COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP2582 **Cir. Ct. No. 2002CF3370**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARL DEWAYNE PHIFFER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Earl Phiffer appeals an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion for relief from a sexual assault conviction. He contends that he received ineffective assistance from his trial counsel, and that the trial court erroneously limited defense counsel's cross-examination of his victim. We affirm.

¶2 Phiffer was convicted after a jury trial. On his first appeal we affirmed his conviction and an order denying postconviction relief. In his subsequent WIS. STAT. § 974.06 motion he alleged that postconviction counsel ineffectively failed to raise issues concerning trial counsel's performance on voir dire, and trial counsel's failure to persuade the trial court not to limit cross-examination of the victim. Phiffer also challenged the trial court's ruling on that issue as an erroneous exercise of discretion. The trial court denied relief, resulting in this appeal.

¶3 The trial court denied relief on its determination that Phiffer failed to reasonably explain why he did not raise his issues during the earlier postconviction proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (any claim that could have been raised on direct appeal or in a previous WIS. STAT. § 974.06 postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason). Because the State does not fully develop its argument on the ***Escalona-Naranjo*** ground, we instead address the issues on the merits. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

47, 492 N.W.2d 633 (Ct. App. 1992) (we do not address insufficiently developed arguments).

¶4 Phiffer first contends that, due to counsel's negligence, his jury contained two biased jurors. One reported during voir dire that a close relative by marriage was accused of sexual assault and that two other family members were "involved" in the matter, which was privately resolved. She also stated that she formerly worked in the Beloit City Attorney's Office, knew quite a few Beloit police officers, and was once the neighbor of a police officer who subsequently testified against Phiffer. The other juror reported that Wells resembled someone who once had a very negative relationship with her daughter, but also stated that Wells obviously was not the same person and that she could judge him fairly and impartially. Counsel did not seek removal of either juror, and both sat on the jury. According to Phiffer, counsel should have removed both for cause, which we interpret as a contention that counsel should have moved the trial court to remove both for cause, as removal is the court's responsibility and not counsel's.

¶5 There are three categories of juror bias: (1) bias as defined in WIS. STAT. § 805.08(1), which Phiffer does not allege; (2) subjective bias, which refers to the particular juror's ability to fairly and impartially reach a verdict, and is revealed through the words and the demeanor of the prospective juror; and (3) objective bias, which refers to a reasonable juror's ability to judge fairly given the facts and circumstances surrounding the prospective juror's answers on voir dire. ***State v. Lindell***, 2001 WI 108, ¶¶35-38, 245 Wis. 2d 689, 629 N.W.2d 223. Here, trial counsel would have had no reasonable basis to argue either subjective or objective bias in the case of either juror. Neither had any connection to this case. The first juror knew some police officers, including a witness against Phiffer, but reported no significant connection with any of them. She reported a

family connection with a sexual assault incident, but one that was not prosecuted and where she was closely related to the perpetrator. She declared that she could be fair and impartial. The second juror reported a physical resemblance between Phiffer and someone the juror viewed very unfavorably, but acknowledged the irrelevancy of that fact and also stated that she could remain fair and impartial. There was no reasonable basis to infer bias in the case of either juror. Consequently, trial counsel's failure to seek either's removal for cause does not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441, *review denied*, 2002 WI 111, 256 Wis. 2d 65, 650 N.W.2d 841 (failure to raise an issue is not deficient performance if the issue is later determined to be without merit).

¶6 Phiffer's next two arguments concern the trial court's decision to limit cross-examination of the victim on the circumstances under which she appeared to testify. The arguments are not adequately developed, and we decline to address them. ***Pettit***, 171 Wis. 2d at 646-47. For the same reason, we decline to address Phiffer's conclusory contention that we should grant him a new trial in the interests of justice because the court's ruling prevented a full trial of the controversy.

By the Court.—Order affirmed.

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