COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1779-CR **Cir. Ct. No. 2009CF94**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OSWALDO ESTRADA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Oswaldo Estrada appeals from a judgment of conviction and an order denying his postconviction motion. Estrada argues that his trial counsel was ineffective during voir dire for failing to move to strike six prospective jurors for cause. We disagree and affirm.

¶2 Estrada went to trial on charges of first-degree intentional homicide and hiding a corpse in relation to the death of Jose L. Martinez, and with taking and driving the vehicle of W.H. in order to dispose of Martinez's body. During voir dire, the circuit court struck four prospective jurors for cause. Trial counsel did not move to strike any additional members of the venire. The jury found Estrada guilty of the lesser charge of second-degree intentional homicide, and of hiding a corpse and operating W.H.'s vehicle without consent.

¶3 Estrada filed a postconviction motion alleging that six venire members made statements which called into question their ability to remain unbiased, and that upon further examination concerning whether they could remain impartial and make a decision based on the evidence and law, each gave an equivocal answer, such as "probably." Estrada claimed that trial counsel was ineffective for failing to request that these prospective jurors be stricken for cause. Following an evidentiary ***Machner***[1] hearing and post-hearing briefs, the circuit court denied Estrada's postconviction motion for a new trial, concluding that trial counsel's decision to forego motions to strike the prospective jurors was a matter of reasonable trial strategy.

¶4 On appeal, Estrada maintains that trial counsel provided constitutionally ineffective assistance by failing to request that the prospective jurors be removed for cause based on their answers provided during voir dire. Three of the venire members at issue are identified as R.H., C.M., and S.T. Of these, only S.T. sat on the jury. The additional three prospective jurors remain unidentified and it is unknown whether or not they were empaneled.

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

¶5 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62; ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove constitutional deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Love***, 284 Wis. 2d 111, ¶30; ***Strickland***, 466 U.S. at 688. To prove constitutional prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Love***, 284 Wis. 2d 111, ¶30; ***Strickland***, 466 U.S. at 694. Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland***, 466 U.S. at 698. The circuit court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance is a legal determination, which this court decides de novo. ***Id.*** We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶6 We first reject Estrada's ineffective assistance of counsel claims as to prospective jurors C.M. and R.H., neither of whom ultimately sat on the jury. "Wisconsin's longstanding rule is that where a fair and impartial jury is impaneled, there is no basis for concluding that a defendant was wrongly required to use peremptory challenges." ***State v. Traylor***, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992). *See also* ***State v. Lindell***, 2001 WI 108, ¶5, 245 Wis. 2d 689, 629 N.W.2d 223 (holding that even where a circuit court errs in denying a motion to strike for cause and the defendant uses a peremptory challenge to remove the prospective juror, the defendant is not automatically

entitled to reversal).[2] In ***Traylor***, the defendant alleged that trial counsel was ineffective for failing to move the court to strike biased venire members for cause, instead using peremptory strikes to remove the questionable jurors. ***Traylor***, 170 Wis. 2d at 395-96, 399. Though the ***Traylor*** court determined that the prospective jurors evinced bias and that trial counsel performed deficiently by failing to request that they be stricken, the court determined that in order to prove prejudice, Traylor would need to show "that the exhaustion of peremptory challenges left him with a jury that included an objectionable or incompetent member." ***Id.*** at 400. The ***Traylor*** court stated;

> There is no constitutional right to peremptory challenges; there is only a constitutional right to an impartial jury. Any claim that a jury is not impartial must focus not on the jurors who were removed by peremptory challenges but on the jury that actually sat in the case. Where there is no showing that any of the actual jurors were biased, it would be speculative for a court to conclude that the jury would have been fairer if counsel had been allowed to preserve peremptory challenges on other, unspecified members of the jury venire. Moreover, there would be no stopping point if the deprivation of such speculative benefit, standing by itself, could establish prejudice.

Id. Because neither C.M. nor R.H. was empaneled and Estrada has made no demonstration that counsel's use of peremptory strikes resulted in a biased jury, he has failed to establish prejudice.

¶7 For related reasons, we reject Estrada's claim that trial counsel was ineffective for failing to move to strike the three unidentified jurors. It is Estrada's

[2] In ***State v. Lindell***, 2001 WI 108, ¶¶5, 63, 245 Wis. 2d 689, 629 N.W.2d 223, the Wisconsin Supreme Court overruled ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), which had required automatic reversal in any situation where the circuit court erroneously denied a defendant's motion to strike a venire member, causing the defendant to use a peremptory challenge to correct the circuit court's error. *See* ***Ramos***, 211 Wis. 2d at 14, 24-25.

burden to establish that these venire members ultimately sat on the jury and were biased. *See* ***State v. Koller***, 2001 WI App 253, ¶15, 248 Wis. 2d 259, 635 N.W.2d 838 (defendant failed to establish prejudice at the postconviction stage where there was no showing that "at least one of the jurors who actually decided his case" was biased). Estrada failed to make such a showing and any prejudice is merely speculative. ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation is insufficient to satisfy the prejudice prong of ***Strickland***).

¶8 Finally, we conclude that Estrada is not entitled to relief on his claim that trial counsel should have moved to strike S.T., who ultimately sat on the jury. During the prosecutor's voir dire, S.T. stated that she had recent contact with Racine County law enforcement as the mother of a victim. She expressed dissatisfaction about her personal situation but said "it has nothing to do with this [case]." She agreed she would be able to keep her personal life separate from the instant case. Trial counsel later questioned S.T.:

> Q: The situation with the police, is that a problem? It sounds like it's a little stressful. Is that going to [] interfere with your ability to sit on this case?
>
> A: I don't know at this point. It's – I had the police at my door again last night. Teen-age drama is what is it. Now it's bothering me a lot.
>
> Q: And you get to have your life. We have plenty of jurors here. So you're the one to just say if this is really more than you can deal with at this point because of your personal situation. That's fair.
>
> A: It is a lot more than I'll be able to deal with.
>
> Q: Do you think it would be preferable if you sat on maybe a little disorderly conduct jury instead of something like this?
>
> [The Court]: I'll -

> Q: Pardon me. The question is, is it – is your own circumstance going to be strong enough that it would cause you a problem in sitting through a fairly long case with pretty detailed information?
>
> A: Right now, yes.

¶9 The Wisconsin Supreme Court recognizes three types of juror bias: statutory, subjective, and objective. ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999). Estrada fails to specify under which of these categories S.T. was biased, asserting simply that she was "legally biased" because she indicated it might be difficult to sit through a lengthy trial.[3]

¶10 We conclude that Estrada did not meet his burden to establish that S.T. was biased. Estrada has not established statutory bias, which occurs when a prospective juror falls within a category of jurors ineligible to sit pursuant to WIS. STAT. § 805.08(1). ***Faucher***, 227 Wis. 2d at 717. Subjective bias "is revealed through the words and the demeanor of the prospective juror" and "refers to the prospective juror's state of mind." ***Id.*** There is no indication that S.T. was subjectively biased. Nor has Estrada established that S.T. demonstrated "an ingrained attitude about the particular subject of the case" or the existence of a "connection between [S.T.'s] [alleged] bias and the issues or theory" of Estrada's case so as to constitute objective bias. ***State v. Wolfe***, 2001 WI App 136, ¶23, 246 Wis. 2d 233, 631 N.W.2d 240. While S.T. acknowledged that her personal life might make it hard to sit through a long trial, she stated she would be able to keep what was happening at home separate from the case at hand, and never once suggested that she was unable to view the evidence objectively or impartially, or

[3] We disagree with Estrada's characterization of S.T.'s answers as a statement of her inability to "listen and think about all of the evidence and form a thoughtful, fair and impartial decision."

to follow the court's instructions. Trial counsel's follow-up with S.T. acknowledged the difficulty of her personal situation, but did not establish any bias. As such, trial counsel did not believe there was justification to strike S.T. for cause or otherwise.

By the Court.—Judgment and order affirmed.

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