STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP1099-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MALTESE LAVELE WILLIAMS,

Defendant-Appellant.

ON CERTIFICATION FROM THE WISCONSIN COURT OF APPEALS TO REVIEW A JUDGMENT OF CONVICTION AND 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. Did Williams prove prejudice caused by his attorney's failure to object when the prosecutor argued to the jury, consistent with firmly established Wisconsin law, that it should find Williams guilty of the felony murder of Authur Robinson if it found beyond a reasonable doubt that Robinson was killed in the course of attempting to rob Michael Parker "or" Authur Robinson?

Defense counsel did not object when the prosecutor correctly argued to the jury that it could find Williams guilty of Robinson's felony murder if it found beyond a reasonable doubt that Robinson was killed during the attempted armed robbery of Parker "or" Robinson. Due to a scrivener's error in the jury instructions, however, the trial court told the jury that it could only find Williams guilty of Robinson's felony murder if it found that Robinson was killed in the course of attempting to rob Parker "and" Robinson. Defense counsel did not argue at trial that the state was bound by those erroneous instructions to proving, contrary to the felony murder statute, that Robinson was killed during the attempted armed robbery of Parker "and" Robinson.

Williams argued for the first time postconviction, and on appeal, that the state could not present the legally correct theory at trial that Williams was guilty of Robinson's felony murder if it proved beyond a reasonable doubt that his murder occurred in the course of the attempted armed robbery of Parker "or" Robinson because it was bound by the erroneous instructions to proving that Robinson was killed in the course of the attempted armed robbery of Parker "and" Robinson. Williams argued further that there was insufficient evidence of Robinson's felony murder because there was insufficient evidence that Williams and his accomplices attempted to rob Authur Robinson.

The trial court upheld the jury's verdict, finding that the theory of felony murder liability presented by the state at trial was legally correct and, in any event, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Williams and his accomplices were attempting to rob both Parker and Robinson when Robinson was killed.

The court of appeals certified the appeal to this court based on what it perceived to be a conflict in this court's precedent regarding whether the sufficiency of the evidence

is to be evaluated under the felony murder statute or the erroneous felony murder instructions. This court granted certification December 18, 2014.

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 had to view graphic crime scene and autopsy photographs. The trial court determined that Williams failed to prove Juror No. 12 was biased and denied the postconviction motion without an evidentiary hearing.

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

The court determined that there was no basis for objecting to the photographs because they were not unduly graphic. It denied the postconviction motion without an evidentiary hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state assumes that, when it granted certification, this court deemed the case appropriate for both oral argument and publication.

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 Dajuan 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 a postconviction motion dated January 24, 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 appealed (40). The Court of Appeals, District IV, certified the appeal to this court based on what it perceived to be a conflict in this court's decisions regarding how to review the sufficiency of the evidence to convict when the jury instructions for the charged offense are in error. The decisions are: *State v. Beamon,* 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681, and *State v. Wulff,* 207 Wis. 2d 143, 557 N.W.2d 813 (1997). This court granted certification December 18, 2014 (A-Ap. F). Relevant facts will be developed and discussed in the Argument section to follow.

SUMMARY OF ARGUMENT

1. The state presented overwhelming evidence at trial to convince a rational jury beyond a reasonable doubt that Williams and his two accomplices killed Authur Robinson in the course of attempting to rob Michael Parker. A rational jury therefore could, and in fact did, find Williams guilty of Robinson's felony murder, contrary to Wis. Stat. § 940.03. This was, indeed, the classic felony murder scenario where armed robbers burst into a house,

brandished a weapon and announced a robbery (a "lick"), and then killed the two men who were there while attempting to rob one or both of them.

Defense counsel did not object when the prosecutor correctly argued to the jury that it could find Williams guilty of Robinson's felony murder once it found beyond a reasonable doubt that his murder occurred in the course of attempting to rob Parker "or" Robinson. Only after trial did Williams point out that the felony murder jury instructions erroneously employed "and" instead of "or" when otherwise correctly defining his liability for Robinson's felony murder. Only then did Williams argue that the sufficiency of the state's evidence was determined by this erroneous instruction and not by the felony murder statute. Only then did Williams argue that the evidence, although legally sufficient to convict him under Wis. Stat. § 940.03, was not sufficient to convict him under the erroneous instructions because the state failed to prove that Robinson was killed during the attempted armed robbery of Parker "and" Robinson.

2. Trial counsel's failure to timely object works as a forfeiture of any argument that appellate review of the sufficiency of the evidence is governed by the erroneous jury instructions and not by the felony murder statute. This forfeited "sufficiency of the evidence as erroneously defined by the jury instructions" challenge can only be reviewed now in the context of a challenge to the effective assistance of trial counsel for not objecting. Williams must prove both deficient performance and prejudice.

If trial counsel performed deficiently, Williams cannot prove prejudice. Had counsel timely objected to the prosecutor's argument, the scrivener's error in the instructions would have been immediately corrected and we would not be here.

Williams cannot prove prejudice because a properly instructed jury would have found Williams guilty beyond a reasonable doubt based on the overwhelming evidence that Robinson was killed in the course of the attempted armed robbery of Parker, Robinson or both.

3. 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 for not exercising a peremptory strike against, Juror No. 12. Williams failed to sufficiently allege that Juror No. 12 was subjectively or objectively biased against him.

4. Williams failed to allege sufficient facts to prove that trial counsel was ineffective for not objecting to the admission of the crime scene and autopsy photographs. The trial court properly exercised its discretion when it allowed the jury to view the highly relevant and not overly graphic autopsy and crime scene photographs.

ARGUMENT

I. WILLIAMS CANNOT PROVE PREJUDICE CAUSED BY HIS ATTORNEY'S FAILURE TO OBJECT WHEN THE STATE ARGUED, CONSISTENT WITH ESTABLISHED LAW BUT NOT WITH THE JURY INSTRUCTIONS, THAT THE JURY COULD FIND WILLIAMS GUILTY OF ROBINSON'S FELONY MURDER IF IT FOUND THAT ROBINSON WAS KILLED IN THE COURSE OF THE ATTEMPTED ARMED ROBBERY OF PARKER "OR" ROBINSON.

A. The evidence presented by the state at trial to prove the felony murder of Robinson.

Maltese Williams knew Michael Parker. He also knew that Parker sold marijuana out of his house near 24th and Scott Streets in the City of Milwaukee. 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 from the bullet wound to his neck (46:104-06, 149-51; 47:12-13, 80-89; 48:35).

Williams took the same path as Parker out of the kitchen toward the front door. When he entered the living room, Williams saw Collins and Robinson in what appeared to be a death struggle over Collins' 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 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 marijuana or anything else of value; hence the "attempted" armed robbery charges (46:123-24, 130-32, 136; 47:108-09; 49:34-35, 45).

Williams did not stick around. He ran outside, joined up with Dixon, and fled to his mother's house. Collins then regained control of his gun and fatally shot Robinson in the heart. Collins jumped through the front window and fled. The three rendezvoused later on. Collins revealed to his cohorts that he lost his cell phone at the scene and feared he would be caught. He was right. Police recovered Collins' 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).

B. The state successfully proved that Williams and his accomplices murdered Robinson in the course of committing attempted armed robbery.

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 challenges only his conviction for the felony murder of Authur Robinson in the living room seconds after Parker was shot. 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) and 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 (Rel. No. 51—4/2013).

It matters not whether Robinson was fatally shot while himself being robbed, while resisting the attempted robbery of Parker, while trying to defend himself, while trying to stop Williams from fleeing or while still sleeping. "A person convicted of a felony as party to the crime becomes a principal to a murder occurring as a result of that felony." *State v. Oimen,* 184 Wis. 2d 423, 449, 516 N.W.2d 399 (1994). "[F]elony murder liability exists if a defendant is a party to one of the listed felonies from which a death results." *State v. Krawczyk,* 259 Wis. 2d 843, ¶ 24. The state successfully proved that Williams was a party to the attempted armed robbery of Parker from which Robinson's death directly resulted.

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 intended victim of 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, this court held, a substantial factor in bringing about the house guest's inadvertent death from the intended victim's gun. This case is indistinguishable in any material respect from *Rivera.*

In *State v. Oimen,* 184 Wis. 2d 423, 428, this court upheld the defendant's felony murder conviction where the intended victim of a botched robbery fatally shot one of the *defendant's* cohorts.

Moreover, it matters not that Williams' accomplice, Collins, may have shot Robinson after Williams fled the house. Williams was still guilty of felony murder because the crime they agreed to commit was not complete when the shooting by Collins occurred. In *State v. Chambers,* 183 Wis. 2d 316, 319, 324-25, 515 N.W.2d 531 (Ct. App. 1994), Chambers and his accomplice split up while being pursued by police after committing an armed burglary. 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 State v. Oimen,* 184 Wis. 2d at 428 (felony murder liability "encompasses the immediate flight from a felony").

The trial court properly instructed the jury, consistent with Wis. JI-Criminal 1031, 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 attempt 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' 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 understood the law when he told the jury 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 his rebuttal argument, the prosecutor again correctly summarized the law for the jury:

> 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 Wisconsin felony murder law as it relates to these facts.

The state proved beyond any doubt that Williams and his accomplices engaged in acts toward the commission of armed robbery which demonstrated unequivocally their intent to commit armed robbery, and they would have succeeded except for the intervening extraneous factor of Parker's flight, causing everything to go badly awry. Wis. Stat. § 939.32. *See* Wis. JI-Criminal 1031. The jury properly found Williams guilty of the felony murders of both Parker and Robinson based on the facts and the law because the state proved beyond any doubt that their deaths occurred in the course of attempting to rob Parker, Robinson or both.

C. This is an ineffective assistance of counsel case.

1. Trial counsel forfeited any post-trial challenge that the state was bound in its proof of Robinson's felony murder to the erroneous jury instruction.

After the state rested, defense counsel unsuccessfully 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 unsuccessfully moved to dismiss Count 4, charging attempted armed robbery of Robinson, on the ground that, "there is no evidence at all that anybody

attempted to take property that belonged to Mr. Robinson" (48:65). Significant here, counsel did not also argue that for the same reason the evidence did not support a felony murder charge and instruction with respect to Robinson. Counsel did not argue that the court must instruct the jury to find Williams not guilty of Robinson's felony murder if it found Williams not guilty of attempting to rob Robinson.

As discussed above, defense counsel also did not object to the prosecutor's closing argument thereafter correctly advising the jury that it could find Williams guilty of felony murder if it found that Robinson's death occurred in the course of the attempted robbery of Parker; the state did not have to prove that Robinson was also a robbery victim (49:64-65).

Finally, at the close of trial even after the jury found Williams guilty of Robinson's felony murder, defense counsel moved to dismiss only 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 did not, therefore, argue at trial that the state failed to present sufficient evidence of felony murder because it did not present sufficient evidence of an attempt to rob Robinson *as erroneously required by the jury instructions*. He waited until the postconviction stage to spring that novel argument on the state and the trial court. Williams thereby forfeited any appellate challenge on that ground. *See State v. Pinno* and *State v. Seaton,* 2014 WI 74, ¶¶ 8, 56-68, 356 Wis. 2d 106, 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). *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 issue now raised was not "obvious from its context" and yet 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 changed "and" to "or" in the felony murder instruction to comport with the law and we would not be here.

By not objecting on this specific ground at trial, *even after the verdict came in,* Williams forfeited any right to appellate review. That must be so, otherwise, scrivener's errors in jury instructions that are not discovered by the state or the trial court, but are found and not timely disclosed by defense counsel, will encourage "sandbagging." This will cause an unnecessary and completely avoidable retrial to the great consternation of victims and witnesses; and will increase the likelihood of a "windfall" acquittal (or hung jury) the second time around due to lost evidence and faded memories.

Williams' forfeited claim is now, therefore, only reviewable as an ineffective assistance challenge based on trial counsel's failure to timely object, with the burden of proving both deficient performance and prejudice squarely on Williams. *See Kimmelman v. Morrison,* 477 U.S. 365, 374-75 (1986); *State v. Pinno* and *State v. Seaton,* 356 Wis. 2d 106, ¶¶ 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.

2. The trial court properly denied the postconviction motion without an evidentiary hearing because it failed to sufficiently allege prejudice caused by trial counsel's failure to object.[1]

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.

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 may 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,* 2004 WI 106, ¶¶ 9, 12, 274 Wis. 2d 568, 682 N.W.2d 433; *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.

[1] The legal principles discussed in this section also apply to the ineffective assistance arguments at "II" and "III," *infra*.

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." *Id.* ¶ 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 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. For the reasons to follow, the trial court properly held that Williams' motion failed to sufficiently allege prejudice to merit an evidentiary hearing.

D. This court's decision in *State v. Beamon* holds that the sufficiency of the evidence must be evaluated against the felony murder statute and its correct elements, and not against the erroneous jury instruction.

Williams insists that this court is bound in reviewing his challenge to the sufficiency of the evidence to convict him of Robinson's felony murder to the erroneous jury instruction and not to Wis. Stat. § 940.03 and its elements. This court has held precisely the opposite:

> We conclude that jury instructions that add requirements to what the statute sets out as necessary to prove the commission of a crime are erroneous; and therefore, we examine the sufficiency of the evidence in this case by comparison to what the statute requires and not by comparison to an additional requirement in the jury instructions. Furthermore, jury instruction errors are subject to harmless error analysis, which we apply here. A harmless error analysis asks 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.

State v. Beamon, 347 Wis. 2d 559, ¶ 3.

The only errors in the instructions occurred when the trial court defined the elements of armed robbery as they related to the crime of felony murder:

> 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 trial court should have employed the word "or" in place of the italicized word "and" to correctly instruct on felony murder liability. No one caught the mistake (or, if defense counsel did, he did not tell anyone). 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.

It is thus plain that the felony murder instruction was erroneous because it added a requirement for felony murder liability not found in Wis. Stat. § 940.03: that the state must prove beyond a reasonable doubt the homicide victim was also an intended victim of the predicate felony. The law is clear that, regardless who the intended victim of the predicate felony was, the defendant is guilty of felony murder if the intended victim *or someone else* was killed in the course of committing that felony. *State v. Oimen; State v.*

Rivera. The pertinent question for this court is whether the erroneous felony murder instruction was harmless.[2]

E. The scrivener's errors in the felony murder instruction were harmless.

It is clear beyond a reasonable doubt that a properly instructed, rational jury would have found Williams guilty of Robinson's felony murder beyond a reasonable doubt.

Williams' 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' postconviction motion at 7 n.2 (30:7 n.2; A-Ap. E: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.

This 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. *State v. Gordon*, 2003 WI 69, ¶¶ 33-43, 262 Wis. 2d 380, 663 N.W.2d 775. This court held it was 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*

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[2] Williams concedes that, "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" (Williams' Br. at 21). But that is exactly what the instruction erroneously did when it told the jury it had to first find that Williams attempted to rob Parker "and" Robinson before it could find Williams guilty of Robinson's felony murder. In his own words, then, the instructions "created a new requirement not in the [felony murder] statute" – "that Williams had attempted to rob both Parker *and* Robinson." *Id.*

v. Harvey, 2002 WI 93, ¶¶ 47-49, 254 Wis. 2d 442, 647 N.W.2d 189; *See 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 in light of the facts of that case). *See also State v. Oimen,* 184 Wis. 2d at 449 (harmless error to give a party-to-the-crime felony murder instruction discussing direct commission of an armed burglary because there was no evidence of direct commission by Oimen when his cohort's death occurred).

In *State v. Beamon,* the jury instruction for fleeing an officer erroneously required the state to prove that the fleeing driver received a visual "and" audible signal from a marked police vehicle, whereas the fleeing statute only required it to prove he received a visual "or" audible signal from a marked police vehicle. The instruction also erroneously required the state to prove that the fleeing driver increased his speed in response to the pursuing officer's signal. 347 Wis. 2d 559, ¶¶ 15, 34-36. The fleeing statute does not require the state to prove that the suspect increased his speed. *Id.* ¶ 1. There was no evidence that the defendant increased his speed once the pursuit began.

This court held that the erroneous fleeing instruction was harmless because, "it is clear beyond a reasonable doubt that the jury would have convicted Beamon of fleeing or eluding if proper instructions had been given." *Id.* ¶ 37.

Once the reviewing 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.

When determining whether 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.

Beamon dictates the outcome here. It is clear beyond a reasonable doubt that the scrivener's errors 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 trial court properly instructed the jury that one is guilty of felony murder if someone is killed in the course of

attempting to commit 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 (emphasis in original).

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.

Williams does not dispute that the state presented overwhelming evidence of the attempted armed robbery of Parker. Had the trial court correctly employed "or" in the instruction, the jury would no doubt 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.[3] Williams put on no defense other

[3] *But see* Wis. Stat. § 943.32(3) (Robinson would be the "owner" of any marijuana he possessed, even if illegally).

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 properly instructed, rational jury to convict Williams of felony murder.

It necessarily follows that Williams failed to prove prejudice from counsel's failure to object to the prosecutor's correct statement of felony murder law in his closing argument, and from counsel's failure to move to dismiss the felony murder count with respect to Robinson at the close of the state's case or upon return of the verdict. Moreover, had counsel timely objected, arguing that the state was bound to the erroneous instruction, the court would have immediately corrected that instruction (changing "and" to "or") to bring it into conformity with the law. *See State v. Gordon,* 262 Wis. 2d 380, ¶ 41.[4]

[4] The trial court also found any error harmless because it determined there was sufficient evidence of an attempt to rob Robinson of marijuana (39:2; A-Ap. B:2). This was so even though the jury returned a verdict finding Williams not guilty of attempting to rob Robinson (50:3). The jury returned that verdict in disregard of the court's specific instruction not to fill out the verdict form for attempted robbery if it had already found Williams guilty of felony murder (49:22). Although an argument could be made that, despite the jury's contrary verdict, a rational jury could have found Williams guilty of attempting to rob Robinson of marijuana, *see State v. Poellinger,* 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990), the state is not pursuing that separate argument here because there is little room for it to challenge the court of appeals' observation in its certification that, "we see no evidence to support a finding that Robinson had a possessory or other ownership interest in the marijuana." Certification at 2 n.3 (A-Ap. F:2 n. 3). Robinson may very well have been just an innocent house guest.

F. The outcome of this appeal is controlled by *State v. Beamon,* not by *State v. Wulff.*

In requesting certification, the court of appeals perceived a conflict between this court's decisions in *State v. Beamon* and *State v. Wulff,* that does not exist.

First and foremost, as pointed out in its *Beamon* decision, this court did not consider the question of harmless error in *Wulff*. *State v. Beamon,* 347 Wis. 2d 559, ¶ 46. That crucial fact alone materially distinguishes the two. Secondly, unlike *Beamon* and here, the jury instructions in *Wullf* correctly set forth the law.

Mr. Wulff went to trial on a charge of attempted second-degree sexual assault. The state's theory was that Wulff attempted to engage in "sexual intercourse" with a person he knew to be unconscious. The trial court correctly instructed the jury that "sexual intercourse" means the intrusion of "any part of a person's body or of any object into the genital or anal opening of another." *State v. Wulff*, 207 Wis. 2d at 145, (quoting Wis. Stat. § 940.225(5)(b) and (c)). There was no evidence adduced at trial that Wulff inserted his penis, another body part or any object into the unconscious victim's vagina or anus.

There was some evidence that Wulff may have inserted, or attempted to insert, his penis into the victim's mouth just before she awoke. *Id.* at 146. Fellatio is a legally recognized third alternative form of "sexual intercourse," and the state argued attempted intercourse by fellatio to the jury. *Id.* at 149. But the jury was never instructed that fellatio is a third alternative form of sexual intercourse. *Id.* at 148. The jury found Wulff guilty "of sexual assault as charged in the Information." *Id.* at 149.

Wulff challenged the sufficiency of the evidence to convict him of attempted sexual assault by genital or anal penetration. *Id.* This court on review could not tell whether

the jury's verdict finding Wulff guilty of sexual intercourse was based on a finding that he engaged in vaginal or anal intercourse, a finding not supported by sufficient evidence at trial, *id.* at 149, 152; or on a finding that he committed fellatio, for which there was evidentiary support and argument by the prosecutor, but no instruction that fellatio was an alternative form of sexual intercourse. *Id.* at 151, 152-53. This court concluded:

> The evidence before the jury did not support a finding of guilt on attempted genital or anal intrusion, and the general verdict leaves us uncertain as to under what theory the jury found guilt. We can uphold Wulff's conviction only if there was sufficient evidence to support guilt on the charge submitted to the jury in the instructions.

Id. at 153.

A harmless error argument, had it been made in *Wulff,* would have been a tough sell for two reasons:

(1) The reviewing court could not tell from the general "sexual assault" guilty verdict whether the jury found Wulff guilty of a crime for which the state failed to present sufficient evidence to convict (vaginal or anal intrusion), or of a crime for which there was sufficient evidence (fellatio) but on which the jury was not instructed. *Id.*;

(2) There was no error in the *Wulff* jury instructions. They correctly stated the law: the defendant is guilty of sexual assault if the state presents sufficient evidence that he committed anal or vaginal intercourse. Absent such evidence, he is not guilty. The instruction would also be correct if it told the jury the defendant is guilty of sexual assault if the state presents sufficient evidence of fellatio, but that separate form of sexual intercourse was not presented. The instruction was correct, but incomplete.

Here, in contrast, the jury was *erroneously* instructed that Williams is guilty of felony murder *only if* the state proves beyond a reasonable doubt that Robinson's death occurred during the attempted armed robbery of Robinson "and" Parker, when proof of Parker's attempted armed robbery was all that the law required. This instruction added a requirement to felony murder liability beyond what the law requires: that the victim of felony murder must also have been the intended victim of the predicate felony. The instruction here was legally incorrect, as was the "fleeing" instruction given in *Beamon*.

The instruction in *Wulff* was legally correct, but incomplete. It did not include the legal and factual theory of guilt (fellatio) to uphold a general verdict on appeal that was not supported by sufficient evidence at trial (anal or vaginal intrusion). The state submits that *Wulff* is primarily a sufficiency of the evidence case, whereas *Beamon* is primarily a jury instruction error case.[5] *Beamon* controls when reviewing the evidence in light of the erroneous felony murder instruction here. A properly instructed rational jury would have found Williams guilty of Robinson's felony murder beyond a reasonable doubt.[6]

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[5] Williams seems to agree. "It is apparent that in *Wulff,* the jury instruction defining sexual intercourse was not erroneous. . . . In *Beamon,* the court set forth the procedure to be followed when a jury is given an *erroneous* instruction." (Williams' Br. at 16). "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." *Id.* at 18.

[6] Williams insists that the instructions requiring the jury not to find him guilty of Robinson's felony murder unless it first found beyond a reasonable doubt that he attempted to rob Robinson, were not erroneous. Simply saying something is so does not make it so. As discussed above, the instructions plainly misstated Wisconsin felony murder liability. The instructions effectively directed the jury *not* to find Williams guilty if it found that he only attempted to rob Parker, a blatant misstatement of the law. This would be the equivalent of correctly instructing, as the court did in *Wulff,* that the jury could find Wulff guilty of sexual intercourse if it found that he invaded the victim's vagina or anus, *but then erroneously instructing the jury it could not find Wulff guilty of sexual intercourse if it found that he only committed fellatio.* That

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 single and a 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, and to watch TV, movies and sports (46:28).

The prosecutor (Stingl) advised the panel of prospective jurors collectively that they would "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, "[a]nd 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.*).

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would be a blatant misstatement of sexual assault law. In that situation, the erroneous jury instruction analysis in *Beamon* and *Wulff* would dovetail and the reviewing court would have to consider harmless error.

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 believed, "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 photographs (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 photographs 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 [*sic*] those pictures would be gross" (*id.*) (emphasis added).

Defense counsel then asked Juror No. 12 how viewing the photographs 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 a little biased" (*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: "That 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 photographs. 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 trial court properly denied the ineffective assistance challenge without an evidentiary hearing.

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

The ineffective assistance allegation in Williams' 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.[7]

> 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

[7] 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 736, 744, 596 N.W.2d 760 (1999).

> 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.

Id. 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) (citation omitted).

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 Id.* 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 postconviction 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:10, ¶ 25). Williams claims trial counsel's reasoning "was flawed," but does not adequately explain why (*id.* ¶ 26). This was a strategic call by trial counsel that cannot be second-guessed.

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 photographs 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 photographs 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 reasonably 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 55, ¶¶ 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 and when asked whether that would influence his ability to be fair and impartial, the juror answered, "yes." *Id.* ¶ 3. Trial counsel was ineffective for not having this admittedly subjectively biased juror removed from the panel. *Id.* ¶¶ 8, 15).

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 did 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 could remain on the jury. *Compare State v. Carter,* 250 Wis. 2d 851, ¶ 3 (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' 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:3). The trial court was correct and Williams does not challenge that finding of fact (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 photographs 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. Williams was tried by a fair and impartial jury. In the end, that is all that matters. *State v. Koller,* 2001 WI App 253, ¶ 14, 248 Wis. 2d 259, 635 N.W.2d 838. *See Ross v. Oklahoma,* 487 U.S. 81, 86 (1988); *Griffin v. Bell,* 694 F.3d 817, 821-22 (7th Cir. 2012). 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 before finding him guilty of the felony murders of Parker and Robinson.

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.

This was a double homicide trial, not Sunday School. The photographs of the crime scene and of the autopsies were highly relevant to resolving the many difficult and unpleasant 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 and 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' (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 the photographs out 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' 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 photograph of deceased victim's fatal head wounds caused by a bolt cutter to prove the bolt cutter was a dangerous weapon; the photograph was relevant and not unfairly prejudicial); *State v. Pfaff,* 269 Wis. 2d 786, ¶¶ 36-37 (trial court properly allowed jury to view photograph of deceased victim's face in a vehicular homicide to prove victim's identity and cause of death; the photograph was not particularly graphic or gory).

A defendant's willingness to stipulate to an element of the crime does not render the photographs inadmissible. *Id.* ¶ 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. Williams had no right to force the state to try its case wearing kid gloves.

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:3). Williams does not challenge that presumed correct finding of fact. He offers nothing to show that it is clearly erroneous. He chooses, instead, to ignore this finding altogether. The photographs 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. They did, however, help prove his heinous crimes beyond a reasonable doubt.

CONCLUSION

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

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

Dated at Madison, Wisconsin, this 5th day of February, 2015.

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 10,615 words.

Dated this 5th day of February, 2015.

_____
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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 5th day of February, 2015.

_____
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