STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1099-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MALTESE LAVELE WILLIAMS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. When it is viewed most favorably to the state and the conviction, was the evidence sufficient for a rational jury to find Williams guilty of the felony murder of Authur Robinson beyond a reasonable doubt?

The jury returned verdicts finding Williams guilty of the felony murders of both Michael Parker and Authur

Robinson during the commission of an attempted armed robbery. The trial court denied Williams's motion to dismiss at the close of evidence, and his postconviction motion, both challenging the sufficiency of the evidence to convict.

2. Was trial counsel ineffective for not moving to strike prospective Juror No. 12 for cause, or for not exercising a peremptory strike against that juror?

Trial counsel did not move to strike for cause, or exercise a peremptory strike against, prospective Juror No. 12 who said he might be "biased" towards the victims if the juror saw graphic crime scene and autopsy photographs. The trial court denied Williams's postconviction motion alleging ineffective assistance of counsel without an evidentiary hearing.

3. Was trial counsel ineffective for not objecting to the introduction of crime scene and autopsy photographs?

The trial court denied Williams's postconviction motion alleging ineffective assistance of counsel without an evidentiary hearing. The court determined that the photographs were not unduly graphic.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case is not appropriate for oral argument or publication. The parties' briefs should adequately address the legal and factual issues presented. The outcome is controlled by the application of established principles of law to the unique facts presented.

STATEMENT OF THE CASE

After a trial held April 22-26, 2013, a Milwaukee County jury found Maltese Williams guilty of two counts of felony murder, in violation of Wis. Stat. § 940.03 (17-18; 50:2-3). The jury determined that Williams, as party-to-the-crime with accomplices Jujuan Collins and Maurice Dixon, caused the deaths of Michael Parker and Authur Robinson during the course of attempting to commit an armed robbery at Parker's home, 1123 South 24th Street in the City of Milwaukee, January 15, 2013. The trial court sentenced Williams to consecutive prison terms for the two counts, each consisting of thirteen years of initial confinement followed by six years of extended supervision (51:39-40). A judgment of conviction (as amended) was entered July 15, 2013 (26; A-Ap. A).

Williams filed for direct postconviction relief January 27, 2014, raising the challenges he presents here (30; A-Ap. E). The trial court denied the motion without an evidentiary hearing May 2, 2014 (39; A-Ap. B).

Williams now appeals from the judgment of conviction and the order denying postconviction relief (40). Relevant facts will be developed and discussed in the Argument section to follow.

ARGUMENT

I. WHEN IT IS VIEWED MOST FAVORABLY TO THE STATE AND THE CONVICTION, AND WHEN IT IS COMPARED TO WHAT THE FELONY MURDER STATUTE REQUIRES RATHER THAN TO WHAT THE JURY INSTRUCTIONS ERRONEOUSLY REQUIRED, THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND WILLIAMS GUILTY OF THE FELONY MURDER OF ROBINSON.

A. The standard for review of a challenge to the sufficiency of the evidence to convict.

The standard for review of a challenge to the sufficiency of the evidence is highly deferential.

> [I]n 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. 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.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). *See State v. Below*, 2011 WI App 64, ¶¶ 2-4, 333 Wis. 2d 690, 799 N.W.2d 95.

Stated another way: "[t]his court will only substitute its judgment for that of the trier of fact when the

fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). The trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See State v. Poellinger*, 153 Wis. 2d at 506. *Also see State v. Hahn*, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998).

When more than one inference can reasonably be drawn from the evidence, the inference which supports the trier of fact's verdict must be the one followed on review. *See State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989).

This court may overturn the fact finder's verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

When a jury instruction erroneously requires the state to prove more than what the controlling criminal statute requires, the reviewing court is to examine the sufficiency of the evidence by comparing the trial evidence to what the statute requires and not to what an erroneous jury instruction required. *State v. Beamon*, 2013 WI 47, ¶¶ 3, 20, 23-25, 40, 50, 347 Wis. 2d 559, 830 N.W.2d 681.

B. The relevant facts proven at trial.

When viewed most favorably to the state and the conviction, the following facts proven at trial (and all reasonable inferences therefrom) support the jury's verdict finding Williams guilty of the felony murder of Robinson beyond a reasonable doubt at trial.

Maltese Williams knew Michael Parker. He also knew that Parker sold marijuana out of his house near 24th and Scott Streets. Williams, Dujuan Collins and Maurice Dixon hatched a plan to go to Parker's house ostensibly to purchase marijuana, but in reality to rob Parker of his marijuana at gunpoint – as Williams put it, to do a "lick" – in the wee hours of January 15, 2013 (48:31-34, 38-39, 45-50).

As planned, Dixon stood watch as a lookout outside Parker's house, while Williams and Collins knocked on the door and were invited inside by Parker. Authur Robinson, a house guest, was asleep on the couch in the living room. Williams went into the kitchen with Parker to inspect the marijuana he supposedly would purchase. According to Williams, Collins then entered the kitchen and announced the robbery while pointing a gun at Parker. Rather than give up the marijuana, Parker tried to flee. Collins shot him once in the base of the neck and twice in the shoulder. Parker fled out the front door but collapsed and died across the street as the result of the bullet wound to his neck (46:104-06, 149-51; 47:12-13, 80-89; 48:35).

Williams then took the same path as Parker out of the kitchen in the direction of the front door. When he entered the living room, Williams saw Collins and Robinson in what appeared to be a death struggle over Collins's gun. Williams did not stick around. He ran outside, joined up with Dixon, and fled to his mother's house.

Meanwhile, Collins regained control of the gun and fatally shot Robinson in the heart. Collins then jumped through the front window and fled. The three rendezvoused later on. Collins revealed to his cohorts that he had lost his cell phone at the scene and feared he would be caught. Police recovered Collins's cell phone, with Robinson's blood on it, at the scene (46:127-28, 136-37; 47:15-17, 92-98; 48:8-13, 36-37, 84-85).

C. The state successfully proved beyond a reasonable doubt that Williams was guilty, as party-to-the-crime, of the felony murder of Robinson.

Williams does not dispute that he, Collins and Dixon went to Parker's house to rob him of marijuana at gunpoint. He does not dispute that Collins announced the robbery in the kitchen and fatally shot Parker when he refused to turn over the marijuana. Williams does not, therefore, challenge his conviction for the felony murder of Michael Parker.

Williams disputes his conviction for the felony murder of Authur Robinson in the living room seconds later. The shooting of Robinson was, however, felony murder in its most classic form: Robinson was shot and killed in the course of an attempted armed robbery.

Williams, as party-to-the-crime, caused the deaths of both Parker and Robinson "while committing or attempting to commit" an armed robbery, contrary to Wis. Stat. § 943.32(2). Wis. Stat. § 940.03. *See State v. Krawczyk*, 2003 WI App 6, ¶¶ 20-21, 259 Wis. 2d 843, 657 N.W.2d 77; Wis. JI-Criminal 1031 (2013).

It matters not whether Robinson was fatally shot while himself being robbed, while resisting the attempted robbery of Parker or while still sleeping. In *State v. Rivera*, 184 Wis. 2d 485, 487-90, 516 N.W.2d 391 (1994), a house guest was accidentally shot and killed by the victim during a botched armed robbery. The defendant's conduct in going to the house with his cohorts to rob the owners of marijuana at gunpoint was a substantial factor in bringing about the house guest's inadvertent death from the victim's gun. This case is indistinguishable in any material respect from *Rivera. See also State v. Oimen*, 184 Wis. 2d 423, 428, 516 N.W.2d 399 (1994) (upholding felony murder conviction where intended victim of botched robbery fatally shot one of defendant's cohorts).

Moreover, it matters not that Collins may have shot Robinson after Williams fled the house. Williams was still guilty of felony murder because the crime he agreed to commit was not complete when the shooting by his accomplice occurred as they both tried to flee. *See State v. Chambers*, 183 Wis. 2d 316, 319, 324-25, 515 N.W.2d 531 (Ct. App. 1994) (after committing an armed burglary, Chambers and his accomplice split up while being pursued by police; Chambers was guilty of felony murder even though his accomplice fatally shot a pursuing police officer while Chambers was hiding under a porch some distance away). *See also State v. Oimen*, 184 Wis. 2d at 428.

D. The overwhelming evidence of guilt is not to be evaluated against the erroneous jury instructions but against the felony murder statute.

The jury determined there was not sufficient evidence to convict Williams of the attempted armed robbery of Robinson (20).[1] The jury could, however, consistently find Williams guilty of the felony murder of Robinson and not guilty of the attempted armed robbery of Robinson because Robinson was shot in the course of committing the attempted armed robbery of Parker.

Robinson wrestled with Collins for the gun. There are several plausible theories as to what prompted the death struggle. It may have occurred when Collins tried to take marijuana he saw in Robinson's possession or at his side. If he possessed it, even if illegally, Robinson was the "owner" of any marijuana in his possession for purposes

[1] The trial court instructed the jury not to return a verdict on attempted armed robbery of either Parker or Robinson if they found Williams guilty of felony murder (49:22), but the jury did so anyway, finding Williams guilty of the attempted robbery of Parker and not guilty of the attempted robbery of Robinson (50:3).

of the armed robbery statute. Wis. Stat. § 943.32(3). It may have been preceded by Robinson's attempting to prevent Collins and Williams from fleeing with Parker's marijuana. In either case, Robinson succeeded in preventing them from taking and carrying away his and/or Parker's marijuana, albeit at the ultimate price. Marijuana was strewn about the house. Police recovered an empty cooler with marijuana residue inside. There was marijuana in the kitchen and a baggie of marijuana was found near the front door. There is nothing to indicate that the three men escaped with anything of value; hence the "attempted" robbery charges (46:123-24, 130-32, 136; 47:108-09; 49:34-35, 45).

This death struggle may have occurred when Collins threatened to kill Robinson, after having just shot Parker, and Robinson then tried to seize the gun to save his own life. Yet another theory is that Robinson tried to protect his friend, the wounded Parker, but Collins refused to let Robinson follow Parker outside and the struggle over the gun ensued. Or, Robinson tried to prevent Collins's escape, and the struggle ensued.

Regardless what prompted the death struggle for the gun, at the very least it occurred during the course of "committing or attempting to commit" the armed robbery of Parker. Robinson's death was every bit a part of that botched robbery as was Parker's. At the very least, a rational jury could, and did, so find beyond a reasonable doubt.

Williams nonetheless insists that the jury instructions required the state to prove beyond a reasonable doubt that he (or his cohorts) also attempted to rob Robinson before the jury could find him guilty of the felony murder of Robinson. That is plainly not the law, as discussed immediately above. *See State v. Rivera; State v. Oimen.* It is also not how the parties understood the law at trial.

The trial court properly instructed the jury as follows:

> Before you may find the defendant guilty of felony murder, the state must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were established:
>
> That the defendant attempted to commit the crime of armed robbery as a party to a crime, that 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.
>
> . . . .
>
> The second element of felony murder requires the death of Michael Parker and Authur Robinson was caused by the intent to commit armed robbery, party to a crime.
>
> Cause means that the attempt to commit armed robbery, party to a crime, was a substantial factor in producing the death.
>
> 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 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 of [sic] felony murder.
>
> If you are not so satisfied, you must find the defendant not guilty as to Count 1 or Count 2 of the amended information.

(49:17, 21-22).

Williams's trial counsel correctly understood the law when he told the jury in closing argument: "And then the next concept is felony murder. If you are committing a felony of any kind and a person is killed during the course of committing this felony, that's felony murder." (49:52).

The prosecutor also correctly expressed his understanding of the law in his own closing arguments: "But more importantly, whether [Robinson's] the victim or Parker's the victim, he is killed in the course of the armed robbery. So he is a victim of the felony murder as well." (49:45). In rebuttal, the prosecutor again correctly summarized the law:

> The last thing [defense counsel] said to you was that you have to find that, in this case, the defendant attempted, as a party to a crime, to rob Authur Robinson in order to find him guilty of the death of Authur Robinson under a [sic] felony murder. That is not true. That is simply a blatant misstatement of the law.
>
> Felony murder is a special type of murder under the law. And it's typically used in just this type of situation.
>
> Someone goes into a bank, for instance, a store. In this case, a drug house. The intent is to rob the bank, or the store, or the drug house. And the state has to show that there was a robbery or an attempted armed robbery in this case taking place.
>
> But [the state] doesn't have to show that Authur Robinson was a victim. Because if in the course of this armed robbery anyone is killed, whether it be the bank clerk, the security guard, an accomplice, a kid walking down the street, if anybody, whether it's Authur Robinson, or anyone else was killed while an armed robbery of Maurice [sic] Parker is taking place, that is felony murder.

(49:64-65).

Williams did not object to the prosecutor's accurate summary of felony murder law as it relates to these facts.

Everyone was, therefore, on the proverbial "same page" at trial with respect to their understanding of the law of felony murder. The jury properly found Williams guilty of the felony murders of both Parker and Robinson based on the facts and the law.

E. Williams preserved only a challenge to the sufficiency of the evidence to convict him of felony murder as contemplated by § 940.03, but forfeited any right to challenge the sufficiency of the evidence to convict him under the erroneous jury instructions.

After the state rested, defense counsel moved to dismiss Count 2, charging first-degree intentional homicide of Robinson, on the ground there was no "evidence of any kind to establish how Mr. Robinson got those bullet holes in his body" and, so, there was insufficient proof of intent to kill (48:64).

Defense counsel also moved to dismiss Count 4, charging attempted armed robbery of Robinson, on the ground "there is no evidence at all that anybody attempted to take property that belonged to Mr. Robinson" (48:65). Significant here, counsel failed to make the separate argument that the court should not instruct the jury on felony murder of Robinson for that reason, or should instruct the jury not to find Williams guilty of felony murder of Robinson if it finds Williams not guilty of the attempted robbery of Robinson.

At the close of trial, after the jury found Williams guilty of the lesser-included offense of felony murder of Robinson, defense counsel moved to dismiss on the ground that the state failed to prove "the manner in which he [Robinson] was shot" (50:5). Counsel did not argue as a separate ground for dismissal that the state failed to prove felony murder of Robinson because it failed to prove an attempted armed robbery of Robinson.

Williams never, therefore, challenged the sufficiency of the evidence to convict him of the felony murder of Robinson on the ground he raised in his postconviction motion and here; that there was insufficient

evidence of an attempt to rob Robinson under felony murder law *as erroneously set forth in the jury instructions.* Williams thereby forfeited any appellate challenge on that ground. *See State v. Pinno* and *State v. Seaton*, 2014 WI 74, ¶¶ 8, 56-68, __ Wis. 2d __, 850 N.W.2d 207 (the right to challenge on appeal a structural constitutional violation may be forfeited by the defendant's failure to timely object. Both defendants forfeited their public trial right challenges to the closure of *voir dire* by not objecting when the violation occurred). *See generally State v. Ndina*, 2009 WI 21, ¶¶ 28-33, 315 Wis. 2d 653, 761 N.W.2d 612 (recognizing the distinction between a defendant's knowing and voluntary waiver of his constitutional rights and his forfeiture of those rights by inaction).

Failure to object at trial generally precludes appellate review of a claim, even claims of constitutional dimension. *See, e.g., State v. Huebner*, 2000 WI 59, ¶¶ 10-11, 235 Wis. 2d 486, 611 N.W.2d 727; *State v. Davis*, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996); *State v. Edelburg*, 129 Wis. 2d 394, 400-01, 384 N.W.2d 724 (Ct. App. 1986). To properly preserve an objection for review, the litigant must "articulate the specific grounds for the objection unless its basis is obvious from its context[] . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (citations omitted).

The requirement of a timely objection helps the circuit court avoid or correct any error with minimal disruption of the judicial process, thus eliminating the need for appeal. *See State v. Huebner*, 235 Wis. 2d 486, ¶ 12. It also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for

strategic reasons and later claiming that the error supports reversal. *See id.* ¶¶ 11-12.

The issue now raised was not "obvious from its context" and it could have been easily rectified had defense counsel brought the matter to the trial court's attention before the case went to the jury. The court would have simply corrected the armed robbery instructions – changing "and" to "or" - to comport with the statute. *See* "I.F.," infra. By not objecting on this specific ground, *even after the verdict came in at trial,* Williams forfeited any right to appellate review.

Williams's forfeited claim is only reviewable, therefore, as an ineffective assistance challenge based on trial counsel's failure to raise the issue, with the burden of proving both deficient performance and prejudice squarely on him. *See Kimmelman v. Morrison,* 477 U.S. 365, 374-75 (1986); *State v. Pinno* and *State v. Seaton,* 2014 WI 74, ¶¶ 81-82; *State v. Beauchamp,* 2011 WI 27, ¶¶ 14-15, 333 Wis. 2d 1, 796 N.W.2d 780; *State v. Carprue,* 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31; *State v. Jones,* 2010 WI App 133, ¶ 25, 329 Wis. 2d 498, 791 N.W.2d 390; *State v. Haywood,* 2009 WI App 178, ¶ 15, 322 Wis. 2d 691, 777 N.W.2d 921.

The only issue that Williams properly preserved for appellate review was a standard challenge to the sufficiency of the evidence to convict him of the felony murder of Robinson when one compares the evidence adduced at trial with the correct statutory elements of that offense. That issue may be raised for the first time in this court. *State v. Monje,* 109 Wis. 2d 138, 153-54, 325 N.W.2d 695, 327 N.W.2d 641 (1982) (on reconsideration; defendant may challenge sufficiency of the evidence, or issues previously raised, for the first time on appeal without having to raise them in a postconviction motion); Wis. Stat. § 974.02(2). *See State ex rel. Rothering v. McCaughtry,* 205 Wis. 2d 675, 678 n.3, 556 N.W.2d 136 (Ct. App. 1996).

F. The erroneous use of "and" rather than "or" in the armed robbery instructions did not diminish the sufficiency of the evidence when it is compared to what the felony murder statute – not the erroneous instructions – required the state to prove.

Williams's entire challenge hangs by the slender thread that the court erroneously employed the word "and" rather than "or" in the armed robbery instructions as they related to felony murder liability. *See* Williams's postconviction motion at 7 n.2 (30:7 n.2; A-Ap. E, at 7 n.2) (conceding that had the instruction read "Robinson *or* Parker," then "perhaps there would have been sufficient evidence to convict Williams of the felony murder of Robinson."). That slender thread snaps under the great weight of the evidence of guilt presented by the state, all reasonable inferences therefrom, and the statutory requirements.

The court correctly instructed the jury that it could find Williams guilty of the felony murders of Parker and Robinson if it found beyond a reasonable doubt that the murders were committed in the course of committing an attempted armed robbery. The court then accurately defined for the jury the legal concept of an attempt and the elements of armed robbery (49:17-21).

The only error in these instructions occurred when the court defined the elements of armed robbery as they related to the crime of felony murder. The court instructed as follows:

> That Michael Parker, Count 1, *and* Authur Robinson, Count 2, was [sic] the owner 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.
>
> . . . .
>
> Forcibly means that the person or persons with whom the defendant was acting as a party to a crime used force against Michael Parker, Count 1, *and* Authur Robinson, Count 2, with the intent to overcome or prevent the physical resistance or physical power of resistance to taking and carrying away the property.

(49:19-20) (emphasis added).

The court should have employed the word "or" in place of the italicized word "and" to correctly instruct on felony murder liability. As discussed above, the jury only had to find beyond a reasonable doubt that Williams attempted to rob *either* Robinson *or* Parker to then find him guilty of the felony murders of both Robinson and Parker. This scrivener's error in the instructions, however, makes no difference here.

A jury instruction error is subject to the harmless error rule. In assessing whether an instructional error was harmless, the appellate court views the instruction in the context of the entire trial to see if a reasonable possibility exists that the jury was misled such that the error contributed to the conviction. *See State v. Gordon*, 2003 WI 69, ¶¶ 33-41, 262 Wis. 2d 380, 663 N.W.2d 765; *State v. Zelenka*, 130 Wis. 2d 34, 49-52, 387 N.W.2d 55 (1986); *State v. McDowell*, 2003 WI App 168, ¶ 76, 266 Wis. 2d 599, 669 N.W.2d 204.

Accordingly, the Wisconsin Supreme Court has concluded that the omission of an element of the crime from the jury instructions was harmless in light of the facts of that particular case. *See State v. Gordon*, 262 Wis. 2d 380, ¶¶ 33-43. It was also harmless error to

give an instruction that created an unconstitutional mandatory presumption in light of the undisputed facts presented at trial because a properly instructed jury would still have found the defendant guilty beyond a reasonable doubt. *State v. Harvey*, 2002 WI 93, ¶¶ 47-49, 254 Wis. 2d 442, 647 N.W.2d 189; *State v. Tomlinson*, 2002 WI 91, ¶¶ 60-64, 254 Wis. 2d 502, 648 N.W.2d 367 (instructing the jury that a baseball bat is a dangerous weapon as a matter of law was harmless error under the facts of that case).

It is clear beyond a reasonable doubt that the instructional error here did not adversely affect the jury's ability to arrive at a fair and impartial verdict. *State v. Harvey*, 254 Wis. 2d 442, ¶ 44. *See State v. Stuart*, 2005 WI 47, ¶¶ 40-41, 279 Wis. 2d 659, 695 N.W.2d 259; *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485.

The outcome of this appeal is controlled by the Wisconsin Supreme Court's decision in *State v. Beamon*, 347 Wis. 2d 559. There the jury was erroneously instructed that, in order to find the defendant guilty of fleeing an officer, it also had to find that he increased the speed of his vehicle after law enforcement officers began pursuit. There was no evidence that the defendant increased the speed of his vehicle once the pursuit began. The fleeing statute did not, however, require the state to prove that the suspect increased his speed. *Id.* ¶ 1.

In such a situation, the court held, it must determine whether an instruction that did not accurately reflect the controlling law was harmless. If the court determines that the instructional error was harmless, it then evaluates the sufficiency of the evidence under the correct legal standard; not the erroneous standard as set forth in the instruction. *Id.* ¶¶ 19-20.

> When reviewing the sufficiency of the evidence, we cannot rely on an erroneous statement of the statute in the jury instructions as our standard,

> because doing so would, in effect, allow the parties and the circuit court in that case to define an ad hoc, common law crime. *Cf. State v. Baldwin*, 101 Wis. 2d 441, 446–47, 304 N.W.2d 742 (1981) (holding that conviction required proof beyond a reasonable doubt of statutory requirements of a criminal offense, rather than requirements as set forth in the complaint and information). Allowing parties or courts to establish the requirements necessary to constitute a crime is contrary to the established principle in Wisconsin that there are no common law crimes and that all crimes are defined by statute. *See* Wis. Stat. § 939.10 (abolishing common law crimes); Wis. Stat. § 939.12 (defining crime as "conduct which is prohibited by state law").

Id. ¶ 23.

Once it determines the instructional error was harmless, the reviewing court,

> will not overturn the jury's verdict "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" based on the statutory requirements of the offense. *See Fonte*, 281 Wis.2d 654, ¶ 10 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)) (internal quotation marks omitted).

Id. ¶ 20. [2]

[2] Williams does not cite, let alone discuss, the all-important *Beamon* decision in his brief. He has chosen to ignore it. This was not an oversight. Williams cited and tried to distinguish *Beamon*, rather unpersuasively, in his postconviction motion (30:6-7, ¶¶ 14-15; A-Ap. E, at 6-7). He apparently thought better than to try to do so again on appeal. The court in *Beamon* easily distinguished the case so heavily relied on by Williams here, *State v. Wulff,* 207 Wis. 2d 143, 557 N.W.2d 813 (1997). *State v. Beamon*, 347 Wis. 2d 559, ¶¶ 42-45 (where the sexual assault instructions correctly stated the law, but the evidence introduced at trial (of fellatio) did not support the specific type of sexual assault the instructions told the jury to find (anal or genital intrusion). Also, *Wulff* did not address the issue of harmless error. *Id.* ¶ 46.

The use of the word "and" rather than "or" to define the elements of attempted armed robbery as they related to Williams's liability for felony murder was erroneous. *See id.* ¶ 34 (the instruction erroneously required the state to prove the driver received a visual "and" audible signal from a marked police vehicle, when the fleeing statute only required it to prove he received a visual "or" audible signal from a marked police vehicle).

Overall, however, the trial court properly instructed the jury that one is guilty of felony murder if someone is killed in the course of committing an attempted armed robbery (49:17, 21-22). As discussed above, the parties also correctly understood the breadth of liability under § 940.03 (49:45, 52, 64-65). *See State v. Beamon,* 347 Wis. 2d 559, ¶ 38 ("it may be said that the effect of the erroneous instructions were [sic] ameliorated by the jury having heard multiple correct statements of the law.").

As did the erroneous fleeing instruction in *Beamon,* the felony murder instruction here forced the state to prove more than what § 940.03 required. "If an error that relieves the State of part of its burden can be harmless, then, logically, a jury instruction that directs the State to prove *additional* requirements also may be subjected to a harmless error analysis. *See Zelenka,* 130 Wis.2d at 48–49, 387 N.W.2d 55; *State v. Courtney,* 74 Wis.2d 705, 715–16, 247 N.W.2d 714 (1976)." *Id.* ¶ 25. It is clear beyond a reasonable doubt that Williams would have been convicted absent the instructional error that, as in *Beamon,* imposed an additional requirement for felony murder liability on the state. *Id.* ¶¶ 27, 37.

Had the trial court correctly employed "or" in the instruction, the jury would still have found Williams guilty of the felony murder of Robinson during the course of committing the attempted armed robbery of Parker. The jury would have done so even if it believed that Robinson

was not being robbed, or was not the "owner" of any of the marijuana strewn about the house. *But see* Wis. Stat. § 943.32(3) (Robinson would be the "owner" of any marijuana he possessed, even if illegally). The state's proof of felony murder during the course of attempting to rob Parker was overwhelming. In contrast, Williams put on no defense other than to argue, successfully, that the state failed to meet its burden of proving him guilty of first-degree intentional homicide and first-degree reckless homicide beyond a reasonable doubt.

A properly instructed rational jury would have found Williams guilty beyond a reasonable doubt of the felony murder of Robinson. One need only compare the overwhelming evidence presented at trial with the correct statutory requirements for felony murder liability to arrive at that conclusion. *State v. Beamon*, 347 Wis. 2d 559, ¶ 28. *See* Wis. JI-Criminal 1031. The evidence was sufficient for a rational jury to convict.[3]

[3] Trial counsel's failure to object to the state's alternative theory of guilt, that an attempted armed robbery *of Robinson* need not be proven to find him guilty of Robinson's felony murder so long as the state proved there was an attempted robbery of Parker (49:45, 64-65), was non-prejudicial even if it was deficient performance. Any objection to the prosecutor's argument would have been without merit; or would have resulted in amending the instructions to replace "and" with "or." *See State v. Gordon*, 262 Wis. 2d 380, ¶ 41.

II. WILLIAMS FAILED TO ALLEGE SUFFICIENT FACTS IN HIS POSTCONVICTION MOTION TO SUBSTANTIATE HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO STRIKE FOR CAUSE, OR NOT EXERCISING A PEREMPTORY STRIKE AGAINST, JUROR NO. 12.

A. The relevant facts.

Juror No. 12 identified himself as a single customer service representative from Oak Creek with no prior jury experience. Juror No. 12 has never been the victim of a crime or a witness, and has no friends or relatives in the criminal justice system or in law enforcement. He likes to read, watch TV, movies and sports (46:28).

The prosecutor (Stingl) advised the panel of prospective jurors collectively that they will "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. You may have to look at other photographs" (46:54). He asked whether anyone would "not want to do that" (*id.*). Juror No. 21 answered that she has four boys. "And I just don't like to see stuff like that." (*id.*). In response to follow-up questions from the prosecutor, Juror No. 21 answered: "I don't know if I can look at the pictures" (46:55). Juror No. 6, when asked whether she would "have trouble doing it," answered: "As far as the pictures, I can't do that" (*id.*).

At this point, Juror No. 12 commented: "It would be totally gross, grossed out in that situation" (46:56). When the prosecutor asked whether Juror No. 12 did not "think that you could sit through it and make a decision in this case," he answered: "Right." Juror No. 8 felt the same way (*id.*).

The second prosecutor (Santiago) later asked an open-ended question of the entire panel whether anyone believes, "they would not be able to listen to all the facts, to hear the testimony and weigh the evidence and make a decision in this case? Anyone feel they would not be able to do that? I see no hands" (46:65-66). Pertinent here, Juror No. 12 did not raise his hand.

Defense counsel revisited the graphic photograph issue with Juror Nos. 6 and 12 later on. Juror No. 6 said she would be "[u]ncomfortable" looking at autopsy photos (46:80-81). When counsel asked how this would affect the juror's deliberations if picked, Juror No. 6 answered: "Probably something I'll think about all day." (46:81). When counsel asked whether having to see the photos would make the juror "angry" at Mr. Williams or at the prosecutor, Juror No. 6 answered: "Not angry at anybody because I don't know" (*id.*). Juror No. 6 answered, "Yes" to defense counsel's question: "Just it would be a difficult job to do" (*id.*). Counsel then asked Juror No. 12, "what would be your emotional response be [sic] to have to look at those pictures?" Juror No. 12 answered: "*Same as hers.* See those pictures would be gross" (*id.*) (emphasis added).

Defense counsel then asked Juror No. 12 how viewing the photos might affect deliberations. Juror No. 12 answered: "Really hard to say. I don't know if I would have a bias or not" (46:82). This prompted the court to comment that everyone agrees "they're not pleasant pictures to look at," but asked "whether or not it would impair your ability to come to [a] fair and just result in the matter after listening to the testimony" (*id.*). Juror No. 12 answered: "I think I would be biased a little bit" (*id.*). Juror No. 12 elaborated: "Just in general, you know, it would be gross. Just a picture itself." (*id.*).

Defense counsel followed up by asking: "Biased in what way?" Juror No. 12 answered, "[t]hat something bad happened." (*id.*). When defense counsel then asked whether the juror would be biased against Mr. Williams or the state, Juror No. 12 answered: "More towards the

victims." (46:83). When counsel asked whether this meant the juror "would feel sorry for" the victims, Juror No. 12 answered: "Yes. Based on looking at a picture" (*id.*).

Defense counsel asked similar questions of Juror No. 9 about the impact of the photos. Juror No. 9 answered: "It would be hard to look at them." When defense counsel followed up by asking whether it would affect the juror's deliberations, Juror No. 9 answered: "I don't think it would" (*id.*).

Juror No. 12 remained on the final panel chosen (46:91-92).

Williams insists that his trial counsel should have moved to strike Juror No. 12 for cause, or at least exercised a peremptory strike against Juror No. 12, and counsel's failure to do so was prejudicially deficient performance. The trial court rejected this challenge without an evidentiary hearing.

B. The applicable law and standard for review.

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this court *de novo. State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

To be sufficient to warrant further evidentiary inquiry, the postconviction motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically allege within its four corners material facts answering the questions who, what, when, where, why and how Williams would successfully prove at an evidentiary hearing that he is entitled to a new trial: "the five 'w's' and one 'h'" test. *Id.* ¶ 23. *See State v. Balliette*,

336 Wis. 2d 358, ¶ 59; *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62.

If the motion is insufficient on its face, presents only conclusory allegations, or even if facially sufficient the record conclusively shows that Williams is not entitled to relief, the trial court could in the exercise of its discretion deny the motion without an evidentiary hearing, subject to deferential appellate review. *State v. Balliette*, 336 Wis. 2d 358, ¶ 50; *State v. Allen*, 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). *See State v. Roberson*, 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111.

To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the motion must allege with factual specificity both deficient performance and prejudice. *State v. Balliette*, 336 Wis. 2d 358, ¶¶ 20, 40; *State v. Bentley*, 201 Wis. 2d at 313-18. Williams could not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d at 313, 317-18; *Levesque v. State*, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974). The motion had to allege with factual specificity how and why counsel's performance was both deficient and prejudicial to the defense. *State v. Balliette*, 336 Wis. 2d 358, ¶¶ 40, 59, 67-70; *State v. Bentley*, 201 Wis. 2d at 313-18; *State v. Saunders*, 196 Wis. 2d 45, 49-52, 538 N.W.2d 546 (Ct. App. 1995). Even when the allegations of deficient performance are specific, the trial court in its discretion may deny the motion without an evidentiary hearing if the allegations of prejudice are only conclusory. *State v. Bentley*, 201 Wis. 2d at 313-18. *See State v. Balliette*, 336 Wis. 2d 358, ¶¶ 40, 56, 70.

To establish deficient performance, it is not enough for Williams to prove his attorney was "imperfect or less than ideal." *State v. Balliette*, 336 Wis. 2d 358, ¶ 22. The issue is "whether the attorney's performance was

reasonably effective considering all the circumstances." *Id.* Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. Williams had to make specific allegations in his motion to overcome that strong presumption, thereby entitling him to an evidentiary hearing. *Id.* ¶ 78. *See Burt v. Titlow*, __ U.S. __, 134 S. Ct. 10, 17 (2013). "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

Williams had to also specifically allege prejudice in his motion because it would be his burden to affirmatively prove by clear and convincing evidence at an evidentiary hearing that he suffered actual prejudice as the result of counsel's proven deficient performance. He could not speculate. *State v. Balliette,* 336 Wis. 2d 358, ¶¶ 24, 63, 70.

C. The trial court properly denied the ineffective assistance challenge without an evidentiary hearing.

1. Williams's motion failed to overcome the presumption of reasonably competent performance.

The ineffective assistance allegation in Williams's postconviction motion was hopelessly conclusory and did not overcome the presumption of competent performance. It failed to allege with any factual specificity subjective or objective bias on the part of Juror No. 12.

A prospective juror must be struck for cause if he or she exhibits bias. There are three forms of bias: statutory, subjective, and objective. *State v. Funk*, 2011 WI 62, ¶¶ 36-38, 335 Wis. 2d 369, 799 N.W.2d 421;

State v. Faucher, 227 Wis. 2d 700, 716-21, 596 N.W.2d 770 (1999). *Also see State v. Mendoza*, 227 Wis. 2d 838, 848-50, 596 N.W.2d 736 (1999); *State v. Kiernan*, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999). The latter two forms of bias — subjective and objective — are at issue here.[4]

> The second type of bias is termed subjective bias. This category of bias inquires whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. *Ferron*, 219 Wis. 2d at 498; *see also State v. Delgado*, 223 Wis. 2d 270, 282, 588 N.W.2d 1 (1999). 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. These observations are best within the province of the circuit court. On review, we will uphold the circuit court's factual findings regarding a prospective juror's subjective bias unless they are clearly erroneous.

State v. Kiernan, 227 Wis. 2d at 745.

A prospective juror is not subjectively biased simply because he equivocated in response to inquiries into his impartiality. This is so because

> a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality. Indeed, we expect a circuit court to use voir dire to explore a prospective juror's fears, biases, and predilections and fully expect a juror's honest answers at times to be less than unequivocal.

State v. Erickson, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999).

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[4]Williams does not argue that Juror No. 12 fell within that category of jurors who are statutorily deemed to be biased. *See* Wis. Stat. § 805.08(1). *Also see State v. Kiernan*, 227 Wis. 2d at 744.

Subjective bias is a factual determination of the circuit court which will be upheld on appeal unless clearly erroneous. *State v. Mendoza*, 227 Wis. 2d at 849.

Objective bias occurs if a reasonable juror in the prospective juror's position objectively could not judge the case in a fair and impartial manner. *See State v. Mendoza*, 227 Wis. 2d at 850. This test assumes that the prospective juror has formed an opinion or has some knowledge of the case. The question then becomes whether a reasonable person in the prospective juror's position could set that opinion or that knowledge aside and decide the case in a fair and impartial manner. *See id.* The issue of objective bias presents a mixed question of fact and law; this court gives weight to the circuit court's determinations on objective bias and should not reverse unless, as a matter of law, a reasonable judge could not have reached such a conclusion. *Id.; State v. Kiernan*, 227 Wis. 2d at 745.

Williams failed to sufficiently allege subjective or objective bias. He offered no proof Juror No. 12 had any opinion as to guilt or prior knowledge of the case. *State v. Kiernan*, 227 Wis. 2d 745. According to the post-conviction motion, trial counsel in response to an e-mail from appellate counsel said he did not strike Juror No. 12 because, if biased at all, the juror could just as easily have been biased against the state for introducing and making him view the photographs (30:10, ¶ 25; A-Ap E, at 10, ¶ 25). Williams claims trial counsel's reasoning "was flawed," but does not adequately explain why (*id.*, ¶ 26).

Juror No. 12 never expressed an opinion as to guilt or innocence, and had no prior knowledge of the case. Juror No. 12 never said he would be biased against Williams or in favor of the state. Juror No. 12 indeed assured the court he would *not* be biased against either party. Juror No. 12 had no connection with the victims or with anyone else involved in the case. Juror No. 12 was not a crime victim and did not know anyone who was a victim of the type of crimes alleged. Juror No. 12 simply

said he did not want to see graphic photos because they would be "gross" and might make him "feel sorry" for the victims. That makes Juror No. 12 a human being, not a hopelessly biased juror. Graphic photographs of any nature – of homicide victims, child pornography, a gruesome crime scene – are not pleasant for any juror to have to examine, and they might generate sympathy for the victims. The photos might even, as defense counsel strategically believed, make the juror angry at the prosecutor for introducing them. That does not render such a juror unable to render a fair and impartial verdict based on the evidence and law. Defense counsel could reasonably have determined from Juror No. 12's answers and demeanor that this juror could be fair and impartial, despite the juror's expressed discomfort at having to view graphic photographs. *See State v. Lindell*, 2001 WI 108, ¶ 36, 245 Wis. 2d 689, 629 N.W.2d 223; *State v. Faucher*, 227 Wis. 2d at 717-18. *Compare State v. Carter*, 2002 WI App 5, ¶¶ 3, 8, 15, 250 Wis. 2d 851, 641 N.W.2d 517 (in a sexual assault trial, a prospective juror said he would be biased because his brother-in-law had been sexually assaulted; counsel was ineffective for not having him removed from the jury).

Williams overreacts to Juror No. 12's use of the word "bias" in describing his distaste at having to examine graphic photographs. The gist of his comments does not reflect a "bias" against anyone, as that concept is understood in the law, but merely a strong preference for not having to view such "gross" photographs if it could be avoided. Juror No. 12 indeed agreed with Juror No. 6's answer seconds earlier that she would not be "angry" at anyone, just that it would be "a difficult job" to have to view such photographs (46:81). Trial counsel could reasonably determine that Juror No. 12's expression of "bias" was nothing more than his expression of discomfort and queasiness, feelings shared by several other prospective jurors, at having to view such photographs. He could otherwise be fair and impartial.

If defense counsel must strike every prospective juror who expresses discomfort at having to view graphic photographs in a homicide case, and who might develop some sympathy for the victims, only the cold and heartless would remain on the jury. *Compare State v. Carter*, 250 Wis. 2d 851 (prospective juror's expression of bias due to sexual assault of a relative likely favored the state). Trial counsel reasonably did not overreact to Juror No. 12's "bias" and decided to let him serve.

2. Williams's motion failed to sufficiently allege prejudice.

Williams failed to sufficiently allege prejudice because, as the trial court found, the photographs shown to the jury "were not particularly gory or gruesome" (39:3; A-Ap. B, at 3). The trial court was correct (37:2-26). That being the case, the concerns expressed by Juror No. 12 during *voir dire* never came to fruition and that juror in all reasonable probability held no bias against anyone during deliberations because the photos were tamer than what he had feared. They were likely tamer than many graphic depictions on TV shows and in movies that Juror No.12 said he liked to watch (46:28).

Finally, the trial court instructed the jurors at the close of trial to "[f]ree your minds of all feelings of sympathy, bias or prejudice" (49:73). Juror No. 12 presumably followed that instruction and freed his mind of any "bias" the photographs may have caused. *See State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994); *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

In conclusion, Williams failed to sufficiently allege prejudice because his motion failed to show that trial counsel's performance at *voir dire* resulted in the seating of a juror who was biased against him. *State v. Koller*, 2001 WI App 253, ¶ 14, 248 Wis. 2d 259, 635 N.W.2d

838. Juror No. 12 was one of the twelve fair and impartial citizens who found Williams not guilty of first-degree intentional and first-degree reckless homicide.

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ALLOWED THE JURY TO VIEW AUTOPSY AND CRIME SCENE PHOTOGRAPHS, ESPECIALLY SINCE WILLIAMS DID NOT OBJECT.

The photographs of the scene and of the autopsies were highly relevant to resolving the many factual issues before the jury. Trial counsel apparently agreed, because he did not object. By not objecting, Williams forfeited any right to appellate review of this claim except in the context of an ineffective assistance challenge where he had to prove both deficient performance and prejudice. *See* "I. E.," above. Williams's motion failed to sufficiently allege deficient performance and prejudice.

This case involved multiple charges involving two homicide victims. There were no eyewitnesses. The gun used was never recovered (48:53-54). The jury had to determine whether Williams was a party to either or both homicides. If he was a party, the jury then had to decide what degree of homicide Williams and his accomplices committed as to either or both victims: first-degree intentional, first-degree reckless, or felony murder. Williams did not testify and he put on no defense (48:73-74, 86). Williams argued that he was not guilty of any of the charged, or lesser-included, offenses and that the state failed to prove its case beyond a reasonable doubt (49:49-63).

The photographs assisted the jury in determining when, where, how and why the victims died. They assisted the jury in determining Williams's (and his cohorts') state of mind and degree of culpability (46:105-

07, 112-37, 149-50; 47:12-17, 89-92, 98-102, 106-10; 48:24-25, 29-30; 53).

Williams faults his trial attorney for not keeping out the photographs with an offer to stipulate to the manner and cause of death. Had counsel made such an offer, it would rightfully have fallen on deaf ears. The state would have rejected the offer outright because the state bore the burden of proving its case beyond a reasonable doubt and this was important evidence. Williams's defense was, after all, that the state failed to prove *any* of the charges beyond a reasonable doubt (49:49-63). The state had to use all relevant evidence at its disposal to prove his guilt. Defense counsel had no right to force the state to dehumanize and "dumb down" its case by stipulating away its most powerful evidence. Counsel did not perform deficiently for failing to offer a stipulation that would have been rejected.

Generally, a trial court's decision to admit photographic evidence rests within its sound discretion. *State v. Pfaff*, 2004 WI App 31, ¶ 34, 269 Wis. 2d 786, 676 N.W.2d 562; *State v. Lindvig*, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996). The decision to admit photographic evidence will not be disturbed "'unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury.'" *Id.* (quoting *State v. Hagen*, 181 Wis. 2d 934, 946, 512 N.W.2d 180 (Ct. App. 1994)).

Even though photographs may be graphic, they are properly received into evidence if they are relevant to establish the elements of the crime charged. *See Sage v. State*, 87 Wis. 2d 783, 787-90, 275 N.W.2d 705 (1979); *State v. Wallace*, 59 Wis. 2d 66, 85-86, 207 N.W.2d 855 (1973). Photographs should indeed be admitted into evidence if they will help the jury better understand the material facts. *See Sage*, 87 Wis. 2d at 788.

The photographs of the crime scene and of the autopsy were all highly relevant because they had at least some tendency to prove material facts in dispute. Wis. Stat. § 904.01. They helped the jury understand the facts. The state had to prove whether Williams and his cohorts intended to rob one or both of the victims with a dangerous weapon, caused their deaths by using a dangerous weapon, did so intentionally or recklessly, or did so in the course of attempting to commit an armed robbery. These photographs were highly relevant to prove all of those disputed issues of fact. *See State v. Linton*, 2010 WI App 129, ¶¶ 24-28, 329 Wis. 2d 687, 791 N.W.2d 222 (trial court properly exercised discretion to let the jury view a photo of deceased victim's fatal head wounds caused by a bolt cutter to prove the bolt cutter was a dangerous weapon; the photo was relevant and not unfairly prejudicial); *State v. Pfaff*, 269 Wis. 2d 786, ¶¶ 36-37 (trial court properly allowed jury to view photo of deceased victim's face in a vehicular homicide to prove victim's identity and cause of death; the photo was not particularly graphic or gory).

A defendant's willingness to stipulate to an element of the crime does not render the photographs inadmissible. *State v. Pfaff*, 269 Wis. 2d 786, ¶ 35; *State v. Lindvig*, 205 Wis. 2d at 108. *See State v. Veach*, 2002 WI 110, ¶¶ 77, 121, 255 Wis. 2d 390, 648 N.W.2d 447 ("other acts" evidence is admissible to prove the elements of the charged offense even when those elements are not in dispute because the state must prove all the elements beyond a reasonable doubt); *id.* ¶¶ 118, 125 (the state and trial court are not obligated to accept a defense offer to stipulate to elements of the offense; the state has the right to present its case as it sees fit). These photographs were all properly received into evidence to prove material facts and the elements of the many offenses considered by the jury. Unlike a bland stipulation, the photographs put a human face on the victims. Their high probative value was not "substantially" outweighed by any danger that they

might cause "unfair" prejudice to Williams. Wis. Stat. § 904.03.

Finally, there was no prejudice because as the trial court found on postconviction review, the photographs actually shown to the jury "were not particularly gory or gruesome and that there was nothing unduly prejudicial in their use" (39:3; A-Ap. B, at 3). Williams offer nothing to show that this finding of fact was clearly erroneous. The photos shown to the jury indeed firmly support the trial court's finding (37:2-26). They make the victims human, but are not such as to gratuitously inflame passion or bias against Williams.

Williams's motion failed to present sufficient factual allegations of both deficient performance and prejudice to substantiate his ineffective assistance claim. The record also conclusively shows that he is not entitled to relief. The trial court properly denied the motion without an evidentiary hearing.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin, this 25th day of August, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,576 words.

Dated this 25th day of August, 2014.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of August, 2014.

_____
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