COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2190-CR **Cir. Ct. No. 2011CF1564**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY W. EHRETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Jerry Ehrett appeals a judgment convicting him of child abuse, recklessly causing great harm. He also appeals an order denying his postconviction motion in which he argued that he was denied his right to trial by an impartial jury and his trial counsel was ineffective for failing to move for a

mistrial after the circuit court learned that two jurors looked up Ehrett on the internet and discussed what they found in the presence of other jurors. The circuit court denied the motion without a hearing, finding that no juror was tainted by extraneous information and that the jurors were credible and sincere when they said they could disregard any extraneous conversation about the defendant. Ehrett argues that the jurors' assurances deserve no weight and that one of the jurors committed perjury. Because we conclude that the allegations in Ehrett's motion are based on speculation and lack sufficient detail to show ineffective assistance of counsel or grounds for a mistrial, we affirm the judgment and order.

BACKGROUND

¶2 After the bailiff informed the judge that he had learned that two jurors allegedly searched for information about Ehrett on the internet, the court conducted individual voir dire of the thirteen jurors. The primary concern was whether the jurors learned of a pending charge of battery by a prisoner. Juror Horton reported that a juror, subsequently identified by his appearance as juror Schlimgen, said he looked up Ehrett on the internet and that another unidentified juror said, "I looked too." Horton reported that someone said Ehrett has been in prison and has remained in prison, so the case would not settle.

¶3 Schlimgen admitted that he looked up Ehrett on the online Circuit Court Access Program (CCAP) and discovered that Ehrett had a case pending for battery by a prisoner. Schlimgen testified that he told other jurors that there was another charge pending, but said he did not describe it to them. After a female juror said she did not think they should be talking about that, the conversation stopped. The court removed Schlimgen from the jury.

¶4 The remaining jurors who overheard the conversation about whether the case would settle gleaned from the conversation that Ehrett had been in jail, or has "a lot of stuff," has "a long list of prior cases," had been in jail for a long time, was in custody, or "has been in jail for … a while." None of the remaining jurors indicated that they knew of the pending battery by a prisoner charge. Each of the jurors assured the court that he or she could disregard the extraneous information. The court found each of the remaining jurors to be sincere and defense counsel agreed with that assessment. Ehrett's trial counsel did not move to strike any of the remaining jurors and did not request a mistrial. Rather, he requested and received a curative instruction.

DISCUSSION

¶5 The circuit court may deny a postconviction motion without a hearing if the allegations contained in the motion are conclusory and lack specificity regarding the details of who, what, where, when, why, and how the alleged errors justify a new trial. ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Our review of the sufficiency of the postconviction motion is de novo. ***Id.***, ¶9. Because Ehrett's trial counsel did not move to strike any jurors remaining after juror Schlimgen was excused, any claim that the jury was tainted by extraneous information must be considered under the rubric of ineffective assistance of counsel. *See* ***State v. Brunette***, 220 Wis. 2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998). Therefore, Ehrett's postconviction motion had to allege facts that, if true, established both deficient performance and prejudice. ***State v. Tucker***, 2012 WI App 67, ¶6, 342 Wis. 2d 224, 816 N.W.2d 325.

¶6 When reviewing a claim of ineffective assistance of counsel, the circuit court's findings of fact will not be disturbed unless they are clearly

erroneous. ***Id.*** The court's legal conclusions, whether the lawyer's performance was deficient and prejudicial, are questions of law that we review de novo. ***Id.*** Counsel's performance is not deficient and the defendant suffers no prejudice from counsel's failure to pursue a meritless motion. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Therefore, Ehrett's motion had to provide sufficient detail to establish grounds for a mistrial.

¶7 The burden for demonstrating grounds for a mistrial lies with the party seeking the mistrial. *See* ***State v. Harrell***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978). A mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). "[N]ot all errors warrant a mistrial, and 'the law prefers [a] less drastic alternative.'" ***Id.*** (quoted source omitted). Whether to grant a mistrial requires the court to exercise its discretion. ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995). Sound discretion includes considering such alternatives as a curative instruction, which juries are presumed to follow. *See* ***State v. Moeck***, 2005 WI 57, ¶72, 280 Wis. 2d 277, 695 N.W.2d 783; ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994).

¶8 Ehrett's argument that his counsel was ineffective for failing to request a mistrial because the entire jury panel was contaminated by extraneous information fails because he failed to present the circuit court with more than mere speculation that he was prejudiced by the alleged juror contamination. First, evaluating each juror's sincerity is a task committed to the trial court. *See* ***State v. Messelt***, 185 Wis. 2d 254, 269-70, 518 N.W.2d 232 (1994). The trial court's finding that each of the remaining jurors was sincere when he or she said that he or she could avoid considering any extraneous information is not clearly erroneous.

A determination that a juror can be impartial may be overturned only where bias is manifest. ***State v. Louis***, 156 Wis. 2d 470, 478-79, 457 N.W.2d 484 (1990). Second, the extraneous information was not highly prejudicial. The jurors' impressions that Ehrett had a substantial record was contradicted by his unrebutted testimony that he had one prior conviction. Schlimgen denied telling other jurors that Ehrett had a pending charge of battery by a prisoner and none of the remaining jurors said they were aware of that charge. Ehrett's argument that the jury was influenced by extraneous information is speculative.

¶9 Ehrett's postconviction motion also fails to provide sufficient detail to merit a hearing regarding the second juror who allegedly said, "I looked too." The motion does not indicate who the juror was, what information he or she found, how that information would prejudice the defense, or why trial counsel was ineffective for failing to request a mistrial on that basis despite each juror's statement that he or she would not consider the information and the court's curative instruction. The motion essentially invites the court to speculate that a juror found the CCAP site and proceeded to open the link that would describe the pending battery by prisoner charge.

¶10 Finally, Ehrett argues that one of the jurors committed perjury. However, he does not identify that juror. The State construes the argument as an allegation that juror Horton committed perjury by testifying that another juror said, "I looked too." The State correctly notes that this statement, even if incorrect, would not necessarily constitute perjury. Ehrett also fails to identify any prejudice that would result from Horton's incorrect assertion. If Ehrett is referring to the remaining jurors, his argument fails to identify any perjurous statement. Only one of the other jurors was asked whether he or she looked up Ehrett on the internet. Neither perjury nor lack of juror candor can be established by the jurors' failure to

answer questions that were never asked. *See* ***State v. Broomfield***, 223 Wis. 2d 465, 476, 589 N.W.2d 225 (1999). Ehrett's postconviction motion did not adequately establish a factual basis for his perjury allegation to justify a hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).