COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3010-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

SANDRA L. BARRETTE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Reversed.*

DEININGER, J.[1] The State appeals an order vacating Sandra Barrette's convictions and granting her a new trial. The circuit court determined that Barrette was entitled to a new trial because two hearing impaired jurors were permitted to remain on the jury. The State contends that the circuit court erred in

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

determining (1) that the presence of these jurors violated Barrette's constitutional rights, and (2) that Barrette's trial counsel was ineffective for failing to challenge these two jurors for cause. We conclude that Barrette waived the right to claim error in the impaneling of these two jurors by failing to object to their presence at trial, and that Barrette's trial counsel was not ineffective for failing to challenge the jurors for cause. Accordingly, we reverse the order of the circuit court.

BACKGROUND

The State charged Barrette with three counts of criminal contempt of court, and the charges were tried to a jury. During voir dire, the court and the parties became aware of prospective juror Wilford Moser's potential hearing problems during the following exchange:

> THE COURT: Okay, if you've been able to hear me talk, please raise your right hand. Okay, Mr. Moser, can you hear me?
>
> PROSPECTIVE JUROR MOSER: Pardon?
>
> THE COURT: Can you hear me okay?
>
> PROSPECTIVE JUROR MOSER: I didn't hear.
>
> THE COURT: I asked the question if you can hear me. Have you been able to hear me all the time?
>
> PROSPECTIVE JUROR MOSER: Most of the time.
>
> THE COURT: Do you think you will have a problem with hearing?
>
> PROSPECTIVE JUROR MOSER: I might miss a few words.
>
> THE COURT: The witnesses will give testimony using a microphone but the lawyers will not have microphones.
>
> PROSPECTIVE JUROR MOSER: I think I can get it.

Near the end of voir dire, prospective juror Maynard Durst volunteered that he, too, had trouble hearing:

> PROSPECTIVE JUROR DURST: I wear a hearing aid and sometimes I'm just going to tell you the words from the distance don't come in, you know, just like –
>
> THE COURT: Okay. Have you been able to hear everything pretty well?
>
> PROSPECTIVE JUROR DURST: Well, pretty good but I got to really concentrate to get it.
>
> THE COURT: You can sit up in front if you're picked to be on the jury, and if you don't hear something, you can raise your hand. Knowing that –
>
> PROSPECTIVE JUROR DURST: I just wanted you to be aware of that.

Neither party moved to strike Moser or Durst, and both were ultimately chosen to serve on the jury. The jury found Barrette guilty on all three counts.

Barrette filed a motion for a new trial asserting several post-judgment claims. She alleged that the trial court erred in allowing jurors Moser and Durst to serve on the jury. Barrette also alleged that her trial counsel was ineffective for failing to challenge jurors Moser and Durst for cause. Two hearings were held on her motion. Barrette's trial counsel testified at the first hearing, and jurors Moser and Durst testified at the second.

After reviewing the record, the circuit court issued a memorandum decision in which it found that Moser and Durst suffered from "significant hearing impairments" during trial, and determined that it was "likely" that these two jurors missed material testimony. The circuit court concluded that permitting jurors Moser and Durst to serve on the jury violated Barrette's constitutional rights to due process and an impartial jury. The court also concluded that Barrette's trial counsel was ineffective for failing to challenge jurors Moser and Durst for cause.

The court entered an order which vacated Barrette's convictions and granted her a new trial. The State appeals the order.[2]

ANALYSIS

Both the Sixth Amendment to the United States Constitution and Article I, section 7 of the Wisconsin Constitution guarantee a criminal defendant's right to an impartial jury.[3] The principles of due process also guarantee this right. *See* ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). A defendant's rights to due process and an impartial jury are compromised when the defendant is tried by a juror who cannot comprehend testimony. *See* ***State v. Turner***, 186 Wis.2d 277, 284, 521 N.W.2d 148, 151 (Ct. App. 1994).

The trial court found that jurors Moser and Durst "suffered from significant hearing impairments during the trial…." As a result, the trial court inferred that these two jurors were unable to comprehend testimony and concluded that permitting them to serve on the jury violated Barrette's rights to due process and an impartial jury. The State contends, however, that Barrette waived her right to assert these constitutional violations when she failed to object at trial to the presence of jurors Moser and Durst. The State is correct. *See* ***State v. Brunette***, 220 Wis.2d 431, 583 N.W.2d 174 (Ct. App. 1998).

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[2] *See* § 974.05(1)(b), STATS.

[3] The Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…." Article I, section 7 of the Wisconsin constitution provides that "In all criminal prosecutions the accused shall enjoy the right … to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law."

The defendant in ***Brunette*** argued that his constitutional right to an impartial jury was violated when a potentially biased juror was permitted to remain on the jury. *See* ***id.*** at 439, 583 N.W.2d at 178. The defendant, however, had not objected to the juror's presence and had not asked the court to discharge the juror for cause. We concluded that the defendant waived his right to object to the juror's bias when he failed to move the trial court to remove the juror for cause. *See* ***id.*** at 442, 584 N.W.2d at 179.

During voir dire, Barrette was made aware that both Moser and Durst had difficulty hearing. She could have moved the court to strike Moser and Durst for cause. By remaining silent, Barrette failed to preserve an objection and waived her right to assert trial court error in permitting these two jurors to serve on the jury. Had Barrette made a timely objection, the trial court could have conducted additional voir dire on the question of the jurors' ability to hear testimony and instructions, and then either removed the jurors or made suitable accommodations to ensure they could hear the proceedings.

Barrette suggests that she did not waive her right to object to the impaneling of jurors Moser and Durst because the right can only be waived by a defendant her- or himself, personally and on the record. The Wisconsin Supreme Court has recognized that certain decisions in criminal cases are considered "so fundamental" that they must be waived personally by the defendant.[4] *See* ***State v. Albright***, 96 Wis.2d 122, 129-30, 291 N.W.2d 487, 490 (1980). This court has concluded, however, that the right to object to a potential juror does not involve

[4] These "fundamental" decisions include whether to plead guilty, whether to request a trial by jury, whether to appeal, whether to obtain or forgo the assistance of counsel, and whether to refrain from self-incrimination. *See* ***State v. Brunette***, 220 Wis.2d 431, 443, 583 N.W.2d 174, 179 (Ct. App. 1998).

one of those "few, fundamental" decisions which go "'to the very heart of the adjudicatory process.'" *See* ***Brunette***, 220 Wis.2d at 444, 583 N.W.2d at 180 (citing ***State v. Albright***, 96 Wis.2d at 130, 291 N.W.2d at 490).

Whether to object to a potential juror is thus a decision which is properly delegated to trial counsel and may consequently be waived by trial counsel. *See* ***id.*** at 445, 291 N.W.2d at 180. We conclude that trial counsel waived Barrette's right to object to jurors Moser and Durst when he failed to object to their presence on the final jury panel. However, Barrette may challenge her counsel's decision by showing that her trial counsel was ineffective in failing to object to the impaneling of these two jurors. *See* ***State v. Albright***, 96 Wis.2d at 133, 291 N.W.2d at 492. We turn next to that claim.

The right to effective assistance of counsel is also derived from the Sixth Amendment to the United States Constitution and Article I, section 7 of the Wisconsin Constitution. Both provisions, in addition to granting the right to a fair trial, guarantee that a criminal defendant has the opportunity to be assisted by an attorney who "plays the role necessary to ensure that the trial is fair." *See* ***Strickland v. Washington***, 466 U.S. 668, 685 (1984). The Supreme Court established a two-part test in ***Strickland*** for determining whether counsel's actions constitute ineffective assistance. First, the defendant must show that trial counsel's performance was deficient. *See* ***id.*** at 687. Second, the defendant must establish that counsel's deficient performance prejudiced the defense. *See* ***id.***

Both the performance and prejudice components present mixed questions of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236-37, 548 N.W.2d 69, 76 (1996). Although the trial court's findings of historical fact will not be upset unless they are clearly erroneous, the questions of whether counsel's

behavior was deficient and whether that behavior prejudiced the defendant are both questions of law which we review independently of the trial court. *See* ***id.***; *see also* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985). In analyzing Barrette's ineffective assistance claim, this court may choose to address either the performance or prejudice component first. *See* ***Strickland***, 466 U.S. at 697. If we determine that Barrette has made an insufficient showing on either of these components, we need not address the other. *See* ***id.*** We choose to first examine the issue of prejudice.

Under ***Strickland***, a defendant usually bears the burden of affirmatively proving prejudice by showing that the errors of trial counsel had an actual, adverse effect on the defense. *See* ***id.*** at 693. In certain circumstances, however, prejudice will be presumed.[5] This court, in analyzing a constitutional claim based on the inability of jurors to hear certain testimony, has concluded that "once it is determined that a juror missed material testimony which bears on a defendant's guilt or innocence, prejudice must be assumed 'for the sake of insured fairness.'" *See* ***State v. Turner***, 186 Wis.2d at 284-85, 521 N.W.2d at 151 (citation omitted). We conclude that the same rationale should apply here. If, as a result of trial counsel's allegedly deficient performance, one or more jurors failed to hear material testimony, prejudice to Barrette should be presumed. We emphasize, however, that the requisite showing to trigger the presumption is not simply that a juror, or several, had hearing impairments, but that they failed to hear "material testimony which bears on a defendant's guilt or innocence." ***Id***.

[5] The Wisconsin Supreme Court has presumed prejudice in situations where counsel failed to bring important evidence to the circuit court's attention. *See* ***State v. Johnson***, 133 Wis.2d 207, 395 N.W.2d 176 (1986). The court has also presumed prejudice when counsel was absent at the reading of the verdict. *See* ***State v. Behnke***, 155 Wis.2d 796, 456 N.W.2d 610 (1990).

The circuit court found that it was "likely" that jurors Moser and Durst missed material testimony during the trial. We acknowledge our duty to defer to a trial court's findings of fact, including those based on reasonable factual inferences. *See* § 805.17(2), STATS. (noting that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"); *see also* ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). We thus readily accept the trial court's factual finding that jurors Moser and Durst "suffered from significant hearing impairments during the trial." We are unwilling to accept the trial court's inconclusive inference flowing from that fact, however, as a sufficient basis upon which to presume that Barrette suffered prejudice on account of her trial counsel's failure to challenge the two jurors for cause.[6]

The trial court chose to find only a likelihood that the two jurors missed material testimony during the trial, perhaps because their own testimony at the postconviction hearing was precisely to the contrary. While both had difficulty recalling many of the specific details of the trial, which had occurred a year earlier, each adamantly denied missing testimony. During direct examination, Moser stated that "right before the trial, I guess I wasn't listening too good and [the judge] had to ask another question, but outside of that, I'm sure I heard everything that went on." Moser admitted that he "might have missed some words" during the trial but insisted that these missed words did not alter his understanding of the trial proceedings. Juror Durst was equally adamant. He

[6] In concluding that it was "likely that the hearing-impaired jurors missed material testimony during the trial," the circuit court could only have inferred that likelihood based on its observations of and dialogue with the two jurors at the postconviction hearing, and its review of the trial transcript. The circuit court judge who presided at Barrette's trial had retired and his successor presided over postconviction proceedings. There is no direct indication in the record of the jury trial that jurors Moser and Durst failed to hear any material testimony during the trial.

insisted that he heard "everything that was said" at trial and had no difficulty hearing the judge, witnesses, or attorneys. When asked if he remembered the testimony of the trial witnesses, Durst stated that he couldn't recall specific testimony "but at the time I heard it all." Durst also insisted that he understood everything that occurred at trial.

Thus, the jurors' postconviction testimony establishes at best that Moser and Durst missed "some words" during trial. By contrast, the record we reviewed in ***Turner*** showed that "[o]n twenty-three occasions during the trial, the court or the attorneys noted that the jury was having trouble hearing" the testimony of two child-victims of alleged sexual assaults. ***Turner***, 186 Wis.2d at 280, 521 N.W.2d at 149. The bailiff relayed to the trial court the jury's expressed difficulties in hearing the testimony, and the court itself stated on the record during trial that there was serious question as to whether "some six of the jurors … missed a substantial portion of the testimony" of the two children. ***Id***. at 281, 521 N.W.2d at 150. When the jurors were questioned regarding their ability to hear the testimony, one admitted not having heard or understood all of the children's testimony, and another said he "had problems … I heard some, not all." ***Id***. at 282, 521 N.W.2d at 150.

In short, unlike the express finding in ***Turner*** that material testimony was missed by certain jurors, the trial court's inference here is little more than a speculation that, because the jurors were hearing impaired, they "must have" missed something important at trial. We noted in ***Turner*** the importance of a trial court's findings regarding what testimony was not heard:

> This is particularly important in cases asserting the presence of a hearing-impaired juror because it will almost always be the case that a juror will not be totally deaf. The trial court will always have to determine … the extent of testimony not heard.… In this case, the trial court found

> that two of the jurors did not hear the testimony. We accept that finding because it is not clearly erroneous.

Turner, 186 Wis.2d at 284-85, 521 N.W.2d at 151 (citations omitted). Here, the trial court did *not* make a finding regarding "the extent of testimony not heard." Accordingly, we are not willing to accept the trial court's inference that the two hearing impaired jurors "likely" missed material testimony as a proxy for a finding that they did, in fact, miss certain material testimony.

Since we have concluded the record does not provide a basis on which we must presume that Barrette suffered prejudice on account of her counsel's failure to object to jurors Moser and Durst, she must affirmatively prove prejudice in order to prevail on her ineffective assistance claim. Specifically, Barrette must establish that there is a "reasonable probability" that, but for trial counsel's errors, the result of the proceeding would have been different—that is, that the presence on the jury of Moser and Durst undermines confidence in the outcome of her trial. *See* ***Strickland***, 466 U.S. at 694. Barrette has made no attempt to establish that she suffered actual prejudice from the presence of the two jurors. And, having failed to establish prejudice, Barrette cannot prevail on her claim of ineffective assistance of counsel.

CONCLUSION

For the reasons discussed above, we reverse the order of the circuit court.

By the Court.—Order reversed.

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