COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP251-CR **Cir. Ct. No. 2006CF707**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVION G. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Davion G. Davis allegedly shot a man in the bathroom of a crowded bar and then fled the state. A jury convicted him of first-degree intentional homicide by use of a dangerous weapon and possession of a

firearm by a felon. The trial court imposed a sentence of life plus five years. Proceeding pro se, Davis appeals the judgment of conviction and the order denying his motion for postconviction relief. We affirm.

¶2 Davis, an African-American, first challenges the racial makeup of the jury. The Sixth and Fourteenth Amendments to the United States Constitution grant the defendant the right to a "jury selected from a fair cross-section of the community." ***Duren v. Missouri***, 439 U.S. 357, 359 (1979). Davis objected at trial because, while thirteen of the sixty-four members of the jury pool were African-American, none ended up on his jury panel.

¶3 "The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the [computer] from which the panels are drawn[.]" ***Lockhart v. McCree***, 476 U.S. 162, 174 (1986) (citation omitted). The court explained to Davis that the panel was randomly selected from a racially diverse pool. Over twenty percent in his jury pool were African-American and Davis himself provides an exhibit indicating that Racine county's minority population is sixteen percent. Members of several other minorities sat on his jury. Davis has not shown any "systematic exclusion" in the jury-selection process. *See* ***Duren***, 439 U.S. at 364.

¶4 Davis next claims that the trial court impermissibly enhanced his sentence by using facts outside the verdict, in violation of ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). Other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Id.*** at 490. "[T]he 'statutory maximum' for ***Apprendi*** purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted

by the defendant." ***Blakely v. Washington***, 542 U.S. 296, 303 (2004) (emphasis omitted).

¶5 Here, a jury found Davis guilty beyond a reasonable doubt of first-degree intentional homicide by use of a dangerous weapon. Davis asserts that the crime "in all actuality[] was run-of-the-mill," yet the court termed the murder a "deliberate, intentional, cold-blooded act." Davis suggests the court's description constitutes impermissible new fact finding. To the contrary, it was part of the court's consideration of the necessary sentencing factors. Further, upon conviction, Davis faced a statutory maximum sentence of life imprisonment plus five years. *See* WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a), and 939.63(1)(b) (2009-10).[1] The imposed sentence, therefore, did not exceed the "prescribed statutory maximum" and is not improper under ***Apprendi*** or ***Blakely***.

¶6 Davis asserts another ***Apprendi***-related claim. Pursuant to WIS. STAT. § 973.014(1g)(a)2., the trial court assigned Davis an extended supervision eligibility date of January 1, 2063. Davis contends the statute is unconstitutional under ***Cunningham v. California***, 549 U.S. 270 (2007). We disagree.

¶7 In ***Cunningham***, the Supreme Court determined that California's three-tiered determinate sentencing law violated ***Apprendi*** because the elevated "upper term" sentence required the judge, not the jury, to find the facts necessary to support it. ***Cunningham***, 549 U.S. at 274. Those facts were neither inherent in the jury's verdict nor pled to, and needed to be established only by a preponderance of the evidence, instead of beyond a reasonable doubt. ***Id.***

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶8 WISCONSIN STAT. § 973.014(1g), by contrast, allows a court complete discretion to set a date at which a defendant sentenced to life imprisonment is eligible for extended supervision. The court may set the eligibility date either at twenty years from the start of the sentence, or at a date later than the twenty-year minimum—or it may find the person ineligible for release on extended supervision. Sec. 973.014(1g)(a)1-3. The statute does not require the court to engage in further fact finding in setting an eligibility date at a particular level. The ***Apprendi***-type concerns raised in ***Cunningham*** do not come into play.

¶9 Finally, Davis claims his counsel rendered ineffective assistance. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that defense counsel's performance was deficient and that the defendant was prejudiced as a result of counsel's deficient conduct. *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). To prove deficient performance, the defendant must show specific acts or omissions of counsel that fell "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We "strongly presume[]" that counsel rendered adequate assistance. ***Id.*** To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687.

¶10 Deficient performance and prejudice both present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the trial court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance was deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶11 Davis first claims counsel performed ineffectively in relation to the State's impeachment of his cousin, Melvin Davis. Melvin gave police a sworn affidavit stating that Davis admitted to him that Davis shot the victim and that another man, Jason Jones, also told Melvin that Davis made the same admission to him. At trial, Melvin claimed the statements in the affidavit were not true, that he did not recall making them, and that he signed it only in hopes of gaining consideration for his own criminal matters. The trial court ruled that the affidavit was permissible to impeach Melvin's credibility.

¶12 The detective to whom Melvin spoke testified that Melvin made his statements after receiving consideration from the district attorney, that he—the detective—typed them up, and that Melvin read and signed the affidavit without making corrections. Davis argues that defense counsel was ineffective for not objecting to the detective's testimony because it improperly vouched for the truth of the contents of the affidavit.

¶13 At the ***Machner***[2] hearing, Davis' trial counsel testified that he viewed the detective's factual testimony as simply giving context to the affidavit and saw no basis for an objection. The trial court agreed, as do we. Counsel is not ineffective for failing to pursue a meritless objection. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶14 Davis also asserts that counsel was ineffective for not objecting on unspecified "Federal Constitutional Grounds." Davis does not clarify what grounds he means. Defense counsel repeatedly and strenuously objected that the

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

affidavit was without foundation, was "rank hearsay," was unfairly prejudicial, and that it violated Davis' right to confrontation. The trial court twice instructed the jurors that the sole purpose of the affidavit was to aid their assessment of Melvin's credibility and that it was not to be considered an admission or statement by Davis. The trial court found that, while counsel made some objections, he refrained from making others to avoid unduly drawing the jurors' attention to the affidavit. These findings are not clearly erroneous. Given the objections and the limiting instructions, we fail to see what more counsel could have done. We see no deficient performance by counsel, and any potential prejudice was presumptively erased by the proper admonitory instructions. *See* ***State v. Collier***, 220 Wis. 2d. 825, 837, 584 N.W.2d 689 (Ct. App. 1998).

¶15 Davis next asserts that defense counsel was ineffective because he neither informed the jury that Melvin and Jones testified only after being granted immunity nor asked the court to instruct the jury to assess their credibility in light of the grant of immunity.[3] Counsel testified at the ***Machner*** hearing that he did not want to risk lending their testimony an air of credibility. While the trial court found that requesting a jury instruction would have been proper, it also found that Melvin and Jones impeached themselves with their own "grossly inconsisten[t]" testimony, such that an immunity instruction would not have "saved the day for anybody." Once again, those findings are not clearly erroneous. Davis has not shown that the error led to an unreliable result.

[3] The jury was aware, however, that Melvin had received consideration from the State before making his affidavit.

¶16 Davis next asserts that defense counsel was ineffective for failing to advise him of WIS. STAT. § 971.20(4), the judge substitution statute. He alleges that, due to the "personal friendship" between the trial judge and defense counsel, the court "issu[ed] pro-prosecution rulings by rote." Davis asserts that counsel testified "how he was always over to Judge Constantine's residence, for party's [sic], celebrations and the holiday get-together(s)" and that he and the judge went "golfing every Saturday."

¶17 This argument is baseless. Counsel actually testified at the ***Machner*** hearing that he attended exactly one holiday gathering at the judge's home, along with many other members of the local legal community and, further: "I've never golfed with the judge. I don't golf." The argument also is illogical. We miss how a claimed friendship between defense counsel and Judge Constantine would result in rulings favoring the State.

¶18 Even viewed through an ineffectiveness lens, counsel testified that he did not recall if he and Davis discussed the matter at all but if they did, he would have advised against substitution. Davis does not, therefore, demonstrate deficient performance. Finally, Davis does not allege that the court's rulings were in error and gives us no reason to believe that a different judge would have ruled any differently. Accordingly, he fails to prove that Judge Constantine's handling of the case rendered the proceeding unreliable or "fundamentally unfair." *See* ***State v. Damaske***, 212 Wis. 2d 169, 199, 567 N.W.2d 905 (Ct. App. 1997).

¶19 Lastly, Davis contends defense counsel was ineffective for failing to adequately investigate the case, alleging a litany of errors. He claims that counsel: did not determine whether Davis' affidavit went to the jury room; did not "investigate, contact or call to testify" a person who was near the bar bathroom the

night of the shooting; failed to have every page, instead of only the top several pages, of his police reports checked for fingerprints; and failed to investigate or call to testify certain witnesses Davis names.

¶20 These claims fall of their own weight. For example, Davis offers no reason to believe that his affidavit did go to the jury room; indeed, the court ruled that it could not. Counsel also testified that his process server made thirteen attempts to subpoena the barroom witness, to no avail. The greater flaw in Davis' argument, however, is that he has failed to "show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999).

By the Court.—Judgment and order affirmed.

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