STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2014AP001099-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MALTESE LAVELE WILLIAMS

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A JUDGMENT OF CONVICTION ENTERED ON JULY 11, 2013, AND A MOTION FOR POSTCONVICTION RELIEF ENTERED ON MAY 2, 2014, BOTH IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HON. JEFFREY A. WAGNER PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Under the instructions read to the jury, was there sufficient evidence to convict Williams of felony murder of Authur Robinson in Count 2?

   Circuit court's answer: Yes.

2. Was Williams' attorney ineffective in failing to move to strike a prospective juror who stated that he/she would be

biased towards the victim upon seeing bloody photographs?

Circuit court's answer: No.

3. Was Williams' attorney ineffective in failing to object to the admission of graphic photographs showing the bodies and autopsies of the victims?

Circuit court's answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Williams welcomes oral argument to clarify any questions the court may have. Publication is not warranted, as this case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE AND FACTS

The defendant in this case is Maltese Williams, and this case concerns his actions on the night of January 14, 2013. At the time, he was 18 years old and had no prior criminal record (50:4, 37). On that night, he was in the company of two acquaintances, Dajuan Collins, and Maurice Dixon, who became his co-defendants (2:1).

Shortly after 2:00 a.m., police officers were dispatched to a residential area of Milwaukee regarding reports of a shooting (46:104-05). Upon arriving, officers found the bodies of two men, Michael Parker and Authur Robinson (46:138). Robinson, found lying on the floor of the kitchen at the residence, died of a single gunshot wound to his chest and abdomen (47:93). He also had blunt force injuries and abrasions. (47:96). Parker, who lived at the residence, was

found lying in the street nearby, and had been wounded by three bullets, including one to his neck that caused his death (47:13-15, 81, 86).

Within a few days, investigators arrested Williams, Collins, and Dixon. Officers took statements from each of the men, each of whom admitted to being present during the shootings, although each differed as to various details (2:2-5).

The State originally charged Williams with two counts of felony murder, as a party to a crime (PTAC) (2:1). However, an Amended Information was later filed, charging Williams with first-degree intentional homicide (PTAC), and attempted robbery (PTAC) as to each of the two victims (5).

Williams was tried before a jury on April 22-26, 2013, Hon. Jeffrey Wagner presiding.

During *voir dire*, the prosecutor asked the prospective jurors if anyone would have a problem looking at "photographs from the scene that have blood on them, that have people deceased, people with gunshot wounds, the victims in this case." (46:54). One panelist—Juror 12—stated that such pictures would be "totally gross" such that he/she[1] could not "sit through it and make a decision in this case." (46:56) (Attached as Appendix D). Juror #12 also stated, "I think I would be biased a little bit," and that the bias would lie "more towards the victims." (46:82-83). Neither the prosecution or the defense moved to strike, so this person ultimately served on the jury (46:91). Later, at trial, the State introduced a number of photographs showing the victims' bodies from the scene of the crime, and from the autopsy (46:106-144; 47:92-102; 53). Williams' attorney made no

[1] There is no indication in the record as to the gender of Juror #12. Throughout this brief, pronouns for Juror #12 will include both genders.

objection to the admission of these photographs on the grounds that they aroused the emotions of the jury and were prejudicial to Williams.

Much of the trial consisted of the testimony of police officers as to how the investigation led to the arrests (46:153-171; 47:19-51; 48:22-25, 52-53, 61-62, and 82-85), medical testimony concerning the causes of death of Parker and Robinson (47:77-103), and police testimony about Parker's residence, and the relevant items collected as evidence from inside or near the house (46:103-153).

Williams did not testify at his trial, and the State did not elicit testimony from Collins or Dixon. There were no other witnesses to the shooting, so the primary account as to what happened during the incident came from Williams' statements to Det. Kent Corbett and other officers during a 6½ hour videotaped interview (47:113). A 37-page transcript was made of portions of the interview, which was admitted as Trial Exhibit 146 (48:39-40) (58:transcript:39-40). In addition, Det. Corbett offered his own testimony about the interview, and the jury viewed portions of the videotape (48:25-58) (58:DVD). [2]

Evidence obtained from the police interrogation of Williams

Based on Williams' statement to police, he knew one of the two victims, Parker, who he referred to as "Old School." (48:34). On prior occasions, Williams had purchased marijuana from Parker (58:transcript:2).

[2] Document 58 on the record on appeal is an envelope that contains both the DVD of Williams' interview, which was viewed by the jury, and the 37 page transcript of the interview. In this brief, the DVD will be cited as 58:DVD, and the transcript as 58:transcript:[page number of the transcript].

On the night of the incident, Collins called Williams, seeking to purchase some marijuana (48:32-33). Williams agreed to introduce Collins to Parker (48:33). Dixon later joined them on the walk to Parker's house. (58:transcript:3).

Williams first told police that their only purpose in going to Parker's house was to purchase marijuana (48:33, 58:transcript:13, 16.). However, he later stated that he knew that this was going to be a robbery (a "lick") and the three would split up the marijuana (58:transcript:28). Williams said that on their way to Parker's house, he never saw a gun. (58:transcript:29). However, when asked if he knew whether anyone had a gun, he said, "I ain't slow." (58:transcript:29). Williams said that he was "just supposed to get the weed," that that no one was going to be hurt (58:transcript:29).

Upon reaching Parker's house, Dixon stayed outside while Williams and Collins knocked on the door to Parker's residence, at which time Parker greeted them and let them in (58:transcript:4). Parker then instructed Williams and Collins to wait in the living room while he went to the kitchen (58:transcript:5). While waiting for Parker, Williams noticed a man—Robinson—who was sleeping on the couch. Williams had never seen Robinson before. (58:transcript:5)

Parker then invited Williams to the kitchen to inspect the marijuana. (58:transcript:14). As Williams was speaking to Parker in the kitchen, Collins entered with a gun pointed at Parker and said something to the effect of "you all know what time it is, give that shit up." (58:transcript:14)

Parker refused to surrender his marijuana to Collins and tried walking past Collins and towards the living room. (58:transcript:14). However, Collins shot once at Parker as he walked by him and shot two to three more times at Parker

as Parker ran into the living room and out the front door. (58:transcript:14-15).

After several shots, Williams walked into the living room and saw Collins wrestling with the man who had been sleeping on the couch—Robinson—for control of the gun. (58:transcript:22). As Williams walked by, Collins said something to Williams to the effect of "Get that nigga." (58:transcript:26). Uncertain what Collins meant, Williams left Parker's house and joined Dixon, who was still waiting outside (58:transcript:24). Williams did not take any of the marijuana, but left it on the floor (58:transcript:21).

As Williams and Dixon started to leave, Williams heard another gunshot (58:transcript:15). Williams then turned around and saw Collins crash out of the front window (58:transcript:6). Afterwards, Williams and Dixon continued fleeing the area together and later regrouped with Collins at Dixon's home (48:37). After regrouping, Dixon asked Collins for his gun back, to which Collins replied that he had "ditched it somewhere." (48:37).

Verdict

At the conclusion of the trial, the court instructed the jury on two counts of first-degree intentional homicide and two counts of attempted armed robbery, both as party to a crime (49:5-7, 25-29). The court also instructed the jury on the lesser included offenses of first-degree reckless homicide, and of felony murder as to both victims (49:7-25).

The jury found Williams guilty of two counts of felony murder (Count 1 on Parker, Count 2 on Robinson). (50:2-3) In addition, the jury found Williams guilty of the attempted armed robbery of Parker (Count 3), but the court subsequently dismissed this charge since it was included

within the felony murder charge (50:7-8). Finally, the jury found Williams not guilty of the attempted armed robbery of Robinson (Count 4). (50:8).

Sentencing

On June 27, 2013, the circuit court sentenced Williams to combined terms totaling 38 years (26 years initial confinement plus 12 years extended supervision). (51:39-40) (Attached as Appendix A).

Postconviction Motion

On January 27, 2014, Williams filed a postconviction motion raising three claims:[3]

1. That there was insufficient evidence to find Williams guilty of felony murder as to Robinson since there was no evidence that Williams or his accomplices attempted to commit a robbery against Robinson (30:3).

2. That Williams' attorney was ineffective in failing to strike Juror #12, who admitted that viewing graphic photographs of the victim's bodies would cause him to be biased toward the victims (30:9).

3. That Williams's attorney was ineffective in failing to object to the State's introduction of the graphic photographs of the victim's bodies (30:12).

[3] The postconviction motion is attached as Appendix E. It does not include the appendix to the postconviction motion because of its volume, and the fact that the contents are repeated in the appendix to the current brief.

On May 2, 2014, the circuit court issued an order denying Williams' motion for postconviction relief as to each ground (39:1) (Attached as Appendix B).

Additional facts will be presented in the Argument.

ARGUMENT

I. There was insufficient evidence to convict Williams of felony murder as to Robinson.

A. Introduction

At trial, the State presented evidence that Williams or his accomplices intended to, and then attempted to rob Michael Parker of his marijuana. However, there was no evidence that they attempted to rob the man who was sleeping on the sofa of Parker's residence when the men entered—Authur Robinson. Under the instructions read to the jury, in order to find Williams guilty of the felony murder of Robinson, it was required to find that he was guilty of the attempted robbery of Robinson. Since there was no such evidence the felony murder verdict in Count 2 must be vacated.

Whether the evidence produced at trial was sufficient to sustain a guilty verdict is set forth in *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990):

> [A] court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

In reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *Id.*, 153 Wis. 2d at 507. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. *Id.*

B. **There was insufficient evidence to convict Williams of felony murder as to Robinson.**

1. **The evidence at trial must be measured against the instructions submitted to the jury.**

In reviewing the sufficiency of the evidence a court must be guided by the manner in which the jury is instructed on the offense. A court may only affirm a conviction "if there was sufficient evidence to support guilt on the charge submitted to the jury in the instructions." *State v. Wulff*, 207 Wis. 2d 143, 153, 557 N.W.2d 813 (1997); *See also Chiarella v. United States*, 445 U.S. 222, 236 (1980) (a court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury").

In *Wulff*, the Wisconsin Supreme Court held that allowing a conviction based upon evidence that is unrelated to the jury instructions violates the fundamental right to a jury trial. The Court held that this violation occurs in two ways: "1) it makes the jury instructions defining the offense

superfluous, and 2) it violates the defendant's right to a unanimous verdict." *Id.*

In *Wulff*, the defendant was tried on a charge of second-degree sexual assault. *Id.* 207 Wis. 2d at 145. The victim testified that Wulff had tried to force his penis into her mouth. *Id.* at 146. During closing argument, the prosecutor argued that Wulff was guilty of attempted sexual contact, attempted sexual intercourse by fellatio, and attempted sexual intercourse by vulvar penetration. *Id.* at 149. On appeal, the defense argued that there was insufficient evidence to convict Wulff of sexual assault, since the jury had not been instructed on those theories advanced by the prosecutor. *Id.* at 150. Rather, the jury had been instructed that the crime required evidence of sexual intercourse, which was defined as "any intrusion, however slight, by any part of a person's body or of any object into the genital or anal opening of another." *Id.* at 145. The Supreme Court found that since there was no evidence of such an intrusion, there was insufficient evidence to sustain the conviction. *Id.* at 152-53.

This court must follow the principles set forth in *Wulff* and view the evidence produced at trial in the context of the instructions given to the jury.

2. The evidence presented at Williams' trial.

At the end of Williams' trial, the court instructed the jury as to first-degree intentional homicide and first-degree reckless homicide, but then told the jury that if it was not satisfied that Williams was guilty of either of those offenses, it should consider whether he was guilty of felony murder (49:5-6, 16). The court then instructed the jury that in order to find Williams guilty of felony murder, it must find beyond

a reasonable doubt that two elements were established.[4] The court instructed:

> The first element of felony murder requires that the defendant or person with whom he was acting as a party to the crime attempted to commit the crime of armed robbery as a party to a crime. (49:17)
>
> ….
>
> The second element of felony murder requires the death of Michael Parker in Count 1 and Authur Robinson in Count 2 was caused by the attempt to commit armed robbery, party to a crime. (49:21).

The instructions specified that in order to find Williams guilty of the felony murder of Robinson (Count 2), the jury had to find that Williams (or his co-actor) intended to steal property from *Robinson:*

> The elements of the crime that the state must prove are:
>
> That Michael Parker, Count 1, *and Authur Robinson, Count 2*, was the owner of the property.
>
> Owner means a person who has possession of the property. The defendant or a person with whom the defendant was acting as party to a crime took property from the person of Michael Parker, Count 1, *and Authur Robinson, Count 2*, the defendant or person with whom the defendant was acting as a party to a crime took the property with intent to steal.
>
> ….
>
> If you are satisfied beyond a reasonable doubt that the defendant or person with whom he was acting as a party to a crime attempted to commit the crime of armed

[4] Appendix C contains the relevant jury instructions that were read to the jury. (49:17-23).

> robbery, party to a crime, and that person – *and that the death of Michael Parker, Count 1, and Authur Robinson, Count 2, was caused by the attempt to commit armed robbery, party to a crime,* you should find the defendant [guilty] of felony murder.

(49:18-22) (emphasis added).

Thus, under the instructions given, in order to find Williams guilty of the felony murder of Robinson, the jury had to find that Williams was guilty of the attempted armed robbery of Robinson.

In viewing the instructions given to the jury, there was insufficient evidence for a rational trier of fact to conclude that anyone attempted to commit an armed robbery against Robinson.[5] Nearly all of the evidence regarding what happened inside Parker's house came from Williams'

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[5] At the close of the State's case at trial, Atty. Jensen moved the Court to dismiss Count 4, the Attempted Armed Robbery of Robinson. He argued that "there is no evidence at all that anyone attempted to take property that belonged to Mr. Robinson, much less that they used any force against him to succeed in the taking." (48:65). The State argued that there was a reasonable inference that Robinson was trying to prevent the carrying away of the marijuana" (48:72). The court agreed, stating, "I suppose that could be an inference." (48:72).

The issue presented in this appeal is different than the issue presented above. The issue on appeal deals with whether there was sufficient evidence to support the felony murder count regarding Robinson (Count 2) *under the instructions given to the jury.* In his postconviction motion, Williams stated that "If this Court agrees with Williams that there was insufficient evidence to convict him on Count 2, but believes that Atty. Jensen's failure to articulate this issue has somehow waived Williams' right to raise it in this motion, then Williams submits that Atty. Jensen's representation was ineffective." (30:8). In its decision denying Williams' postconviction motion, the circuit court did not address the issue regarding whether counsel was ineffective in this regard (39).

interrogation with police, but none of that implicated Williams or his co-actors in an attempted armed robbery against Robinson. Rather, that evidence consisted of the following:

a. That as he was walking to Parker's residence with Collins and Dixon, Williams learned that this was going to be a robbery of Parker's marijuana that the three men would split up (58:transcript:28)
.

b. That on his way to Parker's residence, Williams did not see a gun, but when asked if he knew whether anyone had a gun, he said, "I ain't slow." (58:transcript:29).

c. That after Parker let Williams and Collins into the house, Williams noticed a man—Robinson—who was sleeping on the couch in the living room (58:transcript:4-5). Williams had never seen Robinson before (58:transcript:5).

d. That Parker invited Williams into the kitchen to inspect the marijuana, after which time Collins entered the kitchen with a gun pointed at Parker and said something to the effect of "you all know what time it is, give that shit up." (58:transcript:14).

e. That Parker refused to surrender his marijuana to Collins and tried walking past Collins and towards the living room. (58:transcript:14). However, Collins shot once at Parker as he walked by him and shot two to three more times at Parker as Parker ran into the living room and out the front door. (58:transcript:14-15).

f. That after several shots, Williams walked into the living room and saw Collins wrestling with Robinson for control of the gun. (58:transcript:22). As Williams walked by, Collins said something to Williams to the effect of "Get that nigga." (58:transcript:26).

g. That Williams did not do anything to assist Collins in his fight with Robinson, and left the house and joined Dixon outside. (58:transcript:24).

h. That Williams did not take any of the marijuana from the residence, but left it on the floor (58:transcript:21)

i. That as he was leaving, Williams saw Collins crash out of the front window (58:transcript:6).

j. That afterwards, Williams and Dixon continued fleeing the area together and later regrouped with Collins at Dixon's home (48:37).

Beyond evidence of Williams' interrogation, the State attempted to piece together a picture of what happened from physical evidence found in and near Parker's house. This consisted of:

a) A broken-out front window from the living room of Parker's residence (46:112).

b) A cell phone belonging to Collins, a cell-phone holder and lanyard, and a black-knit cap lying on the front yard of Parker's house (46:115, 171).

c) Marijuana was scattered around Parker's house, some near the bathroom and some near the front

door of the house (46:123, 136). There was also a cooler in the living room with marijuana residue inside it (46:132).

d) Bullet casings, bullet holes, and blood were in various places through the residence (46:117-144).

e) Robinson's body was lying in the kitchen, and Parker's was lying in the nearby street (47:12, 15).

The State did not introduce any evidence at trial showing that Robinson had any connection with Parker, other than the fact that he was sleeping on the sofa when the robbery and shooting of Parker occurred. In addition, there was no evidence that Robinson had any connection to any items found in the house, including the marijuana and the cooler. The State did not introduce any of Robinson's fingerprints or DNA on items found in the house. Robinson was simply sleeping on the sofa when the robbery occurred, and then wrestled with Collins before Collins shot him.

Given the lack of evidence suggesting that Williams or his accomplices attempted to rob Robinson, it is not surprising that the jury returned a verdict finding Williams "not guilty" of attempting to commit an armed robbery against Robinson (50:3).[6] Although the jury's inconsistent verdict in Williams' case is not legally dispositive,[7] such a

[6] The jury was instructed that "if you find the defendant guilty of felony murder, you are instructed that you must not consider whether or not the defendant is guilty of Count 3 or 4 of the amended information, which charges a separate crime of attempted armed robbery, party to a crime." (49:22). In finding Williams not guilty of Count 4, the jury did not follow the court's instructions in this regard.

[7] Williams recognizes that the jury was operating under a different standard, that it had to find each element of attempted robbery beyond a reasonable doubt, as opposed to the standard set forth in *Poellinger.* The

verdict is an indication that that the jury did not believe that Williams (or Collins in concert with Williams) attempted to rob Robinson.

In denying the postconviction motion, the circuit court held that there was sufficient circumstantial evidence to convict Williams of felony murder of Robinson (39:2). The court then proceeded to list that "circumstantial evidence:":

> The defendant told police that when Parker allowed him and Dajuan Collins to enter the residence, he asked them to sit down on the couch in the living room. The defendant said that there was another person (Robinson) asleep on another couch within that same living room. Parker called the defendant into the kitchen and showed him a bag full of marijuana. Collins came into the kitchen armed with a gun and started making demands of Parker, which led to the shootings. Evidence that Robinson's body was found in the kitchen, that there was a struggle between Collins and Robinson, that marijuana was found in several locations in the apartment, and that a cell phone linked to Collins had Robinson's blood on it was sufficient for the jury to reasonably conclude that that [sic] Robinson was in control of the marijuana, as was Parker, and that he died while trying to prevent the defendant and Collins from taking their property.
>
> (39:2).

The court's decision does not explain how the above evidence allows the conclusion that there is any evidence that Williams or his accomplice attempted to rob Robinson. The court's decision does not explain how this evidence shows that Robinson was in control of the marijuana, or that he died

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fact that the jury acquitted Williams of the attempted robbery on Robinson is not dispositive, but it points to the lack of evidence on that count.

trying to prevent Williams or Collins from taking the marijuana.

While there is evidence that Collins struggled with Robinson, and that he shot Robinson, and that Williams was an accomplice to Collins, there is no evidence that either man took, or attempted to take any property from Robinson. Since the jury instructions required the jury to find the existence of such evidence before finding Williams guilty of felony murder of Robinson, this court should reject the circuit court's decision, to which no deference is owed.

Since there is no evidence to support the conviction on Count 2, the conviction must be vacated with prejudice. *See Burks v. United States*, 437 U.S. 2, 11 (1978) (double jeopardy principles prevent a defendant from being retried when a court overturns his conviction due to insufficient evidence); *Wulff*, 207 Wis. 2d at 143.

II. Williams' attorney was ineffective in failing to move to strike a prospective juror who admitted that viewing graphic photographs would cause him or her to be biased towards the victims.

One of the jurors who sat in judgment of Williams was Juror #12, who told the court during the selection process that he/she could not "sit through" and "make a decision" in this case because it would require viewing graphic photographs of the deceased victims (46:56). The juror also stated that the photographs would cause him/her to be biased towards the victims, at least to some extent (46:82-83). Counsel's failure to move to strike that juror compromised Williams' right to a fair trial.

A. Relevant Law

A criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution, as well as principles of due process. *State v. Faucher*, 227 Wis. 2d 700, 732-33, 596 N.W.2d 770, 784-85 (1999). To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The requirement that a juror be indifferent is codified in Wis. Stat. § 805.08(1). That statute requires the circuit court to examine on oath each person who is called as a juror to discover if he or she "has expressed or formed any opinion or is aware of any bias or prejudice in the case." Wis. Stat. § 805.08(1).

There are three situations in which a reviewing court looks at jury bias: (1) statutory, (2) subjective, and (3) objective. *Faucher*, 227 Wis. 2d at 716. Of greatest relevance to Williams' case is subjective bias, since Juror #12 admitted to being biased. Subjective bias "is revealed through the words and the demeanor of the prospective juror" and "refers to the prospective juror's state of mind." *Faucher*, 227 Wis. 2d at 717. "Discerning whether a juror exhibits this type of bias depends upon that juror's verbal responses to questions at *voir dire*, as well as that juror's demeanor in giving those responses." *State v. Lindell*, 2001 WI 108, ¶36, 245 Wis. 2d 689, 629 N.W.2d 223).

To establish a claim of ineffective assistance of counsel, Williams must demonstrate that (1) his attorney's performance was deficient; and (2) that his attorney's

deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

A defense counsel's failure to remove a biased juror who ultimately sits on the jury constitutes deficient performance resulting in prejudice to his client. *State v. Carter*, 2002 WI App 5, ¶15, 250 Wis. 2d 851, 641 N.W.2d 517 (a guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair).

B. Williams' attorney was ineffective in failing to remove Juror #12 from the panel.

During the jury selection, the prosecutor told the jury that "we have to look at photographs from the scene that have blood on them, that have people deceased, people with gunshot wounds, the victims in this case." (46:54) (Appendix D). Three prospective jurors stated that they would have trouble with that, Jurors #6, #8, and #12. (46:55-56). Juror #12 stated that "it would be totally gross, grossed out in that situation." 46:56). The prosecutor asked "Is it a situation where you don't think that you could sit through it and make a decision in this case?" Juror #12 answered, "Right." (46:56).

Later during *voir dire,* Williams' attorney—Jeffrey Jensen—had the following exchange with Prospective Juror #12:

> Jensen: Number 12, what would be your emotional response be [sic] to have to look at those pictures?

Juror 12: Same as hers.[8] See those pictures would be gross.

Court: I can't hear what you said.

Juror 12: Just seeing those pictures would be gross for me to look at.

Jensen: Okay. So then you – on the jury, you get back to deliberations, how would that affect your deliberations?

Juror 12: Really hard to say. I don't know if I would have a bias or not.

Jensen: Okay.

Court: You would agree that–everybody would agree they're not pleasant pictures to look at. But you see the same thing sometimes on, you know, the network stations, for example, or in the media. The question is whether or not it would impair your ability to come to fair and just result in the matter after listening to the testimony.

Juror 12: I think I would be a little biased.

Court: I can't hear you.

Juror 12: I think I would be biased a little bit.

Court: By just looking at a picture?

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[8] Just before this exchange, Atty. Jensen asked Prospective Juror #6 how viewing the photographs would affect her deliberations, and Juror #6 responded that it was "probably something I'll think about all day." (46:81). Atty. Jensen then asked "would it make you angry at Mr. Williams or angry at the prosecutor for showing you the pictures? I mean, what would be your emotional response?" Juror #6 replied "Not angry at anybody because I don't know."

Juror 12: Just in general, you know, it would be gross. Just a picture itself.

Jensen: Biased in what way?

Juror 12: That something bad happened.

Jensen: Okay, Well, I think everybody will agree that something bad happened. The question is what would your bias be against the State of Wisconsin, or would it be against Mr. Williams, would it be against the victims? Where would your bias lie?

Juror 12: More towards the victims.

Jensen: The victims. You would feel sorry for them?

Juror 12: Yes. Based on looking at a picture.

(46:82-83) (Attached as Appendix D).

Despite this evidence of Prospective Juror #12's inability to remain impartial throughout the entire trial, Atty. Jensen failed to remove him/her from the panel using either a preemptory strike or to move the circuit court for cause. Prospective Juror #12 then became a juror at the trial (46:91).

Since the court did not conduct a *Machner* hearing in this case, Atty. Jensen did not have an opportunity to testify as to his reasons for keeping Juror #12 on the jury. However, in the postconviction motion, Williams offered to produce testimony that in Atty. Jensen's view, "it was just as likely that the juror would hold it against the State, who introduced the photo, especially since the cause and manner of the deaths were not disputed." (30:10) (Attached as Appendix E).

In denying the postconviction motion, the circuit court ruled that Williams was not prejudiced by counsel's failure to strike Juror #12 from the panel (39:3). The court did not set forth its reasoning, but stated that it adopted the analysis from the State's brief (36:7-12).

In that brief, the State argued that Juror #12 "did not express an inability to function as a juror." (36:9). Williams disputes that. First, Juror #12 explicitly admitted to the prosecutor that he/she could not "sit through and make a decision in this case." (46:56). At no point did Juror #12 change that statement, or make any indication that belied that sentiment.

Second, Juror #12 expressed that the photographs would cause him/her to be "totally grossed out," and that he/she would be "biased," at least to some extent (46:56, 82). Although Juror #12 first stated that "I don't know if I would have a bias or not," he/she then admitted that "I would be a little biased." (46:82).

Third, Juror #12 stated that the bias would be "more towards the victims." (46:83). It might be argued that this statement reveals no bias against Williams, but that it is neutral. However, it seems apparent that a juror biased toward the victims would naturally place the blame on the person or persons who caused the death of the victims, rather than on the party introducing the photographs. In this case, there was no real dispute that Collins caused the death of the victims.[9] It is difficult to imagine why any juror would blame the State instead of the co-defendants for the disturbing photographs. The average juror would not likely know whether it is standard procedure to show such photos during

[9] In argument to the court, the prosecutor intimated that it was unclear whether Collins or Williams had the gun (48:70). But there is no evidence showing that Williams had the gun at any time.

murder trials and would naturally assume that the prosecutors were simply doing their job in presenting them. This was reinforced when the prosecutor explained to the prospective jurors that he had little choice but to show the photographs when he stated: "I'm not trying to – and certainly let me try and do everything only to the extent that it's necessary." (46:55).

Therefore, it was not reasonable for Atty. Jensen to conclude that it was "just as likely" that Juror #12 would hold it against the State, who introduced the photos (30:10).

Trial counsel's failure to attempt to remove Juror #12 constitutes ineffective assistance of counsel, because having such a juror violated Williams' right to an impartial jury. Williams' case is very similar to the situation in *State v. Carter,* 2002 WI App 5, ¶15, 250 Wis. 2d 851, 641 N.W.2d 517. In *Carter,* the defendant was tried on a charge of second-degree sexual assault. *Id.* at ¶1. During *voir dire,* a prospective juror—Mr. Kestly—indicated that his brother-in-law had been a victim of a sexual assault. *Id.* at ¶3. He was then asked, "Do you feel that that would influence or affect your ability to be fair and impartial in this case?" Kestly answered "Yes." He then stated that it had occurred before he met his wife, and that he was not "directly personally involved" in it. *Id.*

Carter later claimed in a postconviction motion that his attorney was ineffective in not seeking to remove Kestly from the panel, a claim which was denied by the circuit court. *Id.* at ¶6. However, the Court of Appeals awarded Carter a new trial, stating:

> Here, Kestly's response demonstrates unequivocally that he was subjectively biased. Without any ambiguity, he stated that his own personal experience with a sexual

> assault in his family would influence or affect his ability to be fair and impartial.

Id. at ¶8. The *Carter* court noted that there was nothing in the record to suggest Kestly's impartiality after he admitted his bias. *Id.* at ¶13. The court then determined that Carter's attorney was ineffective in failing to remove Kestly from the jury. The Court stated:

> Here, counsel failed to further question the juror's statement of admitted bias, failed to move to strike the prospective juror for cause and failed to use a peremptory challenge to remove him from the jury panel. A guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair. *See State v. Krueger,* 2001 WI App 14, ¶¶ 4, 15, 240 Wis. 2d 644, 623 N.W.2d 211. Consequently, counsel's failure to act to remove a biased juror who ultimately sat on the jury constitutes deficient performance resulting in prejudice to his client. Accordingly, we reverse the conviction and remand the matter for a new trial.

Id. at ¶15.

As in *Carter,* there was no indication that Juror #12 could set aside his/her bias and be objective. Juror #12's comments were not rehabilitated, and were unequivocal in stating that he/she could not "sit through it and make a decision in this case," and that he/she was biased toward the victims (46:56, 83-83).

In such circumstances, there is a reasonable probability that had Atty. Jensen sought removal of Juror #12, the court would have struck him for cause. Circuit courts are cautioned and encouraged to strike prospective jurors for cause when they "reasonably suspect" that juror bias exists. *State v. Lindell,* 2001 WI 108, ¶49, 245 Wis. 2d 689, 716, 629 N.W.2d 223. In addition, circuit courts should "err on the

side of striking prospective jurors who *appear to be biased*, even if the appellate court would not reverse their determinations of impartiality." *Id.*

At the very least, it should have been abundantly clear that Juror #12 *appeared* to have a bias against Williams. A juror who feels sympathy for the victims of a criminal offense is logically more inclined to punish the person who inflicted the suffering—not the State, who advocates for the victims and their respective families. Therefore, Atty. Jensen was ineffective for not moving to dismiss Juror #12 from the panel during *voir dire*, and Williams is entitled to a new trial.

Accordingly, this court should either award a new trial to Williams, or remand for a *Machner* hearing to obtain further evidence concerning Atty. Jensen's decision to not seek to strike Juror #12.

III. Williams' attorney was ineffective in failing to object to the introduction of numerous crime-scene and autopsy photos.

Williams was denied his right to effective assistance of counsel when his attorney failed to object to the State's introduction of crime-scene photographs displaying the victims' bodies with bullet holes and blood.

At trial, the State introduced many photographs taken by police from the crime scene, and from the autopsies.[10] Specifically, the jury saw thirteen photographs showing the victims' bodies at different angles, including close-ups.[11] The

[10] Because of the nature and large number of the color photographs, they are not included in the appendix.

[11] The photographs showing the bodies of the victims are in Document 53, Exhibits 1, 2, 3, 29, 42, 43, 44, 46, 47, 48, 52, 86, and 87.

jury saw ten photographs taken during the autopsy conducted by Dr. Linert.[12] At least fifteen photographs showed blood spots throughout Parker's residence.[13] Although the circuit court found that the photos "were not particularly gory or gruesome," Williams asserts that the average juror would find at least some of the photographs gruesome and inflammatory—particularly the photos showing the bodies of the two victims at the crime scene, and during autopsy.

Whether to admit photographs in evidence is a matter within the circuit court's discretion, and photographs may be admitted if they will help the jury gain a better understanding of material facts. *Hayzes v. State*, 64 Wis. 2d 189, 199, 218 N.W.2d 717 (1974). However, photographs "must be excluded if they are not 'substantially necessary' to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations." *Id*. *See also Sage v. State*, 87 Wis. 2d 783, 788, 275 N.W.2d 705, 708 (1979); *Neuenfeldt v. State*, 29 Wis. 2d 20, 32, 138 N.W.2d 252 (1965).

The circuit court also ruled that the State "had a right to present the photographic evidence in order to satisfy its burden of proving all elements of the offenses beyond a reasonable doubt." (39:3). But there was nothing in the photographs that would have helped the jury gain a better understanding of material facts. From Dr. Linert's testimony of the autopsy, it was abundantly clear that gunshot wounds caused the death of both Parker and Robinson (47:81, 93).

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[12] The autopsy photos are in Document 53, Exhibits 123, 124, 125, 126, 133, 134, 135, 136, 137, and 138.

[13] The photographs showing blood in the residence and elsewhere are in Document 53, Exhibits 12, 13, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, and 65.

The photographs served no practical purpose, and could not help but invoke sympathy for the victims and create anger at Williams.

Atty. Jensen failed to object to the introduction of any of this photographic evidence. His belief that the jurors would be just as likely hold such photographs against the State was unreasonable, since any sympathy towards the victims would almost certainly be directed against the persons who allegedly caused the deaths, rather than the State. Atty. Jensen should have been especially alerted to the potential bias against Williams since Juror #12 had indicated that viewing graphic photographs would bias him/her toward the victims. *See Point Heading II.* Other panelists had also stated during *voir dire* that they would have difficulties looking at graphic photographs, prospective jurors 6, 8, 9, and 21 (46:54-56, 83).[14] Therefore, Attorney Jensen's performance was deficient.

To the extent that the State claims that the photographs were necessary to help the jury understand the cause of death, Atty. Jensen could have and should have offered to stipulate that the cause of death to both Parker and Robinson stemmed from a gunshot wound. Such a stipulation would have negated any potential arguments by the State that the bloody photographs were necessary to prove the elements of the charged offense or any other asserted justification.

As a result, Atty. Jensen's deficient performance prejudiced Williams. Had he objected, there is a reasonable probability that the court would have excluded all of the photographs, or at least the most graphic ones. Even if the court did not find that the photographs were entirely

[14] None of these other prospective jurors were selected for the jury (46:91).

irrelevant, it would have excluded the photographs since the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See* Wis. Stat. § 904.03.

Accordingly, this court should either award a new trial to Williams, or remand for a *Machner* hearing to obtain further evidence concerning Atty. Jensen's decision to not object to the photographs.

CONCLUSION

For the above reasons, Williams' felony murder conviction as to Count 2 (Authur Robinson) should be dismissed with prejudice. Additionally, a new trial should be ordered to correct the prejudicial errors of trial counsel in either failing to remove a biased juror or failing to object to multiple prejudicial photographs.

Respectfully submitted this 24th day of July, 2014.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6,967 words.

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John A. Pray

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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John A. Pray

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant circuit court record entries; (3) the findings or opinion of the circuit court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve.

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John A. Pray

TABLE OF APPENDICES