



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 11, 2013

To:

Hon. William E. Hanrahan
Circuit Court Judge
215 South Hamilton, Br. 7, Rm. 4103
Madison, WI 53703

Timothy David Kiefer
Kiefer Law Office LLC
P. O. Box 1546
Madison, WI 53701-1546

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Robert Probst
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mary Ellen Karst
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

2012AP2073-CR

State of Wisconsin v. Markis D. Terrell
(L.C. # 2010CF1083)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Markis Terrell appeals a circuit court's judgment of conviction and an order denying his motion for an evidentiary hearing to determine whether jurors were asleep during trial, and denying his alternative request for a *Machner*¹ hearing to determine whether his trial counsel had rendered ineffective assistance. Based upon our review of the briefs and record, we conclude at

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).² We affirm.

The undisputed facts are as follows. The circuit court held a jury trial on various charges against Terrell stemming from a fistfight and subsequent shooting. At the end of opening statements, Terrell's trial counsel noted to the court that a juror "was falling asleep." The circuit court stated that it "was watching the jury most of the time" and did not notice the juror sleeping. Furthermore, the court assured Terrell's trial counsel that it would "keep an eye on [the juror]."

During the State's direct examination, the circuit court interrupted testimony to take a quick recess, because it noticed that some jurors looked a "little woozy." The circuit court suggested that the jurors purchase caffeinated beverages because it was that "time of day." Outside the presence of the jury, the court explained that it "noticed one juror was struggling to keep his eyes pointed straight ahead." However, the court noted that the juror was "conscious the entire time and appeared to be listening."

Following closing arguments, the circuit court excused the jury for a short break. Outside the presence of the jury, Terrell's trial counsel notified the court that one juror appeared to be "nodding off fairly solidly" and "might have been completely asleep" during different segments of the State's closing argument. The court noted that it saw the juror momentarily close her eyes, but it appeared that the juror was "weighing conflicting thoughts and concentrating" and then "it appeared she may be going down" The court further noted that as a result, it then

² All references to the Wisconsin Statutes are to the 2011-2012 version unless otherwise noted.

signaled to a bailiff and the bailiff shook the juror on the shoulder. Terrell's trial counsel noted the incident for the record but did not request a remedy at that time.

The jury found Terrell guilty of attempted first-degree homicide and possession of a firearm by a felon, and the court entered a judgment of conviction. Terrell filed a motion requesting an evidentiary hearing to determine whether jurors were asleep during the trial. Additionally, Terrell requested a *Machner* hearing to determine whether his trial counsel had rendered ineffective assistance. The court denied Terrell's request for an evidentiary hearing, finding that trial counsel's observations that a juror was "falling asleep" were "not corroborated by the court's own observations from its superior position" in the courtroom. In addition, the court found that Terrell's trial counsel did not fail to preserve a "sleeping juror claim" because no such claim existed to preserve, as the court found there was no sleeping juror. Terrell now appeals, alleging that the circuit court erred by denying an evidentiary hearing to determine whether Terrell was materially prejudiced when jurors were allegedly asleep or falling asleep during the trial, and denying a *Machner* hearing to determine whether Terrell had ineffective assistance of counsel.

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing is a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, the circuit court must determine whether the motion alleges sufficient material facts, which if true, would entitle the defendant to relief. This is a question of law that is reviewed de novo. *Id.* If "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.* Second, we review a circuit court's conclusion regarding the

decision to hold a postconviction hearing under a “deferential erroneous exercise of discretion standard.” *Id.* We will uphold a circuit court’s findings of fact regarding the attentiveness of the jurors unless the findings are clearly erroneous. *State v. Novy*, 2013 WI 23, ¶48, ___ Wis. 2d ___, 827 N.W.2d 610.

Terrell first argues that the circuit court erred by failing to question the jurors about their attentiveness and thus should have summoned all the jurors for an evidentiary hearing. The Wisconsin Supreme Court recently explained that review of an allegation of juror inattentiveness involves a twofold inquiry. *See id.*, ¶47. First, “the circuit court must determine, as a question of fact, whether the juror was actually inattentive to the point of potentially undermining the fairness of the trial; here, whether the juror was sleeping.” *Id.* (citing *State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998)). Second, if the circuit court finds that the juror was in fact sufficiently inattentive, the court must determine whether the defendant suffered prejudice as a result of the juror’s inattentiveness. *Novy*, ___ Wis. 2d ___, ¶47, 827 N.W.2d 610.

In *Novy*, defense counsel moved to strike a juror for sleeping during the defense’s closing argument. *Id.*, ¶17. The circuit court denied the motion. *Id.* The circuit court reasoned that it always made an effort “to keep track of what’s going on with the jurors.” *Id.* Moreover, the circuit court explained that it did not see the juror sleeping. *Id.* On review, the Wisconsin Supreme Court held that the circuit court’s finding that the juror was not sleeping was not clearly erroneous. *Id.*, ¶51. The court concluded that it did not need to review whether the defendant was prejudiced by the alleged sleeping juror because there was no factual finding that the juror was actually asleep. *Id.*

Following *Novy*, we conclude that the circuit court did not err when it denied Terrell's motion for an evidentiary hearing. As in *Novy*, Terrell has not established a fact necessary to his motion, because the circuit court did not find that a juror was sleeping. Rather, the court watched the jurors throughout the trial and, at times in which a juror may have appeared "woozy" or was "momentarily clos[ing] her eyes," the court took action to proactively prevent any juror from falling asleep. In its ruling on Terrell's motion, the circuit court explicitly found that its attention "was focused primarily upon the jury," and that trial counsel's observations that jurors appeared to be falling asleep "were not corroborated by the court's own observations from its superior position" in the courtroom. The circuit court's findings regarding the conduct and attentiveness of the jurors were not clearly erroneous. Therefore, we conclude that the court did not err in denying Terrell's request for an evidentiary hearing to determine whether any juror's alleged sleeping was prejudicial.

Second, Terrell argues that the circuit court erred when it denied his request for a *Machner* hearing to determine whether trial counsel was effective. As explained above, the circuit court found during trial and in its postconviction ruling that no jurors were asleep. Since no jurors were asleep, Terrell's trial counsel had no grounds to raise an objection and did not forfeit any claim, as no claim for relief existed. The record conclusively demonstrates that Terrell is not entitled to relief. Therefore, the court did not err when it denied Terrell's motion to hold a *Machner* hearing.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT.
RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals