

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2003

Cornelia G. Clark
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. 02-2461-CR

Cir. Ct. No. 01-CF-8

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLOYD W. HIPHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Bayfield County: ROBERT E. EATON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Floyd Hipsher appeals a judgment convicting him of repeatedly sexually assaulting his stepdaughter. He also appeals an order denying his motion for a new trial. He argues that a juror's failure to disclose her relationship with the prosecutor's father entitles him to a new trial based on lack of juror candor, objective juror bias, prosecutorial misconduct for the prosecutor's

failure to inform the court of the relationship and ineffective assistance of counsel for his attorneys' failure to inquire into the relationship. He also argues that his counsel was ineffective for failing to present a defense and that this court should order a new trial in the interest of justice. We reject these arguments and affirm the judgment and order.

¶2 Hipsher's arguments are based on a mischaracterization of the facts as found by the trial court. The trial court's findings are based on its assessment of the witnesses' credibility and are binding on this court. *See* WIS. STAT. § 805.17(2).¹ The trial court found Hipsher's postconviction testimony incredible, instead believing the testimony of one of his trial attorneys, Craig Haukaas, that Haukaas and Hipsher both knew of the juror's relationship with the prosecutor's father and Hipsher wanted her on the jury.

¶3 During voir dire, the juror stated that she worked with Hipsher's wife and knew the prosecutor both personally and professionally. She stated that she had dated the prosecutor's father and the last contact she had with him or a member of his family was the previous summer.

¶4 At the postconviction hearing, Haukaas testified that he knew the juror and the prosecutor's father had been seeing each other and that she had spent time with him in North or South Carolina when he stayed there for the winter. Haukaas suspected that the two had an intimate relationship and discussed the relationship with Hipsher. Hipsher told him that the relationship between the juror and the prosecutor's father had "ended badly" and Hipsher wanted the juror to

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

remain on the jury. Hipsher also knew her in her role as town clerk and thought she would be a positive juror toward him.

¶5 All of Hipsher's arguments relating to the juror's relationship with the prosecutor's father fail because of his and Haukaas's knowledge of the relationship. To be granted a new trial on the basis of lack of juror candor, Hipsher must show that the juror incorrectly or incompletely responded to a material question and that it is more probable than not that she was biased against him. *See State v. Delgado*, 223 Wis. 2d 270, 281, 188 N.W.2d 1 (1999). Hipsher has not demonstrated that the juror was biased against him. At the time Hipsher requested that she be left on the panel, he believed she could be biased in his favor.

¶6 Objective juror bias occurs if a reasonable person in the juror's position objectively could not judge the case in a fair and impartial manner. *See State v. Erickson*, 227 Wis. 2d 758, 775, 598 N.W.2d 749 (1999). Exclusion of a juror for objective bias necessitates a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case to be tried or the juror's intractable negative attitude toward the justice system in general. *State v. Wolfe*, 2001 WI App 136, ¶25, 246 Wis. 2d 233, 631 N.W.2d 240. The juror's past relationship with the prosecutor's father bears no relationship to this case. The victim testified that Hipsher sexually assaulted her. Her sister testified that he had earlier assaulted her. Their mother testified that she caught Hipsher peeking in the girls' bedroom window. Hipsher established through cross-examination that the victim knew Hipsher was about to move back into their home and that he would require her boyfriend to move out of a trailer on their property, providing a plausible motive for her to make a false accusation. The case turns on the credibility of these witnesses. Nothing in the juror's past

relationship with the prosecutor's father relates to the witnesses' credibility or the weight of the evidence presented. The trial court appropriately concluded that a reasonable person in the juror's position could fairly and impartially decide the case.

¶7 The prosecutor's failure to inform the court of his father's past relationship with the juror does not constitute prosecutorial misconduct. Hipsher and Haukaas knew more about the relationship than the juror revealed. The prosecutor's silence did not "poison the entire atmosphere of the trial." *See State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996).

¶8 Hipsher has not established ineffective assistance of trial counsel for his attorneys' failure to inquire further about the juror's relationship with the prosecutor's father. To establish ineffective assistance, Hipsher must show both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). His counsel's performance was dictated by Hipsher's personal knowledge of the relationship and his statement that he wanted her on the jury. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *See State v. Pitsch*, 124 Wis. 2d 628, 637, 389 N.W.2d 711 (1985). Hipsher fails to establish prejudice because the record does not establish any basis for believing that the juror was biased against him.

¶9 Hipsher also fails to establish ineffective assistance of trial counsel for failure to present a defense. His attorneys did present a defense by cross-examining the State's witnesses and by calling the investigating officer as a defense witness. The officer supplied the jury with Hipsher's defense without having to call Hipsher as a witness. Counsel reasonably urged Hipsher not to

testify based on his admitted inappropriate sexual contact with the victim's sister and his drug activity with the children. Because of the testimony presented during the State's case, several potential defense witnesses became irrelevant. The jury was informed of the victim's continuing close relationship with Hipsher, making it unnecessary to call other witnesses to substantiate that relationship. An expert witness whom the defense would have called to challenge the methods of the State's expert witness became irrelevant when the prosecutor decided not to call his expert witness. Counsel's decision not to present irrelevant or cumulative testimony constitutes neither deficient performance nor prejudice.

¶10 Finally, Hipsher has not established any basis for reversal in the interest of justice. We conclude that the issues were fully and fairly tried, that justice has not miscarried and that there is no basis for believing a new trial would result in a different verdict. *See* WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

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

