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DISTRICT I

April 9, 2024

To:

Hon. Danielle L. Shelton
Circuit Court Judge
Electronic Notice

Michael J. Conway
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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Glen R. Jeffery 505958
Wisconsin Secure Program Facility
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1410-CR

State of Wisconsin v. Glen R. Jeffery (L.C. # 2017CF2054)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Glen R. Jeffery, *pro se*, appeals from a judgment convicting him of two counts of armed robbery as a party to the crimes. He also appeals from the order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Background

In 2019, a jury convicted Jeffery of two counts of armed robbery, as a party to the crimes, for the robbery of two individuals at a car dealership. The trial court sentenced Jeffery to an aggregate prison term of twenty-four years, bifurcated as sixteen years of initial confinement and eight years of extended supervision.

Jeffery, *pro se*, filed a motion for postconviction relief alleging numerous claims. As relevant to this appeal, Jeffery alleged multiple instances of judicial bias. He also alleged that his then-trial counsel improperly instructed the jury to find him guilty during closing arguments. The postconviction court denied the claims relevant to this appeal. Jeffery now appeals.

Discussion

On appeal, Jeffery contends that the trial court exhibited bias on four separate occasions; that the postconviction court exhibited bias in denying his motion for postconviction relief; that the State conceded judicial bias in its response to Jeffery’s postconviction motion; and that his trial counsel improperly instructed the jury to find him guilty during closing arguments. We address each issue.

Judicial Bias

“The right to an impartial judge is fundamental to our notion of due process.” *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. We presume that a judge has acted fairly, impartially, and without bias. *State v. Herrmann*, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772. To overcome that presumption, the burden is on the party asserting judicial bias to show bias by a preponderance of the evidence. *Id.* “If a party rebuts

this presumption and shows a due process violation, the error is structural and not subject to a harmless error analysis.” *Miller v. Carroll*, 2020 WI 56, ¶16, 392 Wis. 2d 49, 944 N.W.2d 542.

In evaluating whether a party has rebutted the presumption, our courts have taken both a subjective and objective approach. *Id.*, ¶21. Subjective bias focuses on the judge’s own determination of his or her impartiality. *Id.* Objective bias focuses on whether there is “a serious risk of actual bias—based on objective and reasonable perceptions.” *Id.*, ¶24 (citation omitted). “‘Due process requires an objective inquiry’ into whether the circumstances ‘would offer a possible temptation to the average ... judge to ... lead him [or her] not to hold the balance nice, clear and true.’” *Id.* (citation omitted). “[I]t is the exceptional case with ‘extreme facts’ which rises to the level of a ‘serious risk of actual bias.’” *Id.* (citation omitted). Whether the trial court was objectively biased presents a question of law that this court reviews *de novo*. *Herrmann*, 364 Wis. 2d 336, ¶23.

Jeffery contends that the trial court first exhibited judicial bias at the final pretrial hearing. At that time, Jeffery’s trial counsel filed a motion to withdraw. Jeffery also filed his own motions for bail reduction and suppression of evidence. The trial court denied Jeffery’s motions, but before ruling on counsel’s motion to withdraw, Jeffery made an allegation of judicial bias. The following exchange ensued:

[Jeffery]: You can’t deny me to keep him on my case.

THE COURT: Hold it.

[Jeffery]: You can’t deny me that.

THE COURT: Yes, I can.

[Jeffery]: No, you can’t.

THE COURT: Yes, I can.

[Jeffery]: That’s a fundamental right that I have to effective assistance of counsel.... You can’t deny me my Sixth Amendment right or Wisconsin constitution Article 1, Section 7. You can’t deny me and keep him on my case.

THE COURT: Yes, I can.

[Jeffery]: I’ll write to the Office of Lawyer Regulation about this shit.

THE COURT: That’s fine.

[Jeffery]: I’ll do it right now and make it—

THE COURT: Hold on a second, Mr. Jeffery.

[Jeffery]: I’m not holding on to shit.

THE COURT: Let me try to conduct this hearing in an orderly fashion.

[Jeffery]: No, you’re not. You’re real prejudiced and biased towards—

THE COURT: Not yet.

[Jeffery]: You are.

THE COURT: Not yet. I haven’t decided.

The trial court then inquired into the defendant’s reasons for wanting a new attorney and ultimately granted trial counsel’s motion to withdraw. Jeffery contends that the trial court’s response, “[n]ot yet,” to his allegation of prejudice is reflective of the court’s subjective bias. The record reflects that the trial court and Jeffery were engaged in a heated exchange with Jeffery accusing the trial court of bias before the court even heard any evidence as to the withdrawal motion. The trial court’s response “[n]ot yet” can be interpreted in numerous ways that do not amount to an admission of bias, particularly when the trial court proceeded to a hearing on the withdrawal motion and ruled in Jeffery’s favor after it expressed concern that trial counsel failed to contact a witness. We conclude Jeffery has not overcome the presumption of trial court impartiality.

Jeffery next contends that the trial court exhibited a great risk of actual bias when clarifying witness testimony about surveillance footage. While cross-examining one of the detectives involved in the criminal investigation, trial counsel played a portion of the surveillance footage of the armed robbery. When counsel paused the footage and began to ask a question regarding the two individuals in the footage, the following exchange ensued:

[Trial counsel]: At about 04:14:50, the individual would be—

THE COURT: Both individuals that are the robbers are in—

[Trial counsel]: Well, not the robbers. We don't know.

THE COURT: The alleged robbers.

[Trial counsel]: Right.

THE COURT: We don't know who they are.

Jeffery contends that the trial court exhibited a great risk of actual bias by referring to the two individuals in the surveillance footage as “the robbers” instead of “the alleged robbers.” He contends that this constituted an open declaration of his guilt. Jeffery is mistaken.

The trial court did not identify Jeffery in the video or make a declaration of his guilt. The trial court first made a reference to “the robbers,” and then corrected itself by stating the “alleged robbers.” The trial court did not reference Jeffery, or any individual for that matter, because the court acknowledged that “[w]e don't know who they are.” The trial court interjected to clarify for the record that the portion of the video showed two individuals, not a single individual, as trial counsel had stated. The entire exchange had nothing to do with the identity of either of the “alleged robbers.”

Jeffery next contends that the trial court exhibited a great risk of actual bias when it made a comment during trial counsel's recross-examination of the same detective. Trial counsel was

again questioning the detective about the surveillance footage, specifically, whether the video showed one of the alleged robbers using the dealership's public doorway. The trial court asked trial counsel a follow-up question, which referred to "your client," to clarify the time frame assumed within trial counsel's question. Trial counsel asked the trial court to strike its remark referring to "your client." The trial court agreed: "Sure. I inadvertently said something I shouldn't have said and if the jury heard it in that question, they should disregard it."

Jeffery contends that the trial court's comment directed the jury to find him guilty. Again, Jeffery does not rebut the presumption of impartiality because the trial court immediately corrected itself and instructed the jury to disregard its misspeak. We presume that juries follow the trial court's instructions. *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

Jeffery next contends that the trial court exhibited actual bias when it denied his motion for a directed verdict at the end of the State's case-in-chief. A claim of judicial bias "must be based upon something other than rulings in the case." *Berger v. United States*, 255 U.S. 22, 31 (1921). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The alleged judicial bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

Here, the trial court's decision was based on the evidence, which it clearly stated, when it informed counsel that its decision was based on "whether or not there is any way that the jury could not come back with either of the verdicts.... [I]f they believe [the victims], they're going

to find the defendant guilty. If they don't believe [the victims], they're not going to find [Jeffery] guilty." Jeffery has not shown that his argument is based on anything other than his dissatisfaction with the trial court's ruling. Accordingly, Jeffery cannot rebut the presumption of impartiality.

Jeffery also contends that the postconviction court exhibited judicial bias when it denied his postconviction motion. As stated, judicial rulings alone almost never amount to judicial bias. *See Liteky*, 510 U.S. at 555. Here, the postconviction court addressed each of Jeffery's claims, reviewed the record, and cited the appropriate law when rendering its decision. Nothing about the postconviction court's decision even hints at judicial impartiality. We do not address this issue further.

State's Concession

Jeffery claims that the State conceded one of his claims of judicial bias in its response to Jeffery's postconviction motion. We note that it is unclear to which particular instance Jeffery is referring. Jeffery cites to the trial court's conduct during the morning session of his trial on February 7, 2019; however, Jeffery never raised a claim of judicial bias stemming from the trial court's conduct during that particular trial session. Jeffery raised a claim of bias stemming from the trial court's conduct later that day, when the trial court referred to an individual on the surveillance footage as "your client." The State addressed that claim in its response and did not concede judicial bias. Thus, Jeffery is either raising a new claim or referring to the "your client" claim. If the former, the claim is barred because Jeffery cannot raise a new claim for the first time on appeal. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. If

Jeffery is referring to the trial court’s “your client” comment, then the State did not concede judicial bias as it opposed Jeffery’s argument in its response to his postconviction motion.

Trial Counsel’s Comment During Closing Arguments

Jeffery contends that his trial counsel improperly instructed the jury to find him guilty during closing arguments. At the end of closing arguments, trial counsel said to the jury: “There’s a lot of bad stuff with regard to the State’s case. And you must find Mr. Jeffery guilt—not guilty of the two charges that are against him.” Jeffery contends that trial counsel conceded his guilt in front of the jury. We disagree.

A review of the transcripts indicates that while trial counsel misspoke, counsel immediately corrected himself and urged the jury to find Jeffery not guilty multiple times during the course of closing arguments. Trial counsel’s closing argument focused on weaknesses in the State’s case, particularly, inconsistent witness testimony. When read in its entirety, it is clear that trial counsel emphatically argued that the State had not proven its case beyond a reasonable doubt. Counsel’s simple misspeak is not a basis for relief. *See State v. Chambers*, 2021 WI 13, ¶24, 395 Wis. 2d 770, 955 N.W.2d 144 (stating that counsel’s closing argument, “when read in its entirety (as the jury would have heard it), unquestionably shows that [the defendant’s] trial counsel never conceded his guilt”).

To the extent Jeffery raises issues not addressed in this opinion, we conclude that those arguments not sufficiently developed and we need not address them. *See Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals