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DISTRICT II/IV

October 28, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1546-CR
2012AP1547-CR
State of Wisconsin v. David B. Hall (L. C. ## 2008CF1327, 2009CF630)

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

David Hall appeals a judgment of conviction and an order denying postconviction relief.[1] Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition and summarily affirm. *See* WIS. STAT. RULE 809.21.

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[1] These appeals were consolidated. References to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

After a jury trial, Hall was found guilty of one count of first-degree intentional homicide, while armed, in the May 31, 2008 death of Kenya McEwen (a/k/a "Cherokee") outside a Kenosha night club; one count of carrying a concealed weapon; a separate count of carrying a concealed weapon in an establishment where alcohol is served; and one count of solicitation to commit first-degree intentional homicide of an eyewitness to the shooting, Timothy Stark.[2]

Hall filed a motion for a new trial. Pertinent to this appeal, Hall challenged the effectiveness of trial counsel for not requesting a jury instruction that the homicide and solicitation charges were to be considered separately. *See* WIS JI—CRIMINAL 484. The circuit court held an evidentiary hearing on the motion, and trial counsel testified that he had no strategic reason for failing to request an instruction that the jury consider each count separately, claiming that it was "an oversight" on his part.

The circuit court denied the postconviction motion, ruling that Hall failed to prove both deficient performance and prejudice.[3] The court gave little weight to counsel's testimony, and found it "in some respects sympathetic to the defendant on a subjective level." The court determined that the instructions as given adequately directed the jury to determine whether the State proved each element of each separate charge beyond a reasonable doubt. The court also noted "[v]ery little has been said about the alleged prejudice to the defendant by trial counsel's

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[2] The homicide and solicitation cases were initially charged separately, but were consolidated for trial on the State's motion.

[3] To prevail in an ineffective assistance of counsel claim, the defendant must prove that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not reach the deficiency prong if it is easier to dispose of the ineffective assistance claim by holding that there was a lack of prejudice. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

failure to request a curative instruction." The court concluded this alleged defect "certainly" did not deprive Hall of a fair trial.

Hall now appeals, challenging the effectiveness of trial counsel for not requesting an instruction that the jury consider each count separately.[4] In this regard, Hall relies upon ***Peters v. State***, 70 Wis. 2d 22, 28, 233 N.W.2d 420 (1975). Hall relies on the statement in ***Peters*** that "a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on [one crime] as sufficient in itself to find the defendant guilty of [the second crime]." ***Id.*** at 32.

Assuming without deciding that ***Peters*** applies, Hall has not adequately developed an argument that the failure to request the curative instruction was prejudicial. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we will not abandon our neutrality to develop arguments). Because this matter is presented in the context of ineffective assistance, Hall has the burden to "*affirmatively* prove" prejudice. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (quoting another source). Hall has not shown a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

[4] Hall makes a separate argument that the circuit court's failure to instruct the jury to consider each count separately denied him due process. Hall forfeited that argument by the failure to request the jury instruction, and by his express assurance to the court that he found no objection to the instructions as given at trial. Consequently, Hall's jury instruction challenge is reviewable only in the context of an ineffective assistance of counsel challenge, with the burden to prove deficient performance and prejudice. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986); ***State v. Haywood***, 2009 WI App 178, ¶15, 322 Wis. 2d 691, 777 N.W.2d 921.

Rather, the evidence of Hall's guilt was overwhelming. Cherokee was killed with a single .25 caliber bullet to the heart outside the B&S Lounge shortly before 2:00 am. Stark testified that he was Hall's friend, and witnessed an altercation between Hall and Cherokee at the B&S Lounge the previous weekend. The next day, Hall told a customer at his barbershop that he would shoot Cherokee because they had gotten into a fight. Hall then retrieved a gun from the rear of the barbershop and showed it to the customer. That same day, Hall and the owner of the B&S Lounge, Marlene Frederick, with whom Hall had worked and had a personal relationship, purchased .25 caliber ammunition and a holster at a Gander Mountain store. Later that week, Hall fired two shots from a .25 caliber gun into the air in the parking lot of the B&S Lounge.

Stark was with Hall outside the B&S Lounge on the evening of the murder when another man told Hall that Cherokee was planning to shoot into the bar. Stark said that Hall opened his shirt in response, displayed a gun in his holster and stated, "I ain't worried about nobody tonight."

Cherokee was denied entry into the bar around 10:00 p.m. Stark testified that shortly before closing time, while he and Hall were outside the B&S Lounge, Cherokee returned and sucker-punched Hall in the face. In response, Hall shot Cherokee. Hall then exclaimed that he "fucked up" and tried to pass the gun off to Stark, it dropped to the ground, and Maurice Jorden (a/k/a "Red Boy") picked it up and gave it back to Hall. Jorden corroborated that he heard a shot, someone handed him a gun and he handed it to Hall, who then went inside the bar.

Police found a holster of the same type sold at Gander Mountain in the yard of a house adjacent to the B&S Lounge. DNA analysis of the holster excluded all suspects except Hall. Marlene Frederick's sister, Betty Kent, found a spent .25 caliber casing near a sewer grate in the

B&S Lounge parking lot, and when Kent told her sister of the discovery, Frederick told Kent to get rid of the shell casing by throwing it into the sewer.

Lateasha Gates, who was talking to Hall outside the B&S Lounge, said she heard a gunshot from a few feet behind her where Hall was seated. She ran inside the bar to get her cousin, Daisy Flora, and the two immediately fled the scene in her car.

Flora testified that Gates walked in to the bar, grabbed her, and said, "We have to go. They're outside shooting." They left through the back door and drove off. Flora testified: "She said she was right there. She said she can't believe he shot him." Gates told Flora she was sitting on Hall's lap when she saw Hall pull out a small silver handgun and shoot the man. Gates told Flora not to say anything, but Flora decided to tell the truth.

Gates denied telling her cousin that Hall shot the man, but admitted that she tried calling Hall repeatedly right after the shooting at the phone number Hall had given her.

Hall admitted to police he had been punched by Cherokee, and a Kenosha detective noticed that Hall had a fat lip when he interviewed Hall the day of the shooting. Hall claimed Cherokee punched him and Hall "saw a black light as [he] fell to the ground." Hall insisted Frederick then picked him up and took him inside the bar, where he heard that someone had shot Cherokee.

While in pretrial custody, Hall confessed to two separate jail inmates that he killed Cherokee. Hall told DeAndre Blair that he shot Cherokee with a small gun after getting sucker-punched outside the B&S Lounge. Hall said he tried to pass the gun off, it dropped to the

ground, and someone handed it back to him. He then handed the gun to someone else and headed inside the bar.

While in pretrial custody, Hall solicited three separate jail inmates to kill Stark and other witnesses, offering up to $10,000 to do so. He was helped by Frederick, who offered one man money and guns to commit the homicide, and who put money into prison accounts of the other two men. Prison records confirmed that Frederick put money into the prison accounts of two inmates.

The jury was properly instructed on the elements of each offense. The jurors were asked to determine whether the State proved each element of each count beyond a reasonable doubt. The jury was also instructed as to the presumption of innocence, and provided with a separate verdict form to fill out with respect to each count.

Moreover, Hall's confessions to the jail informants would have been admissible in a separate homicide trial as independent corroborating evidence that he committed the murder. Proof of the murder would have remained admissible in a separate trial on the solicitation offense to provide the motive for Hall to solicit Stark's murder. Therefore, the evidence would have remained the same whether the cases were tried jointly or separately. *See* WIS. STAT. § 971.12(1); ***State v. Hall***, 103 Wis. 2d 125, 141-43, 307 N.W.2d 289 (1981). Accordingly, there is no reasonable possibility of a different outcome even if the court had instructed the jury to consider each count separately.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals