**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 3, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-0333-CR** **Cir. Ct. No. 01CF001303**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIAM P. HAESSLY,**

**DEFENDANT-APPELLANT.**

---

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. William P. Haessly appeals from a judgment entered after a jury found him guilty of one count of first-degree intentional homicide, while armed with a dangerous weapon, as party to a crime, contrary to

WIS. STAT. §§ 940.01(1)(a), 939.05 and 939.63 (1991-92).[1] He also appeals from an order denying his postconviction motion. Haessly claims: (1) the prosecutor's closing constituted impermissible argument; (2) his trial counsel provided ineffective assistance for failing to object during the prosecutor's closing argument; (3) the State improperly delayed filing charges against him; (4) the trial court erred in allowing the State to amend the original charge against him of felony murder to first-degree intentional homicide; and (5) the trial court erroneously exercised its discretion when it denied Haessly's motion for a mistrial based on a defective verdict. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

## I. BACKGROUND

¶2 On November 28, 1992, Lorraine Molnar was murdered in her Oak Creek home. The cause of death was cardio-respiratory failure due to multiple rib fractures and blunt force trauma to the chest. All but one of her ribs were broken, her nose was broken, she had multiple stab wounds on her face, neck, thighs, left hand, left upper lip, left ear and other blunt force injuries. The police determined that Molnar had been killed between 1:00 p.m. and 4:36 p.m. that day. This determination was based on information from individuals who had last seen her alive at 1:00 p.m., and from her son, John Molnar, who discovered her body at 4:36 p.m.

¶3 Two days later, the police received a phone call from Thaddeus Rudnicki who stated that Haessly should be considered as a suspect in the Molnar

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

murder. Rudnicki and Haessly had a history of committing burglaries together. In November 1993, Rudnicki was arrested for a series of ten different burglaries; he confessed, and was incarcerated.

¶4 On November 4, 1998, Special Agent Richard Luell interviewed Rudnicki's cellmate, Michael Jochem. Jochem recounted Rudnicki's account of a burglary Rudnicki and "a friend" committed where the woman who resided in the house was killed during the burglary. Rudnicki told Jochem that "they" beat the "dog shit" out of the woman, eventually killing her. Rudnicki indicated that this occurred in an Oak Creek home and described a time consistent with the Molnar murder.

¶5 Luell interviewed another Rudnicki cellmate, James Pratt. Rudnicki described a burglary "hanging over his head," which he committed with his friend "Moose," also referred to as "Bill." Rudnicki told Pratt that the lady was killed during the burglary in the kitchen, that a meat hatchet and a steak knife were used to attack her, and that there was a trail of blood between the kitchen and the place the lady's body was left.

¶6 Police reports confirmed that Molnar was killed in her kitchen and her body was found in her living room. A blood trail leading from the kitchen to the living room was noted.

¶7 On December 17, 1998, Luell interviewed Rudnicki. Rudnicki stated that he and Haessly, whose nickname is "Moose," had been "casing" the Molnar residence in order to burglarize it. Rudnicki told Luell that he spoke with Haessly after the Molnar murder and Haessly admitted to killing Molnar. Rudnicki also told Luell that Haessly's former girlfriend had threatening letters Haessly wrote to Rudnicki. The police contacted the former girlfriend, Beverly

Bower. Bower confirmed she had seen a couple of letters from Haessly, and remembered one, which referred to using a knife in order to "shut up" an old lady on 27th Street. The letter also threatened Rudnicki to keep his mouth shut or Haessly would "get" Rudnicki. Rudnicki also told Luell that when he saw Haessly in his van the Sunday after Thanksgiving 1992, Haessly had a cut on his hand, a scratch on his face and possibly a black eye. Rudnicki stated that he heard about the murder from a television report and connected the report to the Molnar home. He believed at that point that Haessly was the culprit. Rudnicki called Haessly after the television report and Haessly admitted that he did it. Rudnicki told Luell he did not want to testify against Haessly because he did not want to be a "snitch."

¶8 Subsequently, Rudnicki entered into a plea agreement with the State. He agreed to testify truthfully against Haessly and he pleaded guilty to a reduced charge of conspiracy to commit burglary as a result of his involvement in the Molnar matter.

¶9 Two days after Rudnicki entered his plea, Haessly was charged with felony murder. The charge was subsequently amended to first-degree intentional homicide and the case was presented to a jury. The jury found Haessly guilty. He filed a postconviction motion, which was denied. He now appeals.

## II. DISCUSSION

### *A. Prosecutor's Closing Argument.*

¶10 Haessly first contends that the prosecutor crossed the line during closing by referring directly to him. He argues that the comment improperly implied knowledge of information beyond the evidence. We reject his contention.

¶11 The prosecutor has wide latitude in presenting closing argument and we will not reverse a conviction on this basis unless there was an abuse of discretion that was likely to have affected the jury's verdict. ***State v. Lenarchick***, 74 Wis. 2d 425, 457, 247 N.W.2d 80 (1976). The challenged comment came when the prosecutor was reviewing the evidence and comparing the statements given to the police and Haessly's claim of innocence. Haessly's story regarding being in the Molnar home transformed from his initial questioning, where he denied being in the Molnar home, to the final questioning, where he admitted that he was inside the Molnar home on the date of the killing, but claimed Molnar was alive when he left. The prosecutor's statement he challenges was: "No, Mr. Haessly, the only person that went in that house after you was her son who found her laying on the floor and who called the police and that is where all this gets started." Haessly argues this comment was not based on the evidence, but rather, was the prosecutor's testimony as to his personal belief that Haessly was guilty and implied the prosecutor had other information that no one else entered the Molnar home after Haessly left. As a result, Haessly contends the prosecutor crossed the line into impermissible and improper commentary. We disagree.

¶12 Haessly fails to view this comment in the context in which it was made. The prosecutor had just spent a substantial amount of time reviewing the evidence presented to the jury and concluded with the rhetorical statement set forth above. It was not a direct statement made to Haessly, nor did it convey to the jury that the prosecutor had personal knowledge beyond the evidence. A prosecutor is permitted to comment on the evidence, detail the evidence, argue from the evidence, and state that the evidence convinces him or her and should convince the jurors. ***State v. Nielsen***, 2001 WI App 192, ¶46, 247 Wis. 2d 466, 634 N.W.2d 325. The impermissible line is crossed only when the prosecutor

"suggests that the jury arrive at a verdict by considering factors other than the evidence." ***Id.*** (citation omitted). That did not occur here. In context, the statement was not improper and Haessly's argument otherwise is without merit.

¶13 Haessly makes a related argument that his trial counsel was ineffective for failing to object to the prosecutor's closing on the same basis. In order to prove ineffective assistance, Haessly must show that counsel's conduct was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He has failed to show either. Because we have concluded that the prosecutor's comment was not improper, failure to object cannot constitute deficient performance. The comment was proper and therefore not objectionable.

*B. Charging Delay*.

¶14 Haessly next claims he was denied due process based on the delay in charging him. He points to the fact that this crime occurred on November 28, 1992, and that he was not charged until March 9, 2001. He argues that the State deliberately delayed in charging him to gain a tactical advantage and that he was prejudiced because his alibi defense was affected by the delay. We are not convinced.

¶15 In order to prove a due process violation based on a charging delay, Haessly must prove both that he suffered actual prejudice, and that the State caused the delay for an improper purpose in order to gain a tactical advantage. ***State v. Wilson***, 149 Wis. 2d 878, 904-05, 440 N.W.2d 534 (1989). In order to establish actual prejudice, Haessly must present specific factual allegations. ***State v. Dabney***, 2003 WI App 108, ¶31, 264 Wis. 2d 843, 663 N.W.2d 366. Making self-serving general allegations based on speculation or conjecture will

not satisfy the standard required. ***State v. Blanck***, 2001 WI App 288, ¶23, 249 Wis. 2d 364, 638 N.W.2d 910.

¶16 Haessly's contentions here are purely self-serving general assertions. He contends that he was prejudiced because the long delay impaired his ability to present an alibi defense, account for his own whereabouts, and that his alibi witnesses' memories would be adversely affected. These statements do not satisfy the "specific factual allegation" requirement sufficient to establish a due process violation.

¶17 Moreover, the record reflects that Haessly accounted for his whereabouts on the date of the Molnar murder. He testified specifically as to what he did in the morning and also said that in the afternoon of the murder he was at his friend's, Victor Velez's, home from 1:30 p.m. until 4:30 p.m. Velez was questioned in January 1993, and stated that he could not be sure, but thought Haessly was at his home the whole day on November 28, 1992.

¶18 At trial, Velez testified consistently with the information contained in the January 1993 report. The State responds that Velez's memory was not adversely affected—he was unsure when questioned two months after the murder, and was available to testify consistently with that report at the time of trial. Haessly fails to reply to the State's response on this point and, therefore, concedes that he has failed to satisfy the requisite standard to prove his due process claim.

*See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).[2]

*C. Amendment of the Charge.*

¶19 Next, Haessly argues that the trial court erroneously exercised its discretion in permitting the State to amend the information. Haessly was originally charged with felony murder, party to a crime, based on the Molnar burglary/murder. Seven months later, the State amended the information to charge first-degree intentional homicide while armed. Haessly was convicted of this charge. We conclude that the trial court did not erroneously exercise its discretion in allowing the amendment.

¶20 The prosecutor is provided with the discretion to amend the information before trial and within a reasonable time after arraignment, "with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial and the opportunity to defend." ***Whitaker v. State***, 83 Wis. 2d 368, 374, 265 N.W.2d 575 (1978); WIS. STAT. § 971.29. Absent prejudice to the defendant, amendments are generally permitted as long as the new charge is not "wholly unrelated" to the evidence received at the preliminary hearing. *See* ***State v. Bury***, 2001 WI App 37, ¶7, 241 Wis. 2d 261, 624 N.W.2d 395. A charge is not "wholly unrelated" as long as it "flow[s] from the same transaction for which evidence has been introduced at the preliminary hearing." ***Id.***, ¶8 (citation omitted; emphasis omitted).

[2] Because the test is stated in the conjunctive and requires both a showing of actual prejudice and tactical delay, we need not address the tactical delay portion of the test as we have already concluded that Haessly failed to satisfy the actual prejudice portion of the test.

¶21 Whether the "wholly unrelated" standard is satisfied presents a legal question we review independently. *See* ***State v. Richer***, 174 Wis. 2d 231, 238-39, 496 N.W.2d 66 (1993). Our review demonstrates that the first-degree intentional homicide charge was not wholly unrelated to the evidence presented during Haessly's preliminary hearing. The evidence presented at the preliminary hearing addressed the murder of the victim, Molnar. Both the original felony murder charge and the amended homicide charge were concerned with Molnar's death. Likewise, we cannot hold that the amendment prejudiced Haessly. Therefore, the trial court did not erroneously exercise its discretion when it permitted the amendment.

¶22 Haessly does not argue that he was prejudiced by the amendment and therefore concedes that he was not. ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109. His entire argument on this point rests with the trial court's comment that the amendment would be allowed because the homicide charge was more difficult to prove. We acknowledge that this comment does not reflect the proper basis on which to permit the amendment, but the record clearly reflects that the amendment was permissible under the proper standard. Accordingly, we affirm the trial court's decision.

*D. Mistrial–Defective Verdict.*

¶23 Haessly's final contention is that the trial court should have granted his motion for a mistrial based on the undisputed defective verdict form. We reject his contention.

¶24 The trial court provided the jury with two verdicts—one verdict form was not defective and would be used if the jury found Haessly not guilty.

The other verdict was defective in form because it provided for finding that Haessly was not guilty as well as guilty. It provided:

> We, the jury, find the defendant, William P. Haessly, guilty of First Degree Intentional Homicide, Party to a Crime, as charged in the information.
>
> If you find the defendant guilty, you must answer the following question:
>
> "Did the defendant commit the crime of First Degree Intentional Homicide while using a dangerous weapon?"
>
> Yes ___X____ No _____
>
> And the other reading: "We, the jury, find the defendant, William P. Haessly, not guilty."

The defect was not discovered until the jury returned the defective guilty form to the trial court. At that point, the court noted the defect and sent the jury back to the deliberation room with two defect-free verdicts—one for a finding of not guilty and the other for a finding of guilty. The jury returned a verdict finding Haessly guilty and marked "Yes" in response to the weapon enhancer question.

¶25 After the jury was sent back with the new verdict forms, Haessly moved for a mistrial. The trial court denied the motion, ruling that the problem of the defective verdict was corrected. Haessly argues that the trial court's instruction to the jury about the defective verdict conveyed to them that a "not guilty" verdict was a defective verdict. The postconviction court rejected Haessly's argument, ruling that the jury had "clearly determined that the defendant was guilty prior to the court's discovery of the defect on the form." We agree with the postconviction court.

¶26 Whether to grant a mistrial rests within the discretion of the trial court. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995).

The trial court must determine whether the error was sufficiently prejudicial, in the context of the entire proceeding, to justify a new trial. ***Id.***

¶27 Based on the entire proceeding, we agree that the defective verdict did not warrant a new trial. The jury clearly found that Haessly was guilty of first-degree intentional homicide. The defective form instructed the jury to answer the weapon enhancer question only if it found Haessly guilty. The jury answered this question affirmatively on the original verdict. Thus, there is no question that the jury unanimously concluded that Haessly was guilty. Nevertheless, because the defective form also included the language regarding a "not guilty" finding, the trial court correctly concluded that the form was defective. Before accepting the verdict, the trial court told the jurors to return to the deliberation room with two corrected verdict forms and "reanswer the verdict questions and then return those to the Court so I'm sure that I'm reading the correct verdict."

¶28 Haessly's entire argument rests with his contention that the jury could have interpreted this instruction to mean that the trial court would not accept a "not guilty" finding—that such a finding would be "defective." There is no merit to this argument. The argument is not reasonable, given the circumstances presented here, together with the fact that the jury was polled and each juror confirmed the guilty finding. There was no basis upon which a mistrial was required. Accordingly, we affirm.

*By the Court.*—Judgment and order affirmed.

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