STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2014AP001099-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MALTESE LAVELE WILLIAMS

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS, REVIEWING 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

John A. Pray
State Bar No. 01019121
Attorney for Defendant-Appellant

Criminal Appeals Project
Frank J. Remington Center
Univ. of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-7461

Table of Contents

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Constitution

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2014AP001099-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MALTESE LAVELE WILLIAMS,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS, REVIEWING 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

ISSUES PRESENTED

1) Under the instructions read to the jury, was there sufficient evidence to convict Williams of the 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 victims upon seeing graphic photographs of their bodies?

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

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

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 in response to 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). 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 nor 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 objection to the admission of these photographs on the grounds that the photographs had

[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.

the potential for arousing 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) (58:39-40). 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 (58:2).

On the night of the incident, Collins called Williams, seeking to purchase some marijuana (48:32-33). Williams

[2] Document 58 in 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. Unless otherwise specified, all cites to Document 58 in this brief refer to the transcript not the DVD.

agreed to introduce Collins to Parker (48:33). Dixon later joined them on the walk to Parker's house (58:3).

Williams first told police that their only purpose in going to Parker's house was to purchase marijuana (48:33; 58:13, 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 (58:28). Williams said that on their way to Parker's house, he never saw a gun (58:9). However, when asked if he knew whether anyone had a gun, he said, "I ain't slow." (58:29). Williams said that he was "just supposed to get the weed," and that no one was going to be hurt (58:29).

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 (58:4). Parker then instructed Williams and Collins to wait in the living room while he went to the kitchen (58:5). While waiting for Parker, Williams noticed a man—Robinson—who was sleeping on the couch. Williams had never seen Robinson before (58:5).

Parker then invited Williams to the kitchen to inspect the marijuana (58:14). 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." (58:14).

Parker refused to surrender his marijuana to Collins and tried walking past Collins towards the living room. (58:14). 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 (58:14-15).

After hearing Collins fire 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. (58:22). As Williams walked by, Collins said something to Williams to the effect of "Get that nigga." (58:26). Uncertain what Collins meant, Williams left Parker's house and joined Dixon, who was still waiting outside (58:24). Williams did not take any of the marijuana, but left it on the floor (58:21).

As Williams and Dixon started to leave, Williams heard another gunshot (58:15). Williams then turned around and saw Collins crash out of the front window (58:6). 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, to which Collins replied that he had "ditched it somewhere." (48:37).

Jury Instructions and 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 each victim (49:7-25).

As to the felony murder counts, the instructions specified that in order to find Williams guilty of the felony murder of Robinson (Count 2), it had to find that Williams (or his co-actor) attempted to commit an armed robbery of Robinson (49:17). (The same restriction applied to Parker as well). Specifically, the instructions stated:

> 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.

(49:19-22) (emphases added). Shortly thereafter, the court instructed the jury that the robbery must have been done "forcibly":

> 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 in taking and carrying away the property.

The jury found Williams guilty of two counts of felony murder (Count 1 as to Parker, Count 2 as to 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 the following consecutive terms:

Count 1: 19 years (13 years initial confinement plus 6 years extended supervision).

Count 2: 19 years (13 years initial confinement plus 6 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 an armed robbery against Robinson, as required by the jury instructions (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/her to be biased toward the victims (30:9).

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

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).

Williams subsequently appealed. The court of appeals certified the case to the Wisconsin Supreme Court. (Attached as Appendix F). In the certification, this court was asked to determine whether the sufficiency of the evidence should be measured against the instructions that were read to the jury, as

[3] Since the circuit court denied the postconviction without an evidentiary hearing, it may be necessary for the court to examine whether the motion alleged sufficient facts to warrant a hearing. Therefore, the postconviction motion (without its lengthy appendix) is attached as Appendix E. *See* Rule 809.19(2).

the court did in *State v. Wulff*, 207 Wis. 2d 143, 153, 557 N.W.2d 813 (1997), or against the statutory requirements, as the court did in *State v. Beamon*, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681. In a footnote, the court of appeals stated that certification was not warranted on the two other issues raised in the case: one regarding a biased juror and one regarding counsel's failure to object to crime scene photos. On December 18, 2014, this court granted certification, accepting for consideration all issues raised before the court of appeals.

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. Under the instructions read to the jury, there was insufficient evidence to convict Williams of felony murder as to Robinson.

1. The felony murder jury instructions

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).

(49:17). The court then further instructed:

> 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).

If the instructions had stopped with the above, the jury could have found Williams guilty of the felony murder of Robinson if it found that his death was caused by an attempt to commit an armed robbery against *either* Robinson *or* Parker.

However, the ensuing instruction specified that to find Williams guilty of the felony murder of Robinson (Count 2), the jury had to find that Williams (or his co-actors) intended to commit an armed robbery against Robinson, not from Parker*:* The instructions told the jury that:

> 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

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

> 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.

(49:19) (emphases added) (Appendix C). Shortly thereafter, the court instructed the jury that the robbery must have been done "forcibly":

> 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 in taking and carrying away the property.

(49:20) (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. There was no such evidence, as set forth in point heading (3), below. But first, a threshold issue must be addressed: whether, in deciding if the evidence was sufficient, it should be measured against the instructions read to the jury, or against the statute that was charged. That is the topic of the next section.

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

The court of appeals certified Williams' case to this court to determine whether the sufficiency of the evidence should be measured against the instructions that were read to the jury, or against the statutory requirements of the offense

charged. Williams asserts that it is the jury instructions that must control.

As a general matter, the principle that evidence presented at trial must be measured against the jury instructions is firmly established. Over a century ago, the United States Supreme Court warned of the dangers in allowing a jury to ignore the court's instruction of the law, stating:

> Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well the facts,—if the function of the court be only advisory as to the law,—why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law?
>
> Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves.

Sparf v. United States, 156 U.S. 51, 101 (1895). This basic principle has been often repeated. *See Rewis v. United States*, 401 U.S. 808, 814 (1971); *Dunn v. United States*, 442 U.S. 100 (1910) (to uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process); *Chiarella v. United States*, 445 U.S. 222, 236 (1980) ("we cannot affirm a criminal conviction on the basis of a theory not presented to the jury.")

The circuit court's ruling in Williams' case violates this fundamental principle. Although the jury was told that its

decision must be based solely on the evidence as presented at trial and the law as related in the instructions,[5] there was no evidence supporting the verdict as measured against those instructions.

Recently, this court decided *State v. Beamon*, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681. Although the controversy in *Beamon* differs significantly from the controversy in Williams' case, the court of appeals based its certification on how *Beamon* should be interpreted in conjunction with this court's earlier decision in *State v. Wulff*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997). The certification stated:

> We certify this case to the supreme court because we are uncertain which of two decisions is controlling: *State v. Wulff*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997) or *State v. Beamon*, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681. The issue is whether, under the circumstances here, a sufficiency of the evidence challenge requires us to measure the evidence against the instructions the jury received, as the court did in *Wulff*, or instead against statutory requirements, as the court did in Beamon.

A correct analysis of *Wulff* and *Beamon* reveals a critical distinction between the two cases. That distinction leads to the conclusion that the outcome of Williams' case court must be guided by *Wulff*, not *Beamon*.

---

[5] Before instructing the jury on the elements of the charged crimes, the court told the jury that it must "consider all the evidence received during this trial and the law as given in these instructions and these alone, guided by your soundest reason and best judgment, reach your verdicts." (48:89). The court also instructed the jury that evidence is the sworn testimony of the witnesses, the exhibits the court has received, and stipulated facts (48:89), and that "the remarks of the attorneys are not evidence." (48:93).

In *Wulff*, 207 Wis. 2d at 146, a woman accused Wulff of trying to open her mouth and force his erect penis into her mouth as she awoke from sleeping. The State subsequently charged Wulff with committing second-degree sexual assault because he had "sexual contact or sexual intercourse with a person who the defendant knows is unconscious." Wis. Stat. § 940.225(2)(d). *Id.* at 147. Wulff's conduct clearly fell within the statutory definition of "sexual intercourse" since the statute defined sexual intercourse as including fellatio:

> (b) "[s]exual intercourse" includes the meaning assigned under sec. 939.22(36) [vulvar penetration] as well as cunnilingus, *fellatio,* or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction.

Wis. Stats. § 940.225(5)(c) (emphasis added).

However, the instructions given to the jury did not present every method of violating the statute. *Id.* at 148. Instead, the instructions gave a definition of "sexual intercourse" that did not include fellatio. Those instructions told the jury that "sexual intercourse" means 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.* (emphasis added). Thus, to find Wulff guilty under the instruction, the jury had to find that he intruded into the victim's genital or anal opening.

On appeal, Wulff argued that there was insufficient evidence that he had intruded into the victim's genital or anal opening. This court agreed, and in a unanimous decision, reversed his conviction. As the court stated, "we cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Id.* at 152. The court held that

allowing a conviction based upon evidence that is unrelated to the jury instructions violates the fundamental right to a jury trial. This 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.*

It is apparent that in *Wulff,* the jury instruction defining sexual intercourse was not erroneous. The instruction set forth a method of committing a sexual assault—intrusion into the victim's genital or anal opening—and that method was included in the statute. But since that method was not supported by the evidence at trial, reversal was required.

An entirely different situation was presented in *State v. Beamon,* 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681. In *Beamon,* the court set forth the procedure to be followed when a jury is given an *erroneous* instruction. The court held that the jury instruction used in that case was erroneous because it added a requirement to the statutory provisions. *Id.* at ¶ 3.

In *Beamon,* the defendant was charged with fleeing/eluding a police officer under Wis. Stat. § 346.04(3). That statute provides:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

Citing *State v. Sterzinger*, 2002 WI App 171, ¶ 9, 256 Wis. 2d 925, 649 N.W.2d 677, the *Beamon* court explained the offense as having three elements:

> 1. No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle,
> 2. shall knowingly flee or attempt to elude any traffic officer,
> 3. by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians.

Beamon, 2013 WI 47, ¶ 30. The court then explained that the *second* requirement (knowingly fleeing or attempting to elude) can be violated by one of three ways or methods:

1. By willful or wanton disregard of the signal so as to interfere with or endanger the officer, vehicles, or pedestrians; or
2. By increasing the speed of the vehicle; or
3. By extinguishing the lights of the vehicle.

Id. at ¶ 35.

In *Beamon's* case, the jury was erroneously instructed that to find guilt, it had to find that the defendant "fled by willful disregard of the visual or audible signal so as to interfere with or endanger the traffic officer *by increasing the speed of the vehicle to flee."* *Id.* at ¶ 33. (emphasis in original). According to the court, this instruction erroneously combined two methods to form a requirement not authorized by the statutes. The court stated:

> In the instructions in Beamon's case, the first and second methods of showing that the defendant knowingly fled or attempted to elude were erroneously set out as though

> *both* were required. The jury was therefore asked not only whether Beamon fled or attempted to elude by his willful disregard of the signal so as to interfere with or endanger, but also whether such interference or endangerment was in turn caused by Beamon having increased the speed of his vehicle.
>
> The jury instructions for proving the second statutory requirement by two different factual predicates had the effect of creating an *additional* requirement for the offense, of fleeing or eluding. This is contrary to the legislature's clear separation of the methods by which the State could show that a defendant's conduct satisfied the second statutory requirement of fleeing or attempting to elude an officer. The legislature chose alternative methods by which Wis. Stat. sec. 346.04(3) may be contravened; and therefore, we conclude that the instructions requirement of proof by two methods was erroneous.

Id. at ¶¶ 35-36 (emphasis added).

Thus, the Court concluded that the jury instructions were erroneous because, by combining two of the methods to commit the crime, the instructions added a new requirement to the statute proscribing the crime. *Id.* at ¶ 36. This effectively created a new crime—something that was only within the province of the legislature.

The consequence of finding the instruction in *Beamon* to be erroneous was that the court could then apply the test for harmless error—something that had not been done in *Wulff* where there was no erroneous instruction. Under that test, the court analyzed "whether, based on the totality of the circumstances, it is clear beyond a reasonable doubt that a rational jury, properly instructed, would have found the defendant guilty." *Id.* at ¶ 3. The court's answer in *Beamon* was that the error was harmless. *Id.* at ¶ 39.

The *Beamon* court specifically addressed *Wulff*, and distinguished it. As this court 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 facts 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 instruction, because the instructions conveyed a correct statement of the law, and thereby informed the jury of the requirements of an actual statutory offense….
>
> …
>
> 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. at ¶¶ 44-45 (emphasis added).

Thus, it is apparent that *Wulff* and *Beamon* address two different situations. *Wulff* is concerned with cases in which the jury instructions do not misstate the law while *Beamon* is concerned with cases where the jury instructions misstate the

law, and add requirements that were not authorized by the legislature in promulgating the statute.

In Williams' case, this court should measure the sufficiency of the evidence against the instructions given to the jury because, as in *Wulff*, the instruction properly described a method to commit the crime authorized by the statute. Unlike the instruction in *Beamon*, the instructions given in Williams' case were 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. 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. It 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 *Wulff* 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.

Perhaps Williams' case might have been more comparable to *Beamon* if the jury instruction had combined two methods for committing felony murder. For example, if the instruction had required the jury to find that Williams had attempted to rob both Parker and Robinson, that would have created a new requirement not in the statute, similar to the combination of two methods in *Beamon*. But that is not what the jury was instructed.

On three separate occasions, the instructions clearly tethered the murder of Parker to the robbery of Parker, and the murder of Robinson to the robbery of Robinson. This was done first by instructing that the state must prove that "Michael Parker, Count 1 and Authur Robinson, Count 2, was the owner of the property." (49:19). Second, the instructions required a guilty verdict to be based upon a finding that Williams (or his co-actor) "took property from the person of Michael Parker, Count 1, and Authur Robinson, Count 2." (49:19). Third, the instructions required a guilty verdict to be based on a finding that Williams (or his co-actor) used force against Michael Parker, Count 1, and Authur Robinson, Count 2. (49:20).

The jury instructions cannot be reasonably read to mean that a conviction of the felony murder of Robinson could be based on a finding that *both* men owned the property, as suggested as a possibility in the court of appeals' certification:

> Another possible reading of the jury instructions might be that the instructions told the jury that Williams could be found guilty of felony murder of Robinson only if Williams and his accomplices attempted an armed robbery of *both* Parker *and* Robinson. However,

> Williams does not read the instructions this way and, as far as we can tell, neither does the State.

(certification of court of appeals, at footnote 4). The court of appeals' suggestion does not pass muster. In each of the above instructions, the court interjected "Count 1" or "Count 2" immediately after giving each victim's name. This told the jury that the owner of the property had to be Parker for Count 1, and Robinson for Count 2.

Another reason for rejecting the court of appeals' suggestion is that on the first instruction ("That Michael Parker, Count 1, and Authur Robinson, Count 2, *was* the *owner* of the property"), the court used the singular verb "was" instead of the plural form of "were," and the singular noun "owner" instead of the plural form "owners." To refer to *both* victims, the instruction would have read "That Michael Parker, Count 1, and Authur Robinson, Count 2 *were* the *owners* of the property. Similarly, on the second instruction (Williams "took property from the *person* of Michael Parker, Count 1, and Authur, Count 2), the term "person" not "persons" was used.

It also should be noted that the *Beamon* court found that *Wulff* was distinguishable on another ground. As the court put it:

> Second, *Wulff* is distinguishable because the decision did not address harmless error. Although we need not decide here whether the jury instructions in *Wulff* would be subject to harmless error analysis, we note that *Wulff* preceded our decision in *Harvey*, 254 Wis. 2d 442, ¶ 49, 647 N.W.2d 189, in which we adopted the now-controlling standard for harmless error analysis.

Beamon, 2013 WI 47, ¶ 46 (*citing State v. Harvey*, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189).

The fact that the *Beamon* court noted that its decision in *Harvey* came after its decision in *Wulff* is of no moment. It simply makes no sense to apply a harmless error analysis of jury instructions when the jury instructions were not erroneous. Harmless error analysis requires an error before it can be applied, and here, there was no error in the jury instructions.

A hypothetical drives home the point. Assume a jury convicted a defendant of theft based on evidence that the defendant was found with the missing stolen property and subsequently confessed to the theft. However, assume the jury was never given an instruction on theft, but instead was given an error-free instruction on sexual assault. A reviewing court could not properly apply harmless error analysis against the instruction, because there was no error in the instruction. Should a court nevertheless use such an analysis, and conclude that the defendant would have been found guilty had there been an instruction as to theft, this would entirely usurp the defendant's fundamental right to a jury trial. What would be the point of having a jury if a court could simply impose its own ideas concerning guilt based on its view of the evidence and comparing it against the statute? Unlike what occurred in *Beamon*, this is essentially what happened in *Wulff*, and what happened in Williams' case.

Accordingly, 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. An examination of that evidence reveals that there was no evidence showing that Williams attempted to commit and armed robbery against Robinson, as shown in the next section.

3. There was no evidence that Williams attempted to commit an armed robbery of Robinson.

At the close of the State's case at trial, Williams 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 circuit court agreed, stating, "I suppose that could be an inference." (48:72).

Williams' postconviction motion raised a related issue, whether there was sufficient evidence to support the felony murder of Robinson given the lack of evidence of an underlying robbery against Robinson as required by the jury instructions. In denying the 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 circuit court's decision fails to explain how the above evidence shows 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 trying to prevent Williams or Collins from taking the marijuana.

Contrary to the circuit court's decision, viewing the evidence most favorable to the state, there is no evidence that Robinson was a victim of an attempted armed robbery during the incident. Virtually all of the evidence regarding what happened inside Parker's house came from Williams' interrogation with police. 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 and that the three men would split it up (58:28);
.

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." (58:29);

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 (58:4-5). Williams had never seen Robinson before (58:5);

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." (58:14);

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

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

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

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

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

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 scattered around Parker's house, some near the bathroom and some near the front door of the house (46:123, 136), and a cooler in the living room with marijuana residue inside it (46:132);

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

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

The State did not introduce any evidence at trial showing that Robinson or his co-actors 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] Such a verdict is an indication that that the jury did not believe that Williams (or Collins in concert with Williams) attempted to rob Robinson.[7]

The court of appeals recognized the lack of evidence supporting an attempted robbery of Robinson in its certification, and pointed out that on appeal, the State made no argument to the contrary. The court of appeals stated:

> It appears the circuit court concluded that the trial evidence was sufficient to support a finding of an attempted armed robbery of Robinson. Our contrary conclusion is based on our own review of the evidence, and on the State's plainly conscious decision not to defend the circuit court's conclusion that the evidence was sufficient when measured against the instructions. We say "plainly conscious" because it is difficult to comprehend how the State could have overlooked the argument or failed to make it if the State thought that argument was viable. The State's implicit concession is apt because we see no evidence to support a finding that Robinson had a possessory or other ownership interest in the marijuana and, therefore, no evidence to support a finding that Williams and his accomplices attempted an armed robbery of Robinson.

---

[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 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.

The court of appeals is correct. Williams' conviction of felony murder cannot survive since the evidence produced at trial must be measured against the instructions that were read to the jury, and there was insufficient evidence at trial that Williams or his codefendants attempted to rob Robinson.

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."

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." *Id.* 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.

[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."

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?

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" because of having to look at graphic photographs (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, and 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 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 unreasonable 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 *Carter*, 2002 WI App 5, ¶ 15. 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.*

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

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, 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, counsel 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 counsel'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 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).

---

[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.

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

Trial counsel 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. Trial counsel 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, trial counsel'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, counsel 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

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

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, counsel'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 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 (against 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 16th day of January, 2015.

John A. Pray
State Bar No. 01019121
Attorney for Defendant-Appellant

Criminal Appeals Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-7461

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 10,404 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 amended paper copy of the brief.

_____
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.

_____

John A. Pray

TABLE OF APPENDICES