COURT OF APPEALS
DECISION
DATED AND RELEASED

July 29, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0719-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEE A. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Lee A. Brown appeals from a judgment entered after a jury found him guilty of two counts of second-degree sexual assault, contrary to § 940.225(2)(a), STATS. He also appeals from an order denying his postconviction motion. Brown claims that: (1) he received ineffective assistance of trial counsel; and (2) the trial court erred in denying Brown's motion to strike

for cause juror Phyllis C. Because Brown fails to show how any alleged deficient performance by his trial counsel prejudiced him, and because the trial court did not erroneously exercise its discretion in refusing to strike a juror for cause, we affirm.

I. BACKGROUND

In the early morning hours of February 23, 1993, Terry S. was walking south on Teutonia Avenue in Milwaukee when she noticed that she was being followed. A person grabbed her, pulled her to a big, empty playground, and sexually assaulted her. She managed to get away, immediately called 911 from a pay phone, and provided a description of her assailant. She reported that he was a black man of medium build, wearing tan pants, a blue jacket with "Marquette" printed "under the shoulder," and K Swiss tennis shoes. She told the police that he was heading north on 10th Street.

Within minutes, Brown was spotted and stopped about three blocks away from the scene of the crime. His appearance and clothing matched those described by the victim. Shoeprints at the scene of the crime matched the shoes that Brown was wearing. Brown had a bloody lip, and the two pairs of pants he was wearing were undone. He also had snow high up on his pants in a manner consistent with having been on the ground. The snow that night was freshly fallen and only a few inches deep. Terry S. identified Brown as her assailant.

Brown was arrested, charged and his case was presented to a jury. During jury selection, one juror, Phyllis C., initially stated that she was not sure that she could be fair because her nine-year-old daughter had been sexually assaulted six years ago and she was displeased with how the system had handled the case. The trial court conducted an in-chambers examination of this juror, during which she concluded that she could be fair and impartial. The trial court

denied Brown's motion to strike this juror for cause. Brown's counsel did not use a peremptory challenge to strike Phyllis C. from the panel. She served as a juror in this case.

The jury convicted. Brown filed a postconviction motion alleging that he received ineffective assistance from trial counsel. The trial court denied the motion. Brown now appeals.

II. DISCUSSION

A. Ineffective Assistance.

Brown claims his trial counsel provided ineffective assistance in three ways: (1) by failing to object to improper questions directed to Brown as to whether other witnesses had lied or provided inaccurate testimony; (2) by failing to object to the State's closing argument, which referred to Brown's testimony that other witnesses had lied or testified inaccurately; and (3) by failing to use a peremptory strike to remove Phyllis C. from the jury. The trial court concluded that Brown received effective assistance of counsel. We agree.

In order to establish that he did not receive effective assistance of counsel, Brown must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if Brown can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate

that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, Brown must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (citation omitted).

In assessing Brown's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

We reject Brown's ineffective assistance claim. In doing so, we address only whether he has shown that the alleged deficient performance prejudiced him. Brown alleges that his trial counsel should have: (1) objected to the prosecutor's questions as to whether Brown believed that other witnesses had lied or provided inaccurate information; (2) objected to the prosecutor's reference to this testimony in closing; and (3) used a peremptory strike to remove juror Phyllis C. from the panel. Brown fails, however, to specifically argue how any of this conduct prejudiced him. He does not allege with specificity how posing objections or removing the juror would have altered the outcome of the trial.

Accordingly, we conclude that he has failed to satisfy the prejudice component and, therefore, we reject his claim that he received ineffective assistance.[1]

We agree with the trial court that even if trial counsel had objected as Brown suggests, and struck Phyllis C. from the jury, the result of the proceeding would not have been different. The record contains overwhelming incriminating evidence. The victim positively identified Brown as her assailant. His clothes matched the description the victim had given to police. He was found in the immediate vicinity with his pants undone and snow on his pants. His shoes were an identical match to the shoeprints found at the scene of the crime.

B. Trial Court's Refusal to Strike Juror.

Brown also claims that the trial court erred when it refused to strike juror Phyllis C. for cause. A trial court's decision on whether to dismiss a juror for cause is discretionary and will not be overturned unless it constituted an erroneous exercise of discretion. *See* ***State v. Sarinske***, 91 Wis.2d 14, 33, 280 N.W.2d 725, 733-34 (1979).

During *voir dire* of prospective jurors, Phyllis C. disclosed that her daughter had been sexually assaulted and that she was not happy with the way the system handled the case. She said she did not know whether she could be fair and impartial when sitting as a juror in this case. The trial court then brought her into

[1] Because we have resolved this matter on the prejudice prong, it is not necessary for us to address the issue raised regarding the different conclusions this court reached regarding questioning a defendant as to whether other witnesses are lying, mistaken or inaccurate. *See* ***State v. Kuehl***, 199 Wis.2d 143, 545 N.W.2d 840 (Ct. App. 1995) (concluding that questions as to whether witnesses were mistaken violated ***State v. Haseltine***, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984)), and ***State v. Jackson***, 187 Wis.2d 431, 523 N.W.2d 126 (Ct. App. 1994) (concluding that questions as to whether witnesses were lying did not violate ***Haseltine*** because the purpose and effect of the questions were to impeach the defendant).

chambers, where a colloquy rehabilitated Phyllis C. as a potential juror. After instructing her that this case involved a completely different set of facts with completely different people, Phyllis C. agreed that it would not be fair to hold her prior experience against anyone in the current case. She then assured the trial court that she could put the earlier experience "someplace else" in her mind. The trial court then asked her whether she could be fair and impartial and she answered, "Yeah, I can." The trial court denied Brown's request to strike Phyllis C. for cause.

Brown argues that Phyllis C. should have been removed despite her assertions of impartiality because she demonstrated bias and an inability to be fair and impartial. Established precedent in Wisconsin, however, does not require removal of a juror who initially expresses prejudice but later says that he or she can be impartial. *See* ***Sarinske***, 91 Wis.2d at 33, 280 N.W.2d at 733-34. The trial court must determine, based on the prospective juror's demeanor, whether he or she can sincerely set aside personal bias and give fair consideration to the evidence presented in court. *See* ***id.***

Based on our review of the record, we conclude that the trial court did not erroneously exercise its discretion when it denied the request to strike Phyllis C. for cause. Although she initially indicated that she did feel like she could be fair because of her prior displeasure with the system, Phyllis C. indicated that she could set aside her prior experience and sit as a fair and impartial juror. The trial court believed Phyllis C.'s representations were sincere. We have not been presented with any evidence that challenges her sincerity. Accordingly, we

reject Brown's assertion that the trial court erroneously exercised its discretion when it allowed Phyllis C. to remain on the jury panel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.