RECEIVED
08-13-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2020AP32-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OSCAR C. THOMAS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
levinsonsb@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Constitutional Provisions

Statutes

ISSUES PRESENTED

1. A conviction based on a defendant's confession must have "corroboration" of any significant fact. Defendant Oscar C. Thomas told police he had sexual contact with the victim around 2 a.m. after watching a porn video, when he squeezed her neck with his arm from behind, and she kicked the floor and cried, "Stop, stop, I love you, I love you." Police found the porn video he watched in the bedroom, and the downstairs neighbor testified that she heard a violent altercation at the same time and heard a woman say those words. Is there sufficient corroboration to support the conviction?

The circuit court answered yes.

This court should answer yes.

2. To impeach an expert witness's conclusions, the State may cross-examine the witness about hearsay sources he or she relied on. The State elicited such hearsay from defense's expert witness when it elicited an answer, over defense's objection, that lab results showed that the victim's DNA was found under Thomas's fingernails. Did the circuit court properly admit the evidence?

The circuit court answered yes.

This court should answer yes.

3. A decision that a juror is not objectively biased is reversed on appeal only if a reasonable judge could not have reached that decision. Unpreserved issues are reviewed under the rubric of ineffective assistance of counsel. Without a contemporaneous objection and without raising ineffective assistance in the circuit court, Thomas now argues that the circuit court wrongly decided that a juror who thought she was a cousin of a witness was unbiased based on her statements that she did not socialize with the witness, was only "familiar" with the witness's name, and would not base

her decision-making in the case on the relationship. Has Thomas preserved his claim that he was prejudiced by counsel's failure to object to this juror?

The circuit court answered that the juror was not objectively biased.

This court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as the issues are adequately addressed in the briefs and the case involves the application of well settled law to the facts.

INTRODUCTION

In the early morning of December 27, 2006, Oscar C. Thomas smoked crack cocaine with a friend and then went to his upstairs apartment and had a fight with Joyce Oliver-Thomas, with whom he had a 20-year on-again, off-again relationship and two sons. He initiated sexual contact with her and squeezed her neck hard from behind and did not release her when she told him to stop. He strangled her to death. The State charged him with first-degree intentional homicide, first-degree sexual assault, and false imprisonment.

Thomas was tried a second time in 2018 after his first conviction was vacated in habeas proceedings, and he was again convicted of all charges. He now seeks to have the sexual assault conviction vacated on the grounds that there was no corroboration of his statement confessing it. He seeks a new trial on the ground that hearsay evidence that Oliver-Thomas's DNA was found under his fingernails was improperly admitted. He raises a claim of juror bias, which if meritorious would entitle him to an evidentiary hearing on

whether counsel's failure to object to the juror in question constituted ineffective assistance of counsel. For the reasons given below, none of Thomas's claims has merit, and this Court should affirm the judgment of conviction and the order denying postconviction relief.

STATEMENT OF THE CASE

Thomas's first two claims of error relate to evidence presented at trial, and the third relates to a juror's alleged bias.

Thomas was charged with first-degree intentional homicide, first-degree sexual assault, and false imprisonment. (R. 1:1.) The complaint alleged that after smoking crack cocaine with a friend, Thomas returned to his bedroom at about 2 a.m. and physically restrained the victim, forced sexual contact with her when he rubbed his genitals against her hip even when she told him to stop, and strangled her by squeezing her neck with his arm until she stopped breathing. (R. 1:2.) The complaint alleged that he told police that he was "accidentally responsible for [her] death." (R. 1:3.)

He was convicted in 2007, and that conviction was affirmed on direct appeal (R. 161; 162) but vacated in federal habeas proceedings. (R. 126; 182.) He was retried in 2018 and convicted again of all charges. (R. 251–253; 316–321.) This appeal pertains solely to the 2018 trial.

The selection of the jury.

As relevant to this appeal, one juror, during voir dire, raised her hand when the circuit court read a list of potential witnesses and asked jurors if they knew any of them. (R. 315:57, 60.) The juror told the circuit court, concerning Victor and Erika Cruz, "I think I'm related" to them. (R. 315:57, 60.) The circuit court asked how she was related and whether she socialized with them. (R. 315:60.) She responded that they were cousins, that she was "familiar"

with the names, and that she did not socialize with them. (R. 315:60–61.) The circuit court asked, "Assuming they are related to you, do you think that would affect your judgment in this case at all?" and the juror responded, "No." (R. 315:61.) Neither party objected or moved to strike the juror, and she served on the jury. (R. 315:158–59.)

The contested issues at trial.

The State argued that Thomas intentionally killed Oliver-Thomas and pointed to evidence from the autopsy of the extent of her internal injuries to show the force and the likely length of time it took to kill her. (R. 321:38–39, 53–55.) The State argued that Thomas sexually assaulted Oliver-Thomas by rubbing his genitals against her hip, which he described in his statement to police as "humping" her hip, and continued even when she told him to stop. (R. 321:59, 60.) And the State argued that Thomas was guilty of false imprisonment because Thomas, by his own admission, held Oliver-Thomas in a choke-hold from behind and continued restraining her after she told him to stop. (R. 321:60.)

The defense theory was that Thomas did not intend to cause Oliver-Thomas's death, and defense counsel pointed to the absence of a broken hyoid bone and absence of external bruising of the neck as evidence that the compression that caused her death was of short duration and not much force. (R. 321:78–79.) Defense counsel argued that there was no evidence of any sexual contact other than Thomas's description that "[h]e hopped on the side of her hip with his clothes on" and was "joking around," and in the process of that he "falls down next to her, has his arm around the neck, and they roll off the bed." (R. 321:84.) Defense counsel argued, "That is not sexual assault." (R. 321:84.) Defense counsel similarly discounted the evidence in support of the false imprisonment count, arguing that common sense showed that Thomas's restraint of Oliver-Thomas was not false

imprisonment because he did not "lock[ ] her in a bedroom" or "cuff her to the bed." (R. 321:83.)

The evidence presented at trial.

Thomas's statements. Thomas made a 911 call in which he told the operator that he had found Oliver-Thomas on the floor, blue and unresponsive, and said, "I think my wife just choked to death." (R. 81.) He made multiple statements to police. He made one at the scene that an officer wrote down and Thomas signed. (R. 83; 319:15) He made a second statement at the police station when he spoke to the police voluntarily and was not under arrest. (R. 89; 319:20.) In the first two statements, he described finding Oliver-Thomas unresponsive on the floor next to their bed. (R. 11:2–3; 89:2.)

He made a third voluntary statement to police after he was arrested. (R. 11; 319:53.) In it, he described forcing sexual contact after watching a porn video, ignoring Oliver-Thomas's objection, and squeezing her neck with his arm as she "was struggling":

> Joyce asked me if I was watching one of those dam movies. After that Joyce had laid back down on the bed and was lying on her left side. I said yeah I had been watching one of my movies. I then jumped on her hip area and I was humping. I was just messing around and I told her I had time for a quicky. I believe that Joyce was wearing her underpants and I'm not sure if she was wearing a bra. I rolled Joyce over and we went back down on the floor. Joyce was lying on her left side and I was on my left side behind her. *I had my left arm was around Joyce neck. I didn't think I was squeezing hard but Joyce was struggling and was yelling for me to stop and to quit it[.]* Joyce's feet were kicking the floor while she was telling me to stop. Joyce was telling me she loved me and for me to quit playing. *I kept squeezing for a little while* until she said she would bite the shit out of me. Joyce's breathing started to slow down so I turned her loose. After I turned her loose Joyce was breathing funny and looking at me. I got up and left.

(R. 11:3. Emphasis added.) Thomas also stated, "I do believe I was accidentally responsible for the death of Joyce. I'm not sure if it was my mixing of the crack and medicine that made me so rough with Joyce."[1] (R. 11:3.)

The downstairs neighbor's testimony. Erika Cruz, the woman who lived in the apartment beneath Thomas's, testified that she was awakened at about 2:00 a.m. on December 27, 2006, by "a lot of noise, people fighting, a lot of noise like screaming" from the apartment above her. (R. 316:119.) She said she heard two people upstairs who "were fighting" and she heard "a woman screaming." (R. 316:121.) At one point, she heard the woman say, "Stop, stop, I love you, I love you." (R. 316:126.) After that, she testified, she heard "When she yelled and everything, I heard, like, something fell on the ground -- something big, quite big, and then I heard silence." (R. 316:126–27.) She testified that she then heard steps upstairs and saw Thomas leave the apartment. (R. 316:127.)

The homicide detective's testimony. The homicide detective testified, and, as relevant to the issues on appeal, was questioned on cross-examination about the results of a rape kit done on Oliver-Thomas's body. (R. 319:118–19.) The detective answered that no DNA from the defendant was found inside the victim. (R. 319:119.)

The medical examiner's testimony. The medical examiner who performed the autopsy of the victim testified that the cause of death was strangulation based on the "extensive" internal injuries to Oliver-Thomas's mouth and neck. (R. 316:22, 213.) The autopsy report described Oliver-Thomas as "morbidly obese" at an estimated 250 pounds, and listed her injuries:

---

[1] Thomas made a fourth statement to police while he was incarcerated in which he claimed that a drug dealer named Greg was the person who killed Oliver-Thomas while Thomas was out of the apartment briefly. (R. 102; 319:104–107.) This statement was discredited by both sides at trial. (R. 319:104–107; 321:81.)

Strangulation

A. Extensive hemorrhage involving soft tissues and strap muscles of neck bilaterally

B. Hemorrhages, bilateral bulbar and palpebral conjunctivae (petechial and confluent)

Blunt force injuries to face

A. Superficial abrasions, nose, cheeks and lips

B. Lacerations, buccal mucosa

C. Approximately 70 cc bloody gastric contents.

(R. 88:2.)

The medical examiner testified that she saw scratches on Oliver-Thomas's face and that though she had in other cases seen scratches caused in the course of resuscitation attempts, the scratches in this case did not look like that. (R. 316:194; 317:60–61, 65–66.) On cross-examination, defense counsel elicited that there were no fingertip bruises or fingernail marks on Oliver-Thomas's neck, and no chin abrasions that would indicate defensive efforts to use the chin to protect the neck. (R. 317:36–39.) Defense counsel also elicited from the witness that it is common in manual strangulation cases for there to be bruising on the perpetrator and that she did not review any photos of the defendant before reaching her conclusion. (R. 317:36.)

The State's other witnesses. The State presented 14 other witnesses, including the man Thomas was smoking crack with before and after he killed Oliver-Thomas, the 911 operator, the officers and detectives who responded to the scene and conducted the investigation, the lab analyst who found cocaine in Thomas's blood, the victim's co-workers and supervisors, and the victim's daughter. (R. 316:2; 317:2–3; 318:2.)

The defense expert witness. The defense called one witness, a practicing medical examiner from another state,

who testified that based on the pattern of injuries reported in the autopsy, there was "insufficient evidence to prove that this was an intentional manual strangulation," and instead that the injuries showed a brief "compression of the neck" that was consistent with Thomas's account of accidental strangulation. (R. 320:52–55.)

The defense expert testified that his opinion was based on his review of the autopsy report, photos, the police report, all police department files, statements from witnesses, toxicology reports, crime lab reports—"everything that exists in the case." (R. 320:14–15.)

The expert testified that he had reviewed photos of Thomas and saw no defensive wounds or bruising on his body. (R. 320:21.) The reason he reviewed photos of Thomas's body was that "an exchange of evidence" between the victim and perpetrator would give an indication of the force used against the victim:

> [I]n allegations of violence resulting in death where there is evidence of some sort of a physical struggle as in this case, *you need to examine both the victim as well as the alleged perpetrator* to see if--any event like that *there will be an exchange of trauma, an exchange of evidence.* To the degree that you have got extensive trauma that looks like self-defense, to the degree that you have got extensive trauma that looks like it's on the perpetrator, it gives you again a better overall sense of the degree of trauma, the degree of force related during the incident.

(R. 320:20–21 (emphasis added).)

The expert also testified that the abrasions to Oliver-Thomas's face could have been caused by emergency medical personnel during resuscitation attempts or by contact with the floor while facedown during sex. (R. 320:22–23, 28.)

The expert testified that he reviewed the material he did because 1) "you need to get as much information as you can" before you reach a conclusion; 2) "[y]ou can't tell [the

difference between a homicide and an accident] at all at the autopsy table"; and 3) "[y]ou never know when any one specific part of those investigations will drive your determinations one way or another." (R. 320:15–16.)

The testimony that is the basis for the second of Thomas's appellate arguments was elicited from the defense expert about a lab report that was included in the materials he reviewed. On cross-examination, the State questioned him in connection with the rape kit results and then proceeded to ask about other DNA analysis, and the circuit court overruled defense counsel's objection:

> [Prosecutor]: . . . But in those crime lab reports, you are aware that there was some analysis done?
>
> [Defense counsel]: Objection.
>
> [Prosecutor]: It's what he relied on in his opinion.
>
> [Defense counsel]: I'm objecting to going into the details of reports that haven't been introduced into evidence, though. It's a back door -
>
> THE COURT: If he examined it, then it's presumably something he discounted or relied upon. The objection is overruled.
>
> [Prosecutor]: And you are aware in those crime lab reports that *Oscar Thomas's DNA was found under Joyce Oliver-Thomas's fingernail clippings*, which were clipped from her body at the time of the autopsy, correct?
>
> A. I believe so. I would like to look at the report again, if you can show me that, no?
>
> . . .
>
> Q. Dr. Williams, I'm handing you a document which we have marked as Exhibit No. 36. Can you please take a look at that? It's a three-page document. Let us know if that is the Wisconsin state crime lab report that you reviewed in preparation for your report.

> A. (Witness complies.) Yes, this appears to be an analysis that shows that the DNA found under the fingerprints was obviously a mixture. *You are going to have her DNA, but also evidence of DNA from Oscar Thomas.*
>
> Q. And similarly the fingernails from the defendant were also swabbed, and *her DNA was found under that as well; is that correct*?
>
> A. Yes.

(R. 320:88–89 (emphasis added).)

The witness quickly dismissed the significance of the findings, stating, "A finding of the DNA, they could be scratching each other's back," and restating that "there is no evidence of trauma on him to support the fact that she was struggling sufficiently." (R. 320:89.)

In closing argument, the prosecutor presented his theory of how the victim died—with the defendant holding her neck in a choke hold with one arm and scratching her face with the other hand as he tried to cover her mouth and muffle her screams. (R. 321:37–38.) When defense objected—"there is no evidence of that"—the circuit court admonished the prosecutor that closing argument is "confined to the evidence," and the prosecutor responded that "the evidence supports this theory." (R. 321:37–38.) The circuit court overruled the objection and permitted the prosecutor to argue that the evidence of the victim's DNA under Thomas's fingernails supported the prosecution theory that Thomas scratched the victim's face in the process of strangling her. (R. 321:38.)

Postconviction motion and ruling.

Thomas sought postconviction relief on the three grounds raised in this appeal. (R. 279; 285.) First, he sought to have the conviction for sexual assault vacated on the grounds that there was no corroboration of any significant fact of his statement to police about the sexual contact, as is

required for convictions based on confessions. (R. 279:3–7.) Second, he sought a new trial on the ground that the testimony the State elicited about the victim's DNA under Thomas's fingernails was hearsay evidence[2] that was admitted in violation of the rule that hearsay data is not made admissible just because it was the basis for an expert's opinion. (R. 285:5.) Third, he argued that there should have been a finding of objective bias for the juror who informed the circuit court during voir dire that she thought she was related to witness Erika Cruz notwithstanding the juror's statement that if they were related, that fact would not affect her decision in the case. (R. 279:13–20.)

To the first argument, the State responded that the confession was corroborated by the discovery of the porn video Thomas had mentioned in his statements to police as well as the downstairs neighbor's testimony about hearing a woman telling Thomas to stop, as Thomas said the victim did. (R. 283:1.)

The State argued that there was no error in admitting the DNA fingernail evidence and that "the State cross-examined the defendant's expert witness regarding the report because it contradicted his findings." (R. 286:1.) It argued that the DNA evidence was properly admitted as impeachment evidence under the rule set forth in *Vinicky v. Midland Mut. Cas. Ins. Co.*, 35 Wis. 2d 246, 256, 151 N.W.2d 77 (1967):

> [W]henever it becomes apparent that a medical expert relies on the reports of other physicians or experts not in evidence, *those reports may* in their relevant and competent portions *be introduced by the adverse party into evidence for the purpose of*

---

[2] Thomas made a different argument against the DNA evidence argument in his motion but withdrew the argument in his reply to the State's response and advanced the hearsay argument. (R. 279:8–13; 285:3–6.)

> *impeachment* and in the interests of verbal completeness.

(Emphasis added.)

Finally, the State argued that there was no evidence of objective juror bias because there was never any confirmation of a family relationship between the juror and the witnesses. And even if there was, the only evidence in the record was that the juror did not socialize with the prospective witnesses and would not allow any relationship to interfere with her duties as a juror. (R. 283:3.)

The circuit court denied the motion by operation of law pursuant to Wis. Stat. § (Rule) 809.30(2)(i). (R. 287:1–2.)

This appeal follows.

ARGUMENT

I. The State satisfied the corroboration rule because the sexual assault conviction is supported by Thomas's confession and by at least one significant fact.

A. The standard of review.

The corroboration rule is a common-law standard. *State v. Hauk*, 2002 WI App 226, ¶ 20, 257 Wis. 2d 579, 652 N.W.2d 393. Determining if the facts fulfill a common-law standard presents a question of law. *Peplinski v. Fobe's Roofing, Inc.*, 193 Wis. 2d 6, 18, 531 N.W.2d 597 (1995). The facts in evidence are viewed in a light most favorable to the jury's verdict. *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

B. The governing law.

"[T]he State must present at least one significant fact [in addition to a confession] that gives confidence that the crime the defendant has been convicted of actually did occur." *State v. Bannister*, 2007 WI 86, ¶ 31, 302 Wis. 2d 158, 734

N.W.2d 892. "[T]he corroboration rule functions to ensure a jury has not convicted a defendant on his or her confession alone." *Id.* ¶ 33. "A significant fact need not either independently establish the specific elements of the crime or independently link the defendant to the crime." *Id.* ¶ 31.

C. The video and the testimony of the witness who heard the crime are the significant facts that corroborate Thomas's confession.

Thomas's confession included two specific facts that were corroborated at trial. The first is that he said he watched a porn video before going to the bedroom and getting on the bed with the victim and "humping" her hip. (R. 11:2–3.) The police recovered the porn video he said he watched when they searched the house. (R. 319:25, 36.) The second is that while he was "humping" her hip, the victim told him to stop and that she loved him. (R. 11:3.) The downstairs neighbor testified that during the fighting, she heard a woman say, "Stop, stop, I love you, I love you" immediately before things went silent. (R. 316:126.) These facts satisfy the standard for corroboration of a confession; they are not required to "independently establish the specific elements of the crime." *Bannister*, 302 Wis. 2d 158, ¶ 31.

Thomas argues in his brief that "nothing in the evidence aside from Mr. Thomas's statements suggests any sexual contact or sexual assault." (Thomas's Br. 22.) He points to the fact that the rape kit did not show evidence of intercourse. (Thomas's Br. 22.) There are two problems with his argument. One, the State alleged sexual contact over clothing, not intercourse, and the rape kit results are irrelevant to that allegation. And two, by his own argument, a finding of DNA showing intercourse would still be insufficient to corroborate sexual assault because it would not confirm nonconsensual sex. It appears that to satisfy Thomas's interpretation of the corroboration rule, the State would need to produce video

footage of the incident to corroborate the sexual contact. By his interpretation, the State could not successfully charge sexual contact *that the defendant confessed to* without visual corroboration because even a nearby witness who overhears the assault cannot corroborate it. That is not the law. The standard is whether the corroborating facts here "give[ ] confidence that the crime the defendant has been convicted of actually did occur," and the facts here do so. *See Bannister*, 302 Wis. 2d 158, ¶ 31.

Thomas is therefore not entitled to have his conviction for sexual assault vacated.

II. Thomas is not entitled to a new trial because the hearsay DNA evidence was elicited as impeachment evidence and was therefore admissible under *Vinicky*.

A. The standard of review.

Appellate courts review evidentiary decisions under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the applicable law and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590–91, 478 N.W.2d 37 (Ct. App. 1991). Where a circuit court reaches the right result for the wrong reason, a reviewing court will nevertheless affirm. *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

Even if the circuit court erred in admitting the evidence, however, "[a]n erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial." *State v. Nieves*, 2017 WI 69, ¶ 17, 376 Wis. 2d 300, 897 N.W.2d 363. A reviewing court that finds such error must conduct a harmless error analysis to determine whether the error affected the substantial rights of the party, and if it did not, the error is considered harmless. *Id.*; *see also* Wis. Stat.

§ 805.10. "An error affects the substantial rights of a party if there is a reasonable probability of a different outcome." *State v. Kleser*, 2010 WI 88, ¶ 94, 328 Wis. 2d 42, 786 N.W.2d 144.

B. The governing law.

An expert's opinion may be based on inadmissible hearsay. *See* Wis. Stat. § 907.03. That does not transform the inadmissible hearsay into admissible evidence, and it may not be put in front of the jury either through "the front door" of direct examination of the expert or "the back door" of cross-examination of the expert. *State v. Watson*, 227 Wis. 2d 167, 199, 595 N.W.2d 403 (1999). "[C]ertifications by a laboratory of tests received as substantive evidence, or the testimony by someone who did not perform the tests received as substantive evidence may violate a defendant's right to confrontation." *State v. Heine*, 2014 WI App 32, ¶ 9, 354 Wis. 2d 1, 844 N.W.2d 409.

However, an adverse party can use hearsay from the reports to impeach the expert's opinion:

> [W]henever it becomes apparent that a medical expert relies on the reports of other physicians or experts not in evidence, those reports may . . . be introduced by the adverse party into evidence *for the purpose of impeachment and in the interests of verbal completeness.*

Vinicky, 35 Wis. 2d at 256 (emphasis added).

C. The circuit court's ruling on the testimony about the DNA is supported by law.

The State argued before the circuit court that "the State cross-examined the defendant's expert witness regarding the report because it contradicted his findings." (R. 286:1.) It did.

The defense expert testified that he had reviewed "everything that exists in the case." (R. 320:15.) He testified that every piece of evidence, even evidence on the alleged

perpetrator's body, was relevant because it could "drive your determinations one way or the other." (R. 320:15–16.) He testified that it was important to examine both the victim and the alleged perpetrator for "an exchange of evidence" between them where there is "evidence of some sort of a physical struggle." (R. 320:20–21.) He testified that he saw no defensive wounds on Thomas, and he disputed the characterization of the wounds to the victim's face as "scratches." (R. 320:21, 22.) He testified that the abrasions could have been caused by emergency medical personnel during resuscitation attempts or by contact with the floor while facedown during sex. (R. 320:22–23, 28.)

The evidence that Thomas had the victim's DNA under his fingernails and that she had his under hers impeaches the expert witness's testimony. It shows that despite having access to those facts, and despite saying that he examined all the facts, and despite saying that an "exchange of evidence" between the victim and the perpetrator in a struggle was important evidence, the expert witness *still* testified as if there was no evidence that the victim had Thomas's DNA under her fingernails, which by his own testimony was evidence of a struggle. More damning, he testified as if there was no evidence that Thomas had the victim's DNA under his fingernails—even though it would explain the scratches on her face, and even though Thomas scratching her face while strangling her is more plausible than her scratching her face on the floor during sex.

The evidence was therefore correctly admitted because "[hearsay] reports may . . . be introduced by the adverse party into evidence for the purpose of impeachment" and this evidence was introduced by the adverse party for that purpose. *See Vinicky*, 35 Wis. 2d at 256. Thomas contends that the circuit court's ruling was erroneous because it overruled the defense's objection on the ground that "[i]f [the expert witness] examined it, then it's presumably something he

discounted or relied upon." (R. 320:88.) This statement of the legal ground for allowing the evidence may have been abbreviated, but it is not necessarily wrong. If the expert "discounted or relied on" the challenged evidence, his failure to testify about it undermines his credibility. *See Vinicky*, 35 Wis. 2d at 256. Moreover, even if the circuit court did not state the correct legal standard when it overruled the defense objection, the facts here support admitting the evidence under the correct legal standard. *See King*, 120 Wis. 2d at 292. That is because the DNA fingernail evidence is highly relevant to the analytical framework the defense expert said he used, and it impeached his opinion to show that he did not acknowledge that evidence until forced to do so on cross-examination.

D. If the circuit court's evidentiary ruling was in error, any error was harmless.

In the alternative, if the evidence was not admissible as impeachment evidence, its admission was harmless for two reasons. First, it was harmless because a reasonable jury would have found Thomas guilty of first-degree intentional homicide even without knowing that he had the victim's DNA under his fingernails. Among the other evidence that Thomas intentionally caused the victim's death were the facts that by his own admission, he kept "squeezing [her neck] for a little while" when she was "struggling" and "telling [him] to stop" and the fact that by his own admission he left her when she was "breathing funny" and went for "a walk" and called 911 only after she could no longer be revived. Second, it was harmless because the defense witness offered a non-inculpatory explanation for the presence of the DNA under the victim's and the defendant's fingernails: that it could merely mean that, as a cohabiting couple, they had scratched each other's backs. (R. 320:89.)

The evidence can be reconciled with the defense theory, and there is therefore not "a reasonable probability of a

different outcome" if the evidence was not admitted, which makes any error in admitting it harmless. *Nieves*, 376 Wis. 2d 300, ¶ 17; *Kleser*, 328 Wis. 2d 42, ¶ 94.

E. The DNA testimony did not violate Thomas's right to confrontation because it was legitimate impeachment evidence.

"[A]n objection on the grounds of hearsay does not serve to preserve an objection based on the constitutional right to confrontation," and Thomas made no constitutional objection, so he failed to preserve his argument that the admission of the DNA fingernail evidence violates his constitutional right to confrontation because he was not able to cross-examine the author of the lab report. (Thomas's Br. 32.) *See State v. Nelson*, 138 Wis. 2d 418, 439, 406 N.W.2d 385 (1987).

Because he did not preserve the issue, he was required to raise the argument as a claim of ineffective assistance of counsel he must raise the issue that counsel performed deficiently by failing to raise the constitutional issue and that the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668 (1984). A claim of ineffective assistance of trial counsel must be preserved by a postconviction motion. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996).

Thomas did not preserve a claim of ineffective assistance in his postconviction motion. He has therefore forfeited the claim.

Even if he had preserved it, the claim would fail because there is no confrontation right for impeachment testimony, and he has not argued otherwise. It is well established that a statement is not hearsay, and the Confrontation Clause is not implicated, if the statement is offered for a purpose other than for its truth. *See State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 430, 351 N.W.2d 758 (Ct. App. 1984); *see also Tennessee v. Street*, 471 U.S. 409, 413–14 (1985). The testimony in question

was elicited because it undercut the expert's opinion and contradicted his testimony, so it was legitimate impeachment testimony for which Thomas had no confrontation right. The fact that the prosecutor pointed to the evidence in response to an objection during closing argument—the defense objected that there was "no evidence" supporting the prosecutor's theory of the struggle between the victim and Thomas—did not convert the impeachment evidence into testimonial evidence and retroactively impose a confrontation requirement. Because of this, there was no deficient performance in failing to make this argument. Therefore, Thomas's unpreserved confrontation clause argument fails.

III. Thomas is not entitled to an evidentiary hearing on his unpreserved juror bias claim because he was required to raise it as a claim of ineffective assistance of counsel at the circuit court and he did not do so.

A. The standard of review and governing law.

"The United States Constitution and Wisconsin's Constitution guarantee an accused an impartial jury." *State v. Mendoza*, 227 Wis. 2d 838, 847, 596 N.W.2d 736 (1999) (citing U.S. Const. amends. VI and XIV; Wis. Const. art. I, § 7).11 "To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." *State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999) (citing *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). "Prospective jurors are presumed impartial" and a defendant "bears the burden of rebutting this presumption and proving bias." *State v. Funk*, 2011 WI 62, ¶ 31, 335 Wis. 2d 369, 799 N.W.2d 421 (citation omitted).

A juror bias claim is waived if not presented to the trial court. *State v. Brunette*, 220 Wis. 2d 431, 440, 583 N.W.2d 174 (Ct. App. 1998). A reviewing court "will reverse a circuit court's determination in regard to objective bias only if as a

matter of law a reasonable judge could not have reached such a conclusion." *Funk*, 335 Wis. 2d 369, ¶ 30.

B. Thomas's challenge fails because he did not raise it as required in the circuit court.

The record shows that the juror responded to the circuit court's question during voir dire by informing the court of a possible familial relationship with two people on the witness list. The circuit court followed up with additional questions about the closeness of the relationship and whether it would affect the juror's decision making and based its legal conclusion on her answers to those questions.

The record reflects no objection from defense counsel to this juror, which means that the claim can be raised only as a claim of ineffective assistance. The postconviction motion contains no claim that trial counsel was ineffective for failing to object to the allegedly biased juror. Because Thomas did not preserve a claim of ineffective assistance of counsel at the circuit court, he has forfeited it. *See Rothering*, 205 Wis. 2d at 681 (claim of ineffective assistance of trial counsel must be preserved by a postconviction motion).

Even if his claim is not forfeited, it fails. Thomas has merely asserted that the juror "was related to an important State's witness" and has cited two cases for the proposition that a family relationship can sometimes be "so close that a finding of [objective] bias is mandated." (Thomas's Br. 37–39.) The cases he cites involve the brother of a police officer witness and the mother of the presiding judge. *State v. Gesch*, 167 Wis. 2d 660, 482 N.W.2d 99 (1992), and *State v. Tody*, 2009 WI 31, 316 Wis. 2d 689, 764 N.W.2d 737. Those cases do not stand for the proposition that objective bias exists in every case where a family relationship of any sort exists between a juror and a witness. He relies on the holding of *Gesch* that "what is important is the existence of the very high potential" that "any . . . relative by blood or marriage to the third degree

of a state witness will be actually biased[.]" *Gesch*, 167 Wis. 2d at 669, 671 (jurors who are related to a State's witness by "blood or marriage to the third degree as shown in Figure 852.03(2), Stats., must be struck from the jury panel on the basis of implied bias").

But as the State pointed out in the circuit court, Thomas does not show that the juror is "a relative by blood or marriage to the third degree" of the State's witness. (R. 283:3.) The State noted that the kinship table referred to in *Gesch*, now found at Wis. Stat. § 990.001(16), shows that cousins are no closer than 4th degree relatives. (R. 283:3–4.)

Because there is no basis for finding objective bias on this record, Thomas's claim would fail even if he had not forfeited it.

CONCLUSION

For the reasons given, the State asks this Court to affirm the circuit court's order denying Thomas's postconviction motion.

Dated this 13th day of August 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
levinsonsb@doj.state.wi.us

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 5,909 words.

Dated this 13th day of August 2020.

_____
SONYA BICE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 13th day of August 2020.

_____
SONYA BICE
Assistant Attorney General