

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2305-CR

Cir. Ct. No. 2004CF7061

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN DERRICK MACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. John D. Mack appeals a judgment convicting him of one count of first-degree intentional homicide while armed and an order denying his motion for postconviction relief. He argues that he is entitled to a new trial because the circuit court erroneously struck a prospective juror. He also

argues that the circuit court erred in denying his request to dismiss his attorney. We affirm.

¶2 Mack first argues that he is entitled to a new trial because the circuit court erroneously struck a juror from the *voir dire* panel. During *voir dire*, the prosecutor asked if any juror would have a concern about deciding guilt or innocence on the charge. One of the jurors stated that his son had been charged with a crime before, that he felt his son was treated unfairly, and, as a result of that experience, he did not think he could sit in judgment of anyone else. After a colloquy about this issue, the circuit court granted the State’s motion to strike for cause. The court explained that the juror had said he could not be fair based on what had happened with his son, and that, although he had softened this stance a bit with further questioning, “he was quite strong at the beginning, and I think that he could not be fair.”

¶3 A circuit court’s decision to grant a motion to strike a juror is not automatically grounds for a new trial even if the decision was erroneous. *State v. Mendoza*, 227 Wis. 2d 838, 863-64, 596 N.W.2d 736 (1999) (“[A]utomatic reversal is not required when a circuit court erroneously grants a party’s motion to strike a prospective juror for cause.”). To determine whether reversal is required, we apply a harmless error analysis. *Id.* at 864. An error is harmless if it does not affect “the substantial rights of the party seeking ... a new trial.” WIS. STAT. § 805.18(2) (2007-08).¹ In *Mendoza*, the supreme court concluded that the circuit court’s error in dismissing a prospective juror was harmless error because the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

defendant conceded that an impartial jury convicted him. *Id.* at 864. Here, Mack does not argue that the jury that convicted him was anything but impartial. Therefore, even if the circuit court erred in striking the juror, an issue we need not decide, under *Mendoza*, any error was harmless.

¶4 Mack next argues that the circuit court erred in denying his motion to dismiss his attorney. We review a circuit court decision denying a motion to dismiss a defendant's attorney for a misuse of discretion. *See State v. McDowell*, 2004 WI 70, ¶66, 272 Wis. 2d 488, 681 N.W.2d 500. To determine whether the circuit court properly exercised its discretion, we consider whether the court adequately inquired into the defendant's complaint about counsel, whether the motion was timely made, and "whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *Id.*, ¶72 (quoting *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988)).

¶5 Mack asked the circuit court to dismiss his attorney two times. First, Mack moved to dismiss his attorney by *pro se* motion dated August 10, 2007, which was not filed until August 20, 2007. For reasons that are not clear, the court never acted on the motion. Mack did not bring the motion to the court's attention during a hearing held on August 17, 2007, seven days after he drafted the motion, and did not raise the issue when he next appeared in court for jury trial the morning of December 3, 2007. Because Mack appeared in court twice after drafting the motion without mentioning it to the court, we conclude that the circuit court properly exercised its discretion in concluding that Mack abandoned the motion.

¶6 The second time Mack asked that Attorney Scott Anderson be dismissed was during the afternoon session of the first day of trial. The court addressed the issue at some length after listening to comments by Mack, his attorney, and the district attorney, and concluded that the motion should be denied because trial was underway, and defense counsel's actions about which Mack had complained were proper. We conclude the circuit court properly exercised its discretion in denying the motion because, after considering all of the circumstances, the court ruled that the motion was not timely brought and the conflict between Mack and his attorney was not so great that it prevented an adequate defense. *See McDowell*, 272 Wis. 2d 488, ¶72.

By the Court.—Judgment and order affirmed.

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

