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May 4, 2021

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

2020AP689-CR

State of Wisconsin v. David Thompson, Jr. (L.C. # 2014CF1978)

Before Brash, P.J., Dugan and Donald, JJ.

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).

David Thompson, Jr. appeals the judgment of conviction, following a jury trial, of two counts of armed robbery as a party to a crime, one count of armed robbery, one count of attempted armed robbery, one count of first-degree recklessly endangering safety, and one count of possession of a firearm by a felon. He also appeals from the postconviction order denying his motion for a new trial. Upon our review of the briefs and record, we conclude at conference that

this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ Therefore, we summarily affirm.

On May 14, 2013, Thompson was charged with multiple crimes stemming from the armed robbery of several people on the Marquette University campus. A jury found Thompson guilty of two counts of armed robbery as a party to a crime, one count of armed robbery, one count of attempted armed robbery, one count of first-degree recklessly endangering safety, and one count of possession of a firearm by a felon. The circuit court sentenced Thompson to a combined sentence of thirty-four years of initial confinement and thirty years of extended supervision.

Thompson filed a motion for a new trial, arguing that one of the jurors in his trial—“Juror 14”—was objectively biased, thereby depriving him of his right to fair trial. Specifically, Thompson stated that Juror 14 was a correctional officer at the House of Correction while Thompson was an inmate there. Thompson alleged that he and Juror 14 got into a verbal altercation in which Juror 14 told Thompson that one of her relatives would “kick his ass.” The motion stated that while Thompson did not recognize Juror 14 immediately, towards the end of *voir dire* he informed defense counsel that he remembered Juror 14 from the House of Correction and he “felt there was a problem.” Counsel did not move to strike Juror 14. Thompson also argued that defense counsel was ineffective for failing to strike Juror 14.

At a hearing on the motion, defense counsel stated Thompson did not disclose his altercation with Juror 14—Thompson did not even disclose that he recognized her. Counsel

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

stated that he initially planned to strike Juror 14, but that Thompson convinced him not to, stating he had “a good feeling about her.” Counsel also stated that his decision not to strike Juror 14 was ultimately a strategic one in that multiple other jurors “were available for strikes,” including jurors who had been victims of crimes or had ties to Marquette University. Counsel stated that he did not think Juror 14’s former employment at the House of Correction automatically rendered her a biased juror. Counsel also stated that if Thompson had informed him of his (Thompson’s) history with Juror 14, he would have informed the circuit court and questioned the juror.

Karron Smith, a former inmate at the House of Correction, stated that he witnessed the altercation between Thompson and a correctional officer. Smith stated that he and Thompson were housed in the same “[p]od” in the House of Correction when a correctional officer told Thompson “that she was going to have her little cousin kick David Thompson ass.” Smith provided a vague physical description of the officer and stated that he did not know her full name. Smith also stated that he was not shown a photograph of Juror 14, nor was he present at Thompson’s trial to physically view Juror 14.

Thompson also testified, stating that while an inmate at the House of Correction, he had a verbal confrontation with a correctional officer known to him as “Ms. B.” Thompson stated that Ms. B. approached him regarding a prior incident between Thompson and Ms. B.’s cousin, leading to the two of them “having words.” Thompson stated that he initially did not recognize Juror 14, as he only knew her by her nickname and she looked different at the time of trial, but that he ultimately recognized Juror 14 when the State and defense counsel were determining strikes. Thompson stated that he then told counsel he did not want Juror 14 on the jury and that she would be a “problem.” On cross-examination, when asked whether he told defense counsel

why it would be a problem for Juror 14 to remain on the jury, Thompson replied, “[n]ot at that time.” Later on cross-examination, however, Thompson stated that he did tell defense counsel about the alleged altercation. When asked why he never raised the issue again, either to counsel or to the court, he stated, “[b]ecause I didn’t think nothing could be done at all.”

The postconviction court denied Thompson’s motion. The court found Thompson’s testimony inconsistent, unclear, and lacking in credibility. The court also found Smith’s testimony unhelpful, as he did not know Juror 14’s name, could only provide a vague physical description, and had not identified Juror 14 by photograph. The court also found defense counsel’s testimony to be credible. Indeed, the court stated that it could only speculate as to whether Juror 14 was actually the officer involved in the alleged altercation, whether she even recognized Thompson, or whether she connected the altercation years earlier with Thompson. This appeal follows.

On appeal, Thompson contends that he did not receive a fair trial because Juror 14 was objectively biased towards him. He also contends that the postconviction court erred in denying his motion for a new trial because counsel was ineffective for failing to strike Juror 14.

“If a juror is not indifferent in [a] case, the juror shall be excused.” WIS. STAT. § 805.08(1). There are three types of bias that may result in a juror’s impartiality: statutory, subjective, and objective. *See State v. Mendoza*, 227 Wis. 2d 838, 848, 596 N.W.2d 736 (1999).

Objective bias acknowledges “that in some cases bias can be detected ‘from the facts and circumstances surrounding the prospective juror’s answers’ even though he or she pledges impartiality.” *State v. Lindell*, 2001 WI 108, ¶38, 245 Wis. 2d 689, 629 N.W.2d 223 (citation omitted). “A prospective juror is objectively biased if ‘a reasonable person in the prospective

juror's position objectively could not judge the case in a fair and impartial manner.'" *Mendoza*, 227 Wis. 2d at 850 (citation omitted). A question of objective bias presents a mixed question of fact and law. *See id.*

However, "a defendant waives an objection to a juror's bias if no motion is made to the trial court to remove the juror for cause." *State v. Brunette*, 220 Wis. 2d 431, 442, 583 N.W.2d 174 (Ct. App. 1998). Thompson did not move to strike Juror 14 from the jury panel, nor did he exercise a peremptory challenge to remove him. Consequently, Thompson may only challenge the juror through an ineffective assistance of counsel claim, based on defense counsel's failure to object to Juror 14's presence on the panel. *See id.* at 445.

The requirements for showing ineffective assistance of counsel are well established. A defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "Whether counsel was ineffective is a mixed question of fact and law." *Id.*, ¶19. The defendant must show both elements of the test, and we need not address both prongs if the defendant fails to make a sufficient showing on one of them. *See State v. Maloney*, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583.

Here, the postconviction court found that Thompson's defense counsel credibly testified that Thompson did not alert counsel to his alleged altercation with Juror 14, that Thompson actually wished to keep Juror 14 on the jury, and that counsel's decision not to strike Juror 14 was strategic. "When there is conflicting testimony, the [postconviction] court is the ultimate arbiter of the witnesses' credibility." *Welytok v. Ziolkowski*, 2008 WI App 67, ¶28, 312 Wis. 2d 435, 752 N.W.2d 359; *see also State v. Nielsen*, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634

N.W.2d 325 (“We will not second guess [defense] counsel’s selection of trial tactics or strategies in the face of alternatives that he or she has considered.”). We adopt the postconviction court’s credibility determination, and accordingly, conclude that Thompson has not demonstrated that trial counsel rendered deficient performance.

Moreover, we agree with the postconviction court that Thompson cannot demonstrate that he was prejudiced by the failure to strike Juror 14. Indeed, as the postconviction court noted, there was no confirmation that Juror 14 was even the correctional officer with whom Thompson had an altercation. Nothing in the record suggests that Juror 14 failed to objectively carry out her obligation.

For the foregoing reasons, we affirm the judgment of conviction and the order denying Thompson’s postconviction motion.

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.

Sheila T. Reiff
Clerk of Court of Appeals