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December 23, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP2385-CR State of Wisconsin v. David B. Wheeler (L.C. #2016CF183)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

David B. Wheeler appeals from a judgment of conviction and an order denying his postconviction motion for a new trial. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

Wheeler went to trial on two counts of repeated acts of sexual assault against two children. During voir dire, the circuit court ascertained that none of the prospective jurors needed "hearing assistive devices" or had "any problems hearing." The court inquired: "Everyone who can hear me, raise your hand. Okay. Thanks." There were two instances during voir dire where the court specifically asked prospective juror K.B. if she heard a question. Both times K.B. answered in the affirmative. K.B. was empaneled as a juror.

As the prosecutor began his direct examination of the State's sixth witness, the following exchange occurred:

> THE COURT: Hold on. Hold on. Jurors can't talk. I'm sorry. You can't discuss matters with each other during testimony here. Excuse me. You said you were just asking a name?
>
> [Juror K.B.]: Yes.
>
> THE COURT: That was the only thing asked; is that correct, sir?
>
> [Juror J.J.]: Yes.

The prosecutor had the witness repeat her name.

The next morning, the circuit court made a further record:

> THE COURT: Good enough. One other thing, I think, we'll place on the record right now is I'm sure you saw yesterday I somewhat admonished a juror, [K.B.], for talking to other jurors.
>
> One of the other jurors did voice some concern to the bailiff that the juror has been interrupting him—and I've noticed she's

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

> interrupted a couple different ones during the beginning of testimony, I think, trying to get information down.
>
> The concern is that she doesn't distract the other jurors. That she's trying to—I think all she's trying to do is verify basic information at the start of the testimony but I just wanted to note that concern.
>
> I'm not going to raise it any further at this point. I'm just going to continue to monitor it but we may want to address this at the end of the trial as to whether that juror should possibly be the alternate if they're continuing to have problems following the testimony.

The circuit court placed additional facts on the record and set forth some options:

> If you want me to do a voir dire on the juror, I could. If you just want to use her as the thirteenth juror, so be it. I think you saw it was [K.B.]. She's the same one that had some hearing issues at the beginning and we offered the hearing devices multiple times and she doesn't want the hearing devices.
>
> I just thought I would make you both aware of it and we can come back to it by the end of the trial unless there's any issues in the meantime.

The attorneys said "Okay" and "Thank you" and agreed that the jurors could return to the courtroom.

After the jury started deliberating, the circuit court made a further record:

> On the record in the absence of the jury, first, there was the side bar before we proceeded and [trial counsel] had addressed the fact that the Court had noted to both counsel and Mr. Wheeler this morning the issue with regard to Juror [K.B.].
>
> The Court had observed [K.B.] today. She was not asking any questions of jurors during the testimony today. Did not see any inappropriate interactions so did not deem it appropriate to have her stricken but, rather, have one alternate randomly stricken and there was no objection from either counsel; is that correct?

Both attorneys answered, "Correct." The jury found Wheeler guilty of both counts.

Wheeler filed a postconviction motion seeking a new trial on grounds that he was "tried by jurors who were unable to comprehend the testimony for and against him." His theory was that K.B. was unable to hear material testimony and that her interruptions might have prevented

other jurors from hearing material testimony. Wheeler claimed that the circuit court erroneously exercised its discretion by failing to conduct further inquiry into K.B.'s ability to hear witness testimony, or in the alternative, that trial counsel provided ineffective assistance by not asking the court to conduct further inquiry. Following an evidentiary ***Machner***[2] hearing, the court denied the postconviction motion. Wheeler appeals.

As to Wheeler's claim that the circuit court erred by not questioning jurors about their ability to hear witness testimony, we agree with the State's brief that Wheeler forfeited review of this issue. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues "not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal"). The forfeiture rule promotes timely error correction, smooth operation of the judicial system, and conservation of judicial and litigation resources. ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. These interests apply here, where the circuit court was clearly on top of the issue and expressed a willingness to take timely action if requested. Neither party made such a request, and both agreed that juror K.B. should not be stricken as the alternate. The court did not erroneously exercise its discretion by failing to do something it was never asked to do.

Turning to Wheeler's ineffective assistance claim, he must prove that (1) trial counsel's performance was deficient and (2) this deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent

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

assistance." ***Id.*** at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. This court presumes that trial counsel performed effectively and made all significant decisions in the exercise of reasonable professional judgment. ***Id.*** Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id.*** at 698. We need not address both prongs if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

We conclude that trial counsel did not perform deficiently by failing to (1) ask the court to question the jurors about their ability to hear witness testimony, (2) move for a mistrial, or (3) request that juror K.B. be stricken as the alternate juror. At the ***Machner*** hearing, trial counsel testified that she recalled nothing odd about K.B.'s behavior at trial and did not remember "anything standing out … as far as the jurors talking to one another or nodding off or having any difficulty hearing[.]" When asked why she did not accept the court's offer to further "voir dire" K.B., counsel answered, "I didn't think it was necessary I would imagine. I don't remember what my specific thought process was." Similarly, though counsel did not recall a specific strategic reason for leaving K.B. on the jury, she did not view the issue of K.B.'s hearing "as a significant concern." If counsel had considered the situation significant or problematic, she would have discussed it with Wheeler. Trial counsel agreed that the circuit court's on-the-record observations and comments informed her assessment of the situation, including her decision that additional action was unnecessary.

Trial counsel's belief that the K.B. situation did not present a significant concern worthy of additional action is supported by the contemporaneous circumstances of record. None of the

jurors, including K.B., requested assistive hearing devices or said they had problems hearing the proceedings. When asked, K.B. said she was able to hear. When K.B. spoke to another juror, the circuit court immediately addressed the situation by admonishing jurors not to talk during the testimony. The court confirmed that all K.B. did was ask the other juror the witness's name. Concerned about possible distraction, the court said it would monitor the situation and essentially hold the matter open. At the close of evidence, the court revisited the issue and informed the parties that K.B. had not asked further questions of or had "inappropriate interactions" with other jurors. At that point, trial counsel decided not to ask the court to take further action.

Wheeler emphasizes trial counsel's inability at the ***Machner*** hearing to summarize the precise principles of law governing constitutional challenges based on a juror's inability to hear material testimony. Wheeler has not shown that trial counsel's decisions were unreasonable or outside professional norms. First, Wheeler's suggestion that counsel's ***Machner*** testimony evinced her ignorance of the constitutional right to a "competent, impartial jury" is hyperbolic. While she may not have had a hornbook summary on the tip of her tongue, trial counsel's testimony showed that she was aware of and attuned to issues involving juror inattentiveness. Second, the record shows that neither the circuit court nor trial counsel believed that K.B. was unable to hear the proceedings. Counsel is not required to become fluent in irrelevant jurisprudence.

Finally, we reject Wheeler's argument that trial counsel performed deficiently by failing to request a mistrial. First, Wheeler never asked trial counsel to explain why she did not seek a mistrial. Second, Wheeler has not shown grounds for such an extreme remedy and counsel is not required to make a meritless motion. Finally, the fact that such a request would not have harmed the defense is irrelevant. *See* ***Knowles v. Mirzayance***, 556 U.S. 111, 122 (2009) (Supreme Court

precedent does not establish a "nothing to lose" standard for ineffective assistance of counsel claims.).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals