COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1170-CR **Cir. Ct. No. 2002CF388**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MACHON L. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Machon L. Williams, pro se, appeals from a judgment convicting him of child enticement and two counts of second-degree

sexual assault, as a habitual criminal, and from an order denying his motion for postconviction relief. Machon[1] raises four claims of error: trial court interference with the verdict, juror misconduct, ineffective assistance of counsel and insufficiency of the evidence. None are persuasive. We affirm.

¶2 A fifteen-year-old girl reported that Machon took her to a motel room and raped her. A jury found him guilty of one count of child enticement with intent to have sexual contact and two counts of second-degree sexual assault of a child. The court imposed a total sentence of twenty years' initial confinement followed by ten years' extended supervision. Machon's appellate challenges all arise from the claim that, unbeknownst to the trial court, one of the jurors may have communicated about the progress of the trial with a prosecution witness, Machon's mother and Machon himself. Additional facts will be set out below.

VERDICT INTERFERENCE

¶3 Count one of the information alleged child enticement with intent to have sexual contact; counts two and three alleged sexual assault of a child under sixteen. During deliberations, the jury sent out a note stating: "In reading the statutory definition of the crime we would like to ask for a new ver[d]ict form for charge one …." The court did not advise the parties of the note. It responded to the jury:

> Along with this note is a new blank verdict form for count One. Please do not destroy the original verdict, simply mark through it with an "X" and return it with the other verdict forms.

[1] Several individuals in this case share the surname "Williams." We will use first names to reduce confusion. Machon Williams and Latoya Williams, mentioned later, are not related.

¶4 The jury deliberated further and informed the court when it reached its verdict. The court then informed the parties about the earlier request and read aloud the juror's note. The court commented that it did not know the reason for the request, if an answer had been inserted at that point, or "if they'd made notes on it[,] … if it had been used inadvertently, if water had been spilled on it, [or] if it had any type of tears or something." The jury then returned the verdict, including the original crossed-out verdict form. The jury found Machon guilty on all three counts. The crossed-out form read "not guilty" for the child enticement charge.

¶5 Machon contends that the trial court interfered with the jury's unanimous not-guilty verdict by responding to the note without advising the parties. He is incorrect. A jury's verdict is not accepted until it is received in open court, the results announced, the jury polled, if requested, and the judgment entered. ***State v. Reid***, 166 Wis. 2d 139, 144, 479 N.W.2d 572 (Ct. App. 1991). Jurors are free to reconsider a verdict until it has been accepted by the court. *See* ***State v. Knight***, 143 Wis. 2d 408, 416, 421 N.W.2d 847 (1988).

¶6 The trial court's handling of the situation was exemplary. The court announced the verdict, verified that it was the jury's unanimous decision to change the verdict on count one from not guilty to guilty, and then individually polled the jurors, confirming in particular that each juror intended a vote of guilty on count one. The court paid due respect to the jury's role and responsibility during deliberations, and ascertained that the resulting verdict represented the intent of each individual juror and the panel as a whole. Machon's claim fails.

JUROR MISCONDUCT

¶7 Machon contends that the changed verdict answer resulted from juror Latoya Williams' improper influence on the other jurors. He posits that

Latoya first planned to acquit him because she was attracted to him but when she learned he was married, she changed her mind and prevailed on the other jurors to change their verdict. Machon asserts that Latoya did not acknowledge during voir dire that she was acquainted with at least one witness, repeatedly discussed the case with her friends and family members, communicated with a State's witness, and contacted Machon and his mother during the trial and jury deliberations. He also claims his trial counsel, Douglas Henderson, knew during the trial about Latoya's alleged communications but did nothing about it. He asserts the trial court erred in denying his postconviction motion seeking a new trial.

¶8 A criminal defendant has a constitutional right to receive a fair trial by a panel of impartial jurors, ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999), and to be judged solely on the evidence adduced at the trial. ***State v. Kiernan***, 227 Wis. 2d 736, 750, 596 N.W.2d 760 (1999). The party seeking to impeach the verdict has the burden of establishing that extraneous information was improperly brought to the jury's attention, and that the extraneous information was potentially prejudicial. *See* ***State v. Eison***, 194 Wis. 2d 160, 172, 533 N.W.2d 738 (1995). We will not reverse the trial court's grant or denial of a motion for a new trial unless it erroneously exercised its discretion. *See* ***id.*** at 171.

¶9 Machon first claims prejudice because at voir dire Latoya did not admit to being acquainted with various witnesses. To be awarded a new trial on this ground, Machon must show that Latoya answered incorrectly or incompletely and that under the particular facts and circumstances it is more probable than not that Latoya was biased against him. *See* ***Faucher***, 227 Wis. 2d at 726. Machon's argument falters on the second prong. He does not show how it is more probable than not that, at voir dire, Latoya was biased against him. He does not even assert

that he believed that to be the case. In fact, that notion runs counter to Machon's contention that Latoya was attracted to him.

¶10 The trial court explored the matter at the postconviction ***Machner***[2] hearing through the testimony of various witnesses. Critical to Machon's claim of prejudice was the testimony of Sarah Eddy, a prosecution witness at trial. Critical to the court's conclusion was the credibility of the witnesses. The court found, and we agree, that no extraneous, prejudicial information came to the attention of the other jurors, despite how Latoya flouted express instructions to avoid communications about the case and thereby "disgraced" the integrity of the jury.

¶11 Eddy testified at the ***Machner*** hearing that she met Latoya before the trial ever started. Eddy was friends with Latoya's sister, Wangosha Feemster. Eddy said that she, Feemster and Latoya were outside the courtroom when Machon walked by and Latoya commented that he could not be guilty because he was good-looking. Eddy said she saw Latoya that evening at Feemster's house, and Latoya told her she had called Machon and she "kept repeating" that she was going to find him not guilty because she wanted to start a relationship with him. Charles Fox, an investigator with the Office of the State Public Defender, testified otherwise. He said Eddy told him she did not meet Latoya until after the trial was over, and that Eddy never mentioned anything about Latoya calling Machon.

¶12 Machon's mother, Shirley Williams, testified that during the four-day trial she received updates twice daily in phone calls from "Theresa" and "Ta-Ta," or "Toya," who said they were friends of Machon. Shirley said she told

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Machon that "Toya" said things were "going good." Shirley said she appreciated the updates because she lived out of state and could not attend the trial. She said she advised defense counsel when she learned one caller was a juror.

¶13 Latoya admitted that she took part in three-way telephone conversations with her sister and Shirley, and called Shirley when the trial was over to say she was "really sorry" that Machon was going to jail. Investigator Fox accessed telephone records showing that during the trial numerous calls were made between Latoya's phone and Eddy's phone, and between Feemster's phone and Shirley's phone. Latoya also admitted discussing the case with her family members, but said it was "[n]othing but he was old and [the victim] was young." Latoya asserted that she never discussed anything with her fellow jurors.

¶14 We agree that the evidence fails to support Machon's claim that he was not tried by an impartial jury. While telephone records establish that calls were made and received to and from particular numbers, they do not establish either the identity of the callers or the content of the conversations. The trial court found that the contact alleged between Latoya and Machon or his family members left Machon with the impression the contact was beneficial to him. The court also found incredible the notion that Latoya caused the other jurors to capitulate when her alleged infatuation dimmed. The court observed that if Machon knew of Latoya's asserted bias, he either waived that complaint by waiting to see how it played out or has no grounds to make it, because the State is the party against whom the bias is asserted. *See* ***Faucher***, 227 Wis. 2d at 726.

¶15 Further, even if Latoya's conduct was precisely as Machon and Eddy described, Machon has not shown that extraneous information was improperly brought to the jury's attention, let alone that it was potentially prejudicial. *See*

Eison, 194 Wis. 2d at 172. Latoya denied discussing anything with them. Indeed, according to Investigator Fox, the other jurors said that Latoya spoke little during deliberations and never indicated that she knew anyone involved in the case. Numerous credibility determinations had to be made, and we may not substitute ours for those made by the trial court or the jury. *See* ***State v. Hampton***, 217 Wis. 2d 614, 623, 579 N.W.2d 260 (Ct. App. 1998).

¶16 While we have chosen to address Machon's challenge on the merits, we cannot help but agree with the trial court that Machon appears to have waited to see which way the winds blew as far as whether Latoya's impartiality might work to his benefit. The law will not allow a party to secure a benefit by thus speculating upon the chances. ***Grottkau v. State***, 70 Wis. 462, 472, 36 N.W. 31 (1888). Machon simply has not met his burden of demonstrating that he is entitled to a new trial due to juror misconduct.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶17 Machon asserts that he was deprived of his right to effective assistance of counsel because his trial counsel failed to bring the juror misconduct matter to the court's attention and to object to the jury being given a new verdict form without the parties' knowledge. To demonstrate ineffective assistance of counsel, a defendant must show counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Deficient performance and prejudice both present mixed questions of fact and law. *See* ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. We uphold the trial court's factual findings unless clearly erroneous. ***Id.*** Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Id.***

¶18 Machon insists he told Henderson during the trial about Latoya's contacts, but the trial court stated that a review of its notes and the ***Machner*** hearing transcripts yielded nothing showing that Henderson knew about Latoya's alleged involvement prior to return of the verdict. That finding is not clearly erroneous. To the extent the court was left to make credibility determinations, we see no basis to disturb them. *See* ***Hampton***, 217 Wis. 2d at 622-23. We concur that, ethically, Henderson should have notified the court at whatever point Machon advised him of juror misconduct. Since the record does not bear out that Henderson knew of misconduct during the trial, however, he cannot be deemed deficient for failing to report information he did not have.

¶19 We likewise conclude that Henderson had no obligation to object to the issuance of a new verdict form. Machon is correct that he had a right to be present in the courtroom at every stage of his trial. *See* ***State v. Haynes***, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984); *see also* WIS. STAT. § 971.04(1)(f) (2005-06).[3] As explained above, however, the jury's request for a new form did not constitute a return of the verdict. Henderson did not perform deficiently by not objecting. Since Machon has not demonstrated that Henderson perfomed deficiently in either regard, we need not address prejudice. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

[3] All references are to the 2005-06 Wisconsin Statutes except where noted.

SUFFICIENCY OF THE EVIDENCE[4]

¶20 Machon contends the evidence is insufficient to convict him because the DNA evidence does not support his guilt. Our review of a sufficiency of the evidence claim is very narrow. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. We may not substitute our judgment for the jury's "unless the evidence, viewed most favorably to the [S]tate 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." ***Id.***, ¶56 (citation omitted). We must examine the record to find facts that support upholding the jury's decision to convict. ***Id.***, ¶57.

¶21 The State charged Machon with one count of child enticement with intent to have sexual contact and two counts of second-degree sexual assault of a child, in violation of WIS. STAT. §§ 948.07(1) and 948.02(2) (1999-2000).[5] On the child enticement charge, the State had to prove beyond a reasonable doubt that the victim was under eighteen and that Machon caused her to go into a room with the intent of having sexual contact with her. *See* WIS JI—CRIMINAL 2134. On the sexual assault charges, the State had to prove beyond a reasonable doubt that the victim was under sixteen and that Machon had sexual intercourse with her. *See* WIS JI—CRIMINAL 2104. "Sexual intercourse" includes vulvar penetration, cunnilingus and fellatio. WIS. STAT. § 948.01(6) (1999-2000).

[4] Machon may challenge as of right the sufficiency of the evidence despite not raising it during trial. *See* ***State v. Hayes***, 2004 WI 80 273, ¶¶3, 55, Wis. 2d 1, 681 N.W.2d 203.

[5] The State charged Machon under the 1999-2000 statutes for crimes it alleged occurred on September 26, 2001.

¶22 The fluid and hair samples the State Crime Lab tested either were not useful for DNA analysis or belonged to the victim. The case did not rest solely on DNA evidence, however. To the contrary, the fifteen-year-old victim identified Machon as her assailant and testified that she, Machon and others were at a party at a motel. Later, she and some companions ran errands with Machon. Machon then dropped the other people off but, saying he forgot something, took her back to the motel room. She testified that Machon then forced her to engage in vaginal intercourse, cunnilingus and fellatio. The victim's testimony, which the jury was free to believe, is sufficient evidence of the crimes alleged.

By the Court.—Judgment and order affirmed.

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