing their statements or affidavits stating what they saw. While Ward would likely have a constitutional right to present evidence that Maggett shot McCollum, he utterly failed to demonstrate that such evidence exists.

(Italics added.) Without such support, we cannot conclude that the trial court erred when it denied Ward's motion. We are not persuaded that Ward presented the trial court with a claim of "error which, were there evidence of it revealed in the transcript, might lend color to a claim of prejudicial error."[6] *See* ***Perry***, 136 Wis. 2d at 101; *see generally* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996) (explaining that if the defendant fails to allege sufficient facts or presents only conclusory allegations in a postconviction motion, the trial court may deny the motion without a hearing).

¶17 Ward argues that this conclusion, in essence, requires him to demonstrate prejudice when ***Perry*** instructs that he need only convince the court that the missing portion of the transcript would demonstrate reviewable error. *See*

[6] We are confident in our resolution of Ward's appeal; however, we are troubled by the trial court's assessment of the effect of the incomplete record in this matter. In its decision denying Ward's postconviction motion on this issue, the trial court wrote: "Although there is no apparent record of the court's ruling in this matter, the court clearly would have found this testimony to be unreliable and untrustworthy inadmissible hearsay." The court went on to state: "The prohibited evidence was clearly inadmissible, and the absence of a record of the court's former ruling does not alter the only possible legal conclusion with respect to that evidence." We urge the trial court to do more in the future to ensure that its rulings are placed on the record and to carefully consider whether reconstruction is warranted.

id., 136 Wis. 2d at 101. We disagree with his assessment that we are somehow changing the burden that was imposed upon him. It would have been an easy thing for Ward to present more than conclusory allegations by, for example, including a copy of the discovery his postconviction counsel claimed Ward had a copy of (i.e., "10. Mr. Ward had a copy of the discovery, and knew that there were witnesses who would say that it was the guy (Mr. Maggett) with the braids and the orange golf shorts [who] shot Mr. McCollum."). Without more, we hold fast to our determination that trial court did not err when it denied Ward's motion.

¶18 We further agree with the State that Ward's claim that he and his trial counsel agreed that Ward needed to perjure himself because of the court's ruling was insufficient to require reconstruction. The State writes: "[W]hile Ward asserted that his counsel was responsible for telling him to lie under oath, this claim, like Ward's arguments about the witnesses he wanted to call, is based solely on Ward's conclusory and unsupported assertions." We agree.[7] Furthermore, we cannot condone Ward's decision to commit what amounts to perjury in response to an unfavorable ruling on a motion *in limine*. Accordingly, we affirm the trial court's order denying Ward's postconviction motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[7] We would be shocked if Ward was, in fact, able to substantiate his claim in this regard given that if trial counsel endorsed Ward's decision to lie on the stand, counsel would have suborned perjury.