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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The sufficiency of the evidence must be measured against the jury instructions.

This case is not as complex as the State makes it. Simply put, the jury was instructed that to find Williams guilty of the felony murder of Robinson in Count 2, it first had to find beyond a reasonable doubt that Williams or his cohorts attempted to rob Robinson. The State cannot point to any evidence that anyone attempted to rob Robinson because there is none. Both common sense and the law dictate that the felony murder conviction against Robinson cannot stand.

Nevertheless, the State attempts to salvage Count 2 in various ways. It argues:

- *The jury instructions don't matter:* The jury *would have* found Williams guilty of Robinson's death if it had been instructed that Robinson's death flowed from the robbery of Parker. State's Brief I-C.

- *The facts don't matter:* Even though there was no evidence that Williams or his cohorts attempted to rob Robinson, maybe the jury could have concocted a possible scenario. State's Brief Heading I-D.

- *Waiver:* For unarticulated reasons, Williams' attorney should have objected to jury instructions that were indisputedly legal, but which made it more difficult to convict Williams of the felony murder of Robinson. State's Brief Heading I-E.

- *Harmless Error:* This theory has two parts: First, the jury instructions were erroneous because, although the court didn't, it *could* have instructed that the robbery of Parker could serve as the underlying felony in Count 2. Second, the errors were harmless because the jury would have convicted Williams had the court actually used such an instruction. State's Brief Heading 1-F.

None of these arguments is persuasive. This court should reject them for the reasons stated below.

A. **It does not matter that, in theory, Williams could have been convicted under the felony murder statute.**

The State spends much time arguing the undisputed point that, under the felony murder statute, and the court's decisions in *Rivera* and *Oimen*,[1] Williams' conviction for the felony murder of Robinson *could have been* based on the armed robbery of Parker. But what matters is not how the statute *could have been* applied, but how it *was* applied; not how the jury *could have been* instructed, but how it *was* instructed. Regardless of what the felony murder statute allows, Williams' conviction for felony murder of Robinson cannot be upheld on the basis of a theory on which the jury was not instructed. *Chiarella v. United States*, 445 U.S. 222, 236 (1980).

Further, this excerpt from the State's rebuttal, as quoted by the State, shows, contrary to the State's claim that everyone was "on the proverbial 'same page' at trial," that

[1] *State v. Rivera*, 184 Wis. 2d 485, 516 N.W.2d 391 (1994); *State v. Oimen*, 184 Wis. 2d 423, 516 N.W.2d 399 (1994).

defense counsel did in fact state the same application of the law to the facts as did the jury instructions:

> 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. . . .

State's Brief at 11. In any case, it does not matter how the prosecution or defense counsel explained felony murder to the jury during closing arguments. The jury is presumed to follow the explanation of the law given by the court. *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).

B. **The facts matter; the State's speculation as to what could have happened cannot support the conviction on Count 2.**

As required by the jury instructions, for Williams' conviction on Count 2 to stand, there must be sufficient evidence that Robinson himself was the victim of an attempted armed robbery. In Section I-D of its brief, the State imagines various scenarios as to what conceivably could have led to Robinson's shooting. None are based on the evidence presented at trial.

First, the State speculates that Robinson may have been trying to prevent Williams and Collins from taking the marijuana. There was no evidence of this. But if there had been, it would not be enough that Robinson was protecting Parker's marijuana—the jury instructions required Robinson to be the *owner* of the property.

The State also speculates that Robinson may have been shot "when Collins tried to take marijuana he saw in Robinson's possession or at his side." This is not a reasonable inference. The State's speculation that Robinson might have been the subject of a robbery is not supported by any evidence adduced at trial. No reasonable jury could convict Williams of the felony murder of Robinson on the basis submitted to the jury, nor on the basis of any of the State's imagined scenarios.

C. **Waiver—The jury instructions were legal and therefore there was no reason for defense counsel to object.**

The State concedes that Williams properly preserved a challenge to the sufficiency of the evidence to convict him of the felony murder of Robinson. However, it argues that Williams waived his right to challenge the conviction because he failed to object to the jury instructions. State's Brief at 12-14. The State attempts to put the onus on defense counsel to have objected to the jury instruction itself, arguing that the "erroneous" instruction could have been "easily rectified." State's Brief at 14.

But it is not Williams who takes issue with the jury instruction; it is the State. There was nothing illegal about the jury instruction that was used, and the State does not suggest otherwise. The instruction was not illegal simply because it was more favorable to the defense. Defense counsel's obligation was to his client, and he had no reason to object to a valid instruction that made it more difficult to convict his client. The State does not explain why the prosecutor did not object to the jury instructions, but that was the State's call to make, not Williams'.

D. Harmless error analysis does not apply because the jury instruction was not erroneous.

In his initial brief, Williams asserted that his case is controlled by *State v. Wulff,* 207 Wis. 2d 143, 557 N.W.2d 813 (1997), which mandates that when jury instructions correctly state the law, the sufficiency of the evidence is to be measured against the instructions read to the jury, rather than the elements of the statute. The State disagrees, and maintains that Williams cannot prevail because of *State v. Beamon,* 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681, which concludes that harmless error analysis should be applied when jury instructions are erroneous.

The State is wrong. *Beamon* does not address the situation that exists in Williams case since the instructions read to Williams' jury were not erroneous. Why this matters requires a closer look at *Wulff* and *Beamon.*

In *Wulff,* the defendant was charged with having sexual contact or intercourse with an unconscious person for trying to force his penis into the victim's mouth, contrary to Wis. Stat. § 940.225(2)(d). 207 Wis. 2d at 146-47. Although such conduct fell within the statutory definition of sexual contact or sexual intercourse, the jury was not instructed that oral sex could be a form of either of those. Rather the jury was instructed that it could find Wulff guilty only if it found that he had sexual intercourse with the victim by intruding into her genital or anal opening. *Id*. at 148. Although Wulff may have engaged in sexual contact or intercourse with the victim as defined by the statute, the court reversed the conviction because there was no evidence that he engaged in sexual intercourse as defined in the instructions read to the jury. The court concluded that "we cannot affirm a criminal

conviction on the basis of a theory not presented to the jury." *Id.* at 152.

In constrast, *Beamon* is concerned with the procedure to be followed only when a jury is given an *erroneous* jury instruction. In *Beamon,* the defendant was charged with fleeing/eluding a police officer. 2013 WI 47, ¶11. The jury was instructed that to find Beamon guilty, it had to find that she eluded/fled by "increasing the speed of the vehicle." *Id.,* ¶15. Beamon argued on appeal that there was no evidence she increased her speed. *Id.,* ¶16. The court concluded that the jury instructions were erroneous because they added a new element (increasing speed) to the statute proscribing the crime. *Id.,* ¶36. This effectively created a new crime—something that was only within the province of the legislature. As the court stated:

> In contrast to *Wulff*, in which we stated that we could uphold the conviction "only if there was sufficient evidence to support guilt on the charge submitted to the jury," 207 Wis. 2d at 153, *here, the addition of a requirement created a charge that does not exist in the statutes. If we evaluated sufficiency of the evidence against the instructions given, we would be sanctioning the creation of a new crime that was not created by the legislature.* This is contrary to Wis. Stat. § 939.10, which outlaws common law crimes. Therefore, sufficiency of the evidence in Beamon's case cannot justifiably be measured against the jury instructions.

Id., ¶45 (emphasis added).

The *Beamon* court then proceded to apply the test for harmless error, but specified that harmless error analysis comes into play "where jury instructions do not accurately state the controlling law." *Id.,* ¶19.

Therefore, in Williams' case, this court must determine, "as a threshold matter, whether the jury instructions correctly stated the statutory requirements for conviction of the crime." *Id.*, ¶18. Unlike the instruction in *Beamon*, the instruction given here was not erroneous. The instructions on Count 2 properly stated a method by which Williams could commit felony murder, i.e., through first committing an attempted armed robbery of Robinson. The instruction was not erroneous simply because it did not instruct the jury on every theory that *could have* fit the statutory definition of felony murder.

The State argues that the jury instruction on Count 2 is comparable to the erroneous instruction in *Beamon* because it forced the state to prove more than what § 940.03 required. State's Brief at 19. However, the instruction in *Beamon* was not erroneous because it required "more" than the statute, but only because it added a new element to the crime. In Williams' case, the instruction did not proscribe an additional element of felony murder, but instructed the jury on a method by which an existing element could be met, and completely omitted the method for which there was testimony.

The *Beamon* court recognized the distinction between that case and *Wulff*. It stated:

> The primary distinction between *Wulff* and our decision today is the nature of the jury instructions in each case. *In Wulff, the instructions did not add a requirement to the applicable law; instead, the instructions properly stated one of the methods by which a defendant could commit second-degree sexual assault and completely omitted the method for which there was testimony*. Therefore, in *Wulff*, the jury was asked to apply the correct law to the fact adduced at trial, and reached a conclusion contrary to the evidence. In that situation, the proper standard for evaluating the sufficiency of the

> evidence was the jury instructions, because the instructions conveyed a correct statement of the law, and thereby informed the jury of the requirements of an actual statutory offense.

Beamon, 2013 WI 47, ¶44 (emphasis added).

Just as genital or anal intrusion is one way to fulfill the "sexual intercourse" element of second-degree sexual assault under § 940.225(2)(d) (as in *Wulff*), evidence of an attempted armed robbery of Robinson is one way to prove an element of the felony murder of Robinson. ~~I~~t does not matter whether the defendant *could have been* convicted under another theory. Indeed, the court in *Wulff* agreed that the alleged conduct of the defendant *could have* met the sexual intercourse element of second-degree sexual assault under the statute, and even conceded that there was sufficient evidence to sustain a conviction on that theory. The court stated:

> Although there is no evidence to prove an attempted genital or anal intrusion, admittedly there was evidence sufficient to sustain a conviction on review if the jury had been instructed to deliberate the fellatio intercourse or sexual contact theories of liability. However, in *Chiarella v. United States*, 445 U.S. 222, 236 (1980), the Court stated, "we cannot affirm a criminal conviction on the basis of a theory not presented to the jury."

Wulff, 207 Wis. 2d at 152.

It follows that this court cannot uphold Williams' conviction of the felony murder of Robinson based on the attempted armed robbery of Parker, as that theory was not submitted to the jury.

II. Williams' attorney was ineffective in failing to move to strike Juror #12.

The State claims that Williams "failed to allege with any factual specificity subjective or objective bias on the part of Juror #12." State's Brief at 25. Subjective bias is revealed by the prospective juror on voir dire; it refers to the prospective juror's state of mind. *State v. Carter*, 2002 WI App 55, ¶7, 250 Wis. 2d 851, 641 N.W.2d 517. Here, in response to the court's statement that "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 stated "I think I would be a little biased," and that his/her bias would lie "towards the victims." (46:82-83).

When a juror openly admits his bias and his partiality is never questioned, the prospective juror is subjectively biased as a matter of law. *Id.*, ¶12. A failure to object or to further question a juror may be raised as a claim of ineffective assistance of counsel. *Id*., ¶14. Here, as in *Carter*, defense counsel did not further question Juror #12 to determine whether he/she could set aside any bias.

The State cites *State v. Erickson*, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), for its statement that "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." But in Williams' case, Juror #12 openly admitted that he/she *would* be biased, while *Erickson* concerned a juror who stated just the opposite—when asked if she could be fair and impartial, the juror stated, "I think so." *Id*. at 763 n. 4. In contrast, Juror #12 gave unambiguous statements of subjective bias, like the juror in *Carter*.

The State speculates that Juror #12, "in all reasonable probability held no bias against anyone during deliberations

because the photos were tamer than what he had feared." State's Brief at 29. This is unsupported by the record, which contains no references Juror #12's demeanor that would suggest an impartiality after openly admitting that he would be unable to sit through the case, that he would be biased in a way that would effect his ability to be fair and impartial, and that his bias would lie "towards the victims." *Compare Carter*, 2002 WI App 55, ¶13.

The State cites to *State v. Koller*, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838. In that case, however, Koller conceded that the record did not support a finding that any of the jurors who sat on his case were biased, but nonetheless asserted that his trial counsel's failure to properly pursue indications of possible bias during voir dire might have resulted in a biased juror escaping detection. *Id*., ¶11. Koller was unable to show prejudice because he was unable to show "whether counsel's performance resulted in the seating of a biased juror." *Id*., ¶14.

In contrast, Juror #12's responses constitute an unambiguous statement of subjective bias. A guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair. *Carter*, 2002 WI App 55, ¶15.

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

The State claims that the crime scene and autopsy photographs "assisted the jury in determining when, where, how, and why the victims died." State's Brief at 30. However, the photographs do not demonstrate when or why the victims died. They could not show where the victims died without testimony to identify the locations in the photographs.

And they do not show how the victims died—this was established by the testimony of Dr. Linert.

The State further argues that the photographs "assisted the jury in determining Williams's (and his cohorts') state of mind and degree of culpability." State's Brief at 30. Indeed, the State calls the photographs "its most powerful evidence," despite the fact that they were not necessary to establish any element of the crime. State's Brief at 31.

But what makes the photographs so powerful is that, as the State further states, "the photographs put a human face on the victims." State's Brief at 32. Putting a human face on the victims does not give the photographs probative value. Rather, it goes to their tendency to generate sympathy for the victims and prejudice the defendant.

Finally, the State argues that "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." State's Brief at 33. However, being "particularly gory and gruesome" is not synonomous with being prejudicial. What makes the photographs prejudicial is that, as the State said, they "put a human face on the victims."

CONCLUSION

For the aforementioned reasons, Williams' felony murder conviction as to Count 2 should be dismissed with prejudice. Additionally, a new trial should be ordered as to the remaining counts to correct the prejudicial errors of trial counsel.

Respectfully submitted this 18th day of September, 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 2,984 words.

_____
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 paper copy of the brief.

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