COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2011

A. John Voelker
Acting 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. 2011AP806-CR **Cir. Ct. No. 2010CM129**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Joseph Johnson appeals an order of the circuit court denying his motion for postconviction relief without a ***Machner***[2] hearing.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

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

Johnson filed a motion for postconviction relief seeking a new trial because his trial counsel provided ineffective assistance of counsel during voir dire. He contends on appeal that the court erred in denying his motion without a hearing because, according to him, the motion set forth sufficient facts entitling him to a fact-finding hearing. This court disagrees and therefore affirms.

BACKGROUND

¶2 Johnson was charged with fourth-degree sexual assault and attempted misdemeanor theft. The complaint alleged that in December 2009, Johnson inappropriately touched Sandra O. and attempted to take $20.00 from a drawer in her room. Johnson pled not guilty to both counts, and the case proceeded to a trial before a jury, which found Johnson guilty of the fourth-degree sexual assault charge, but not guilty of the attempted misdemeanor theft charge.

¶3 Johnson filed a postconviction motion seeking a new trial on the ground of ineffective assistance of counsel. He argued that his trial counsel was ineffective during voir dire in the following respects. First, in using peremptory challenges to strike prospective jurors Jared Basl, Jennifer Beyer, Melissa Inlow and Joan Hanson, rather than seeking to have them struck for cause due to either their subjective or objective bias. Second, in failing to adequately question prospective jurors Basl and Beyer, and empanelled jurors Jeanie Bell, Brian Johnson, and Charles Clemence in order to ascertain whether those jurors were subjectively or objectively biased. Johnson argued that as a result of his trial counsel's failure to conduct an adequate voir dire, the empanelled jury was not impartial. The circuit court denied Johnson's motion without a ***Machner*** hearing. Johnson appeals. Additional facts will be set forth below as necessary.

DISCUSSION

¶4 Johnson contends that the circuit court erred in denying his postconviction motion for a new trial without first holding a ***Machner*** hearing.

¶5 A defendant is entitled to an evidentiary hearing on a postconviction motion only if the motion raises sufficient facts that, if true, would entitle that defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). If the motion meets this standard, the circuit court must hold an evidentiary hearing as a matter of law. ***Id.*** However, if the motion does not raise sufficient facts or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the grant or denial of the postconviction motion is a matter of discretion entrusted to the circuit court. ***Id.***

¶6 Johnson's postconviction motion is based on his claim that his trial counsel was ineffective. To be entitled to an evidentiary hearing on a claim that his trial counsel was ineffective, Johnson was required to state sufficient facts that, if true, would lead a court to conclude that counsel's performance was deficient and that the deficient performance prejudiced his defense. ***State v. Balliette***, 2011 WI 79, ¶63, No. 2009AP472. To establish deficient performance, Johnson was required to set forth in his motion specific acts or omission by his trial counsel that fall "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish that he was prejudiced by his counsel's deficient performance, Johnson was required to set forth sufficient facts that, if true, would lead a court to conclude that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have

been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶7 Johnson asserted in his postconviction motion that his trial counsel was ineffective because counsel failed to adequately question empanelled jurors Jeanie Bell, Brian Johnson, and alternate juror Charles Clemence.[3]

¶8 With respect to Bell, Johnson argued in his motion that trial counsel should have questioned Bell further because of her familial relationship to a deputy assistant district attorney. During voir dire, the circuit court asked the jury if any juror was related to any member of the prosecutor's office. Bell informed the court that she is a cousin of Brian Barton, a deputy assistant district attorney. After being advised of this relationship, the court asked Bell whether "[a]nything about [her] dealings with Mr. Barton as a relative of [hers] would in any way influence [her] in [the] case?" After Bell answered "[n]o" to the court's question, no further questions were asked of Bell regarding this issue.

¶9 With respect to Brian Johnson, Johnson argued in his motion that his trial counsel was ineffective in failing to ask Brian Johnson additional questions to evaluate his ability to remain indifferent in light of the fact that Brian had been sexually abused as a child. During voir dire, the prosecutor asked the jurors whether "anybody [had] experience … with persons who have been the victim of a sexual assault or have been inappropriately touched by somebody." Brian indicated that he did and explained that he was sexually abused as a child. The

[3] Johnson also argued that his trial counsel failed to adequately question prospective jurors Basl and Beyer. Because Basl and Beyer were not part of the empanelled jury, this court addresses Johnson's claims as to those jurors in ¶¶13-15, wherein this court discusses Johnson's claims relating to prospective jurors who were not part of the empanelled jury.

prosecutor then asked Brian: "despite your experience as a victim, do you feel that you could fairly judge this case and set that aside and apply the law to this case?" Brian responded: "Yeah. Yeah." No further questions were asked of Brian.

¶10 Finally, with respect to Clemence, Johnson argued in his motion that his trial counsel was ineffective in failing to further question Clemence after Clemence stated he was involved with a woman who had been date-raped as an adult by an acquaintance. When questioned further by the prosecutor, Clemence stated that the woman had discussed her experience with him, but that there was nothing "about being involved with somebody who's been a victim that would cause [him] to be unfair to [] Johnson."

¶11 This court agrees with the circuit court that Johnson's assertions with regard to Bell, Brian Johnson, and Clemence did not raise sufficient facts to warrant a ***Machner*** hearing.

¶12 In ***State v. Traylor***, 170 Wis. 2d 393, 399-400, 489 N.W.2d 626 (Ct. App. 1992), this court held that a defendant's trial counsel was deficient for failing to ask appropriate follow-up questions of jurors who had admitted bias. We stated that "[c]ounsel should have asked the appropriate follow-up questions to assess whether the juror would follow the instructions of the court and, if counsel failed to receive a satisfactory answer, should have moved to reject the juror for cause." ***Id.*** In the present case, after the jurors indicated a possible source of bias, each was asked an appropriate follow-up question, and each provided a satisfactory answer indicating their ability and willingness to fairly judge the case. According to ***Traylor***, nothing more was required. Because the record conclusively demonstrates that Johnson was not entitled to relief as a result of his trial counsel's

voir dire of these jurors, the court properly denied this portion of Johnson's claim without a ***Machner*** hearing.

¶13 Johnson also contends that his trial counsel was ineffective because counsel failed to fully question prospective jurors Jared Basl and Jennifer Beyer, and used peremptory challenges to strike prospective jurors Basl, Beyer, Melissa Inlow, and Joan Hanson, when instead counsel should have moved the court to have those jurors struck for cause because they were either objectively or subjectively biased. The implicit argument Johnson seems to be making is that he would have had an entirely different jury panel if his trial counsel had moved to strike jurors Basl, Beyer, Inlow and Hanson for cause because counsel could then have used his four peremptory challenges on other jurors. *See* ***id.***

¶14 The failure to fully question jurors during voir dire, the failure to move the court to strike jurors who are biased, and the misuse of peremptory challenges can be the basis of an ineffective assistance of counsel claim. *See, e.g.*, ***id.*** (failure to adequately question jurors who admitted bias and using peremptory challenges on those jurors rather than moving to strike them for cause not prejudicial). However, a defendant cannot prove that he has been prejudiced unless he or she can show that the resulting empanelled jury included an objectionable or incompetent juror. ***Id.*** We have explained that a defendant has no constitutional right to peremptory challenges, only a constitutional right to an impartial jury, and any claim that a jury is not impartial must focus on the jury that actually sat on the case. *See* ***id.*** at 400. Thus, "where a fair and impartial jury is [e]mpaneled, there is no basis for concluding that a defendant was wrongly required to use peremptory challenges." ***Id.*** It would be pure speculation for a court to conclude that the jury would have been fairer if counsel would have been

allowed to preserve peremptory challenges on other, unspecified members of the jury venire where there is no showing that any of the actual jurors were biased.

¶15 This court concludes upon its review that Johnson has made no showing that any member of the final jury panel was biased. Of the empanelled jurors, the only ones which Johnson raises bias concerns about are Bell, Brian Johnson, and Clemence. However, each of those jurors advised the court that they could and would serve as impartial jurors and, Johnson has made no showing that they were biased. This court therefore concludes that because Johnson failed to show that the empanelled jury was anything other than fair and impartial, he did not show that he was prejudiced by his trial counsel's failure to move the court to strike for cause prospective jurors Basl, Beyer, Inlow and Hanson. Accordingly, the circuit court also properly denied this portion of Johnson's motion without a ***Machner*** hearing.

CONCLUSION

¶16 This court concludes that Johnson did not set forth sufficient facts in his postconviction motion to establish that his trial counsel was deficient and that he was prejudiced by that deficiency. Accordingly, this court affirms the order of the circuit court dismissing Johnson's postconviction motion without a ***Machner*** hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.