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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

In its brief, the State does not contend that there is any evidence suggesting that Thompson or his co-defendants robbed, or attempted to rob Robinson. Indeed, there is no such evidence, contrary to the finding of the trial court.

Nor does the State dispute Williams' assertion that, if the jury faithfully followed the language of the instructions, in order to find Williams guilty of the felony murder of Robinson in Count 2, it had to find beyond a reasonable doubt that Williams or his co-defendants attempted to rob Robinson.

Nevertheless, the State attempts to salvage the felony murder conviction against Robinson by arguing that Williams' right to raise this issue was forfeited since counsel failed to object to the instruction. The State also claims that the jury instructions were harmless error, and the jury would have found Williams guilty of Robinson's death if it had been properly instructed. None of these arguments is persuasive. This court should reject them for the reasons stated below.

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

The State begins by establishing the undisputed point that under Wisconsin law, it would have been theoretically sound to base the felony murder of Robinson upon a finding that Robinson's death was caused by a robbery of Parker by Williams or his co-defendants. At least two of this court's decisions would support such a theory, *State v. Rivera*, 184 Wis. 2d 485, 516 N.W.2d 391 (1994) and *State v. Oimen*, 184

Wis. 2d 423, 516 N.W.2d 399 (1994) (both cases holding that an individual can be convicted of felony murder even if another person, including an intended felony victim, fired the fatal shot).

The State cites to *Rivera* and *Oimen*, and declares that Williams' case is "indistinguishable in any material resepct" from *Rivera*. State's Brief at 9. But the State's analysis fails to take into account the jury instructions. In contrast to Williams' case, in *Rivera*, there was no issue with the jury instructions. *Rivera* is only "indistinguishable" from Williams' case if one ignores the instructions under which the jury was told to decide the case. That surely is a material distinction.

What matters in Williams' case is not how the felony murder statute *could have been* applied, but how it *was* applied; not how the jury *could have been* instructed, but how it *was* instructed. Regardless of what the felony murder statute allows, Williams' conviction for felony murder of Robinson cannot be upheld on the basis of a theory on which the jury was not instructed. *Chiarella v. United States*, 445 U.S. 222, 236 (1980), *State v. Wulff*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997).[1]

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[1] The State also asserts that Williams' trial counsel correctly understood the law when he argued in closing that "If you are committing a felony of any kind and a person is killed during the court of committing this felony, that's felony murder." (49:52). However, this statement does not indicate that counsel agreed that the felony could be against someone who was not the victim of the homicide, and in fact, counsel argued to the jury that:

> "there isn't even evidence that an attempted armed robbery occurred as to Robinson. So when you get to that, the answer is no and your work is done. You find Mr. Williams not guilty of attempted armed robbery of Robinson and not guilty of any level of the homicides we've discussed."

B. **Williams did not forfeit his right to challenge the sufficiency of the evidence.**

The State argues that Williams forfeited his right to challenge his conviction because he failed to move to dismiss Count 2, or object to the jury instructions, or move to dismiss the verdict on that count at the close of trial. State's Brief at 12-13. The State attempts to put the onus on defense counsel to have objected to the jury instructions, arguing that the "erroneous" instruction could have been "easily rectified," and that, if anything, the issues in this case should have been reviewable only under a claim of ineffective assistance of counsel.

But it is not Williams who takes issue with the jury instruction; it is the State. There was nothing illegal about the jury instruction that was used. It is undisputable that one proper way to convict Williams of the felony murder of Robinson was to find that he (or his cohorts) attempted to rob Robinson. The fact that the instruction was more favorable to the defense than was necessary does not render it erroneous or illegal. Defense counsel's obligation was to his client, and he had no reason to object to a valid instruction that may have made it more difficult to convict his client. The State does not explain why the prosecutor did not object to the jury

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(49:63). The prosecutor viewed counsel's argument in the same vein, stating, "The last thing he 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 felony murder. That is not true." (49:65). In any event, it does not matter how counsel viewed the law, but how the jury viewed the law. The jury is presumed to follow the explanation of the law given by the court. *See State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994); *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

instructions, but that was the State's call to make, not Williams'[2]

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

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

In order to prevail on this claim, the State must therefore establish that the jury instructions were erroneous. The State's attempt to do this is misguided for several reasons. First, and most fundamentally, it is not erroneous to instruct the jury that a felony murder verdict on Count 2 could be properly premised upon a finding that Williams (or his cohorts) attempted to rob Robinson. That was a perfectly valid method of convicting Williams on Count 2, and the State makes no argument to the contrary. To be sure, it also would have been proper to instruct the jury that it could find Williams guilty of the felony murder of Robinson if it found

[2] The State also complains that Williams' postconviction motion was insufficient since it did not allege with factual specificity the two prongs of ineffective assistance of counsel claims—deficient performance and prejudice. State's Brief at 16. This argument makes no sense, since this was not an ineffective assistance of counsel claim, and counsel had no obligation or reason to object to a proper instruction that made it more difficult to convict his client.

that Robinson's death was caused by an attempted robbery of Parker. And had Williams been convicted on that instruction, he could not complain on that ground. But that does not somehow transform the instruction that was given into an erroneous instruction.

The State did not address Williams' hypothetical he included in his initial brief (Brief-in chief at 23), but here is another. A person can commit a battery by either hitting or kicking a victim. If a jury is instructed that it may find a defendant guilty of battery if he *struck* the victim with his fist, it can hardly be said that the instruction was erroneous on the ground that it failed to instruct that the battery could also be committed if the defendant *kicked* the victim. That is essentially what the State is arguing in Williams' case. It is unpersuasive.

The State then picks up on a comment in the court of appeals' certification suggesting that the instruction could "possibly" be read in a way that would require that, in order to render a guilty verdict on felony murder, the jury would have to find that *both* Parker *and* Robinson were robbed. Certification at fn 4. The State latches onto this suggestion and claims that the instruction was erroneous since it "added a requirement to felony murder liability beyond what the law requires." State's brief at 26. If it worked, this might make the instruction in Williams' case seem more comparable to the erroneous instruction in *Beamon.* (In *Beamon* the instruction added an element to the offense when it told the jury that it could find Beamon guilty of fleeing if it found that he disregarded the officer's signal so as to endanger the officer, *and* that he did it "by increasing the speed of the vehicle to flee.")

The State's attempt to read the instruction to require the jury to find that *both* victims were robbed hangs on the

word "and." ("That Michael Parker, Count 1 *and* Authur Robinson, Count 2, was the owner of the property."). But the State's reading does not work. In his brief-in-chief, Williams offered several reasons why the insertion of the word "and" in the instructions given did not require the jury to find that Williams attempted to rob *both* Parker *and* Robinson. Those are:

- *The designation of an individual victim for each count.* See Brief-in-chief at 21. On three separate occasions, the instructions indicated that to find guilt, it had to find the victim of the attempted robbery in Count 1 was Parker, and the victim of the attempted robbery in Count 2 was Robinson. This was accomplished by juxtaposing "Count 1" or "Count 2" immediately after the name of the victim relevant to that count.[3]

  In its brief, the State makes no reference to this argument.

- *The use of singular rather than plural verbs and nouns.* See Brief-in-chief at 22.

  - *Use of the words "was" and "owner."* In the instruction ("that Michael Parker, Count 1, and Authur Robinson, Count 2, *was* the *owner* of the property"), the court used the singular verb "was"

[3] As pointed out in the brief-in-chief, 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." (emphasis added) (49:19). Second, the instructions required a guilty verdict to be based upon a finding that Williams "took property from the person of Michael Parker, *Count 1*, and Authur Robinson, *Count 2."* (emphasis added) (49:19). Third, the instructions required a guilty verdict to be based on a finding that Williams "used force against Michael Parker, *Count 1*, and Authur Robinson, *Count 2*." (49:20).

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.

The State ignores the "owner/owners" distinction.

As to the distinction between the verbs "was" and "were," the State is more creative. It quotes the jury instructions this way: "That Michael Parker, Count 1, *and* Authur Robinson, Count 2, was [sic] the owner of the property." State's Brief at 18. By conveniently inserting the word "sic" in its quotation of the instruction, the State apparently assumes that the court actually used the word "were" and that the word "was" simply represents an error in transcription by the court reporter. Of course, there is is no reason to believe the transcription is wrong.

- *Use of the word "person."* See Brief-in-chief at 22. Similarly, the instruction used the singular form of the word "person" rather than "persons" (Williams "took property from the *person* of Michael Parker, Count 1, and Authur Robinson, Count 2").

The State ignores the "person/persons" distinction.

The State's failure to address the above arguments is telling, and this court should not read the jury instructions as erroneous under the theory that they incorrectly added a requirement to the statute—that felony murder required a finding that Williams robbed both victims.

Since there was no error in the jury instructions, this court should follow its holding in *Wulff*, which governs the procedure to be followed when there is no error in the instructions. This court cannot uphold Williams' conviction of the felony murder of Robinson based on the attempted armed robbery of Parker, as that theory was not submitted to the jury.

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

The State claims that Williams "failed to allege with any factual specificity subjective or objective bias" as to Juror #12." State's Brief at 32. Subjective bias is revealed by the prospective juror on voir dire; it refers to the prospective juror's state of mind. *State v. Carter*, 2002 WI App 55, ¶7, 250 Wis. 2d 851, 641 N.W.2d 517. Here, in response to the court's statement that "The question is whether or not it would impair your ability to come to fair and just result in the matter after listening to the testimony," Juror #12 stated "I think I would be a little biased," and that his/her bias would lie "more towards the victims." (46:82-83).

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

The State cites *State v. Erickson*, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), for its statement that "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." But in Williams' case, Juror

#12 openly admitted that he/she *would* be biased, while *Erickson* concerned a juror who stated just the opposite—when asked if she could be fair and impartial, the juror stated, "I think so." *Id*. at 763 n. 4. In contrast, Juror #12 gave unambiguous statements of subjective bias, like the juror in *Carter*.

The State speculates that Juror #12, "in all reasonable probability held no bias against anyone during deliberations because the photos were tamer than what he had feared." State's Brief at 34. This is unsupported by the record, which contains no references Juror #12's demeanor that would suggest an impartiality after openly admitting that he would be unable to sit through the case, that he would be biased in a way that would affect his ability to be fair and impartial, and that his bias would lie "towards the victims." *Compare Carter*, 2002 WI App 55, ¶ 13.

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

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

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

The State claims that the crime scene and autopsy photographs "assisted the jury in determining when, where, how, and why the victims died." State's Brief at 35. However, the photographs do not demonstrate when or why the victims died. They could not show where the victims died without testimony to identify the locations in the photographs. And they do not show how the victims died—this was established by the testimony of Dr. Linert.

The State further argues that the photographs "assisted the jury in determining Williams's (and his cohorts') state of mind and degree of culpability." State's Brief at 35. Indeed, the State calls the photographs "its most powerful evidence," despite the fact that they were not necessary to establish any element of the crime. State's Brief at 36.

But what makes the photographs so powerful is that, as the State further states, "the photographs put a human face on the victims." State's Brief at 37. Putting a human face on the victims does not give the photographs probative value. Rather, it goes to their tendency to generate sympathy for the victims and prejudice the defendant.

Finally, the State argues that "there was no prejudice because as the trial court found on postconviction review, the photographs actually shown to the jury "were not particularly gory or gruesome and that there was nothing unduly prejudicial in their use." State's Brief at 38. However, being "particularly gory and gruesome" is not synonomous with being prejudicial. What makes the photographs prejudicial is that, as the State said, they "put a human face on the victims."

CONCLUSION

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

Respectfully submitted this 19th day of February, 2015.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,996 words.

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John A. Pray

ELECTRONIC CERTIFICATION

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

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John A. Pray