COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2050 **Cir. Ct. No. 2007CF2496**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL A. BOOSE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mitchell A. Boose, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2009-10)[1] motion for postconviction

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

relief without a hearing.[2] Boose argues that his motion should have been granted because his trial counsel provided ineffective assistance in four ways and his postconviction counsel provided ineffective assistance by not raising those issues in a postconviction motion as part of Boose's direct appeal. We affirm.

BACKGROUND

¶2 Boose was charged with first-degree reckless homicide while armed in connection with the shooting death of Fred Richardson. Boose was also charged with being a felon in possession of a weapon. Boose told police that the night Richardson was shot, Boose was at his friend Trenton Edwards's house watching a basketball game. Boose filed a notice of alibi and the case proceeded to trial. Boose elected to have a jury determine the homicide charge and the trial court determine the weapon possession charge.[3]

¶3 At trial, an eyewitness testified that she was looking out the window of a house and saw Boose in the alley below, arguing with Richardson and another man, Sam Sanders. The witness testified that she saw Boose holding a gun and backing up as Richardson and Sanders approached him. She said Sanders tried to grab the gun from Boose and the gun went off, after which Boose and Sanders "took off running." Another witness testified that he saw the same three men

[2] The Honorable Jeffrey A. Wagner presided over the trial, sentencing and initial postconviction proceedings, while the Honorable Jeffrey A. Conen presided over the WIS. STAT. § 974.06 proceedings that are the subject of this appeal. We will refer to Judge Conen as the postconviction court.

[3] We note that the judgment of conviction indicates that the weapon possession charge was tried to a jury, but it was actually the trial court that made the findings on that charge after the jury returned its guilty verdict on the homicide charge. On remittitur, the clerk of the circuit court is directed to correct this error and enter an amended judgment.

arguing earlier in the day. Edwards testified that he was not sure when Boose came to his house that night and said that Boose did not mention the shooting. Boose did not testify.

¶4 Prior to closing arguments, trial counsel told the trial court that he was not seeking jury instructions on lesser-included offenses, and Boose told the trial court that he agreed with that decision. Trial counsel also told the trial court that he was not seeking a self-defense instruction, noting that Boose's "defense has always been that he wasn't there." The next day, however, trial counsel and the State stipulated to jury instructions that included a self-defense instruction and related instructions on retreat and provocation. No reason was given on the record for trial counsel's decision to stipulate to those instructions.[4] When asked, Boose said he agreed with the proposed instructions.

¶5 During his closing argument, trial counsel asserted that the only eyewitness to the crime gave inconsistent testimony and that her testimony contradicted the medical examiner's conclusion that the victim was shot in the back. He also noted that there was no DNA evidence tying Boose to the shooting and reminded the jury that Edwards said that when Boose arrived at his house, Boose did not mention a shooting or appear flustered. Trial counsel concluded that there were other people who could have shot Richardson and that instead of the State's theory of the crime, "something else happened." Trial counsel urged the jury to acquit Boose because the State had not shown his guilt beyond a

[4] In its trial court brief responding to the postconviction motion filed by postconviction counsel, the State asserted that trial counsel "at first" did not want a self-defense instruction, "but after thinking on it overnight, decided to request it."

reasonable doubt. Trial counsel did not argue that Boose committed the shooting in self-defense and did not mention the self-defense instructions.

¶6 Boose was found guilty of both charges and postconviction counsel was appointed. He filed a postconviction motion that argued Boose was entitled either to judgment notwithstanding the verdict or a ***Machner***[5] hearing on the alleged ineffective assistance of Boose's trial counsel. Specifically, the motion argued: (1) the prosecutor improperly argued facts not in evidence during his closing argument; (2) the eyewitness testimony about the shooting is contradicted by the medical evidence and cannot be reconciled; (3) trial counsel failed to raise issues concerning the medical evidence in opposition to the motion to bind Boose over for trial; (4) trial counsel failed to effectively challenge the inconsistent evidence at trial; (5) trial counsel provided ineffective assistance by "requesting and obtaining jury instructions on self-defense, provocation and withdrawal without proffering credible evidence or argument to support those defenses"; and (6) trial counsel failed to move for a mistrial during closing argument. (Some capitalization omitted.)

¶7 The trial court denied Boose's postconviction motion and he appealed. We affirmed. *See* ***State v. Boose***, No. 2009AP848-CR, unpublished slip op. (WI App March 2, 2010).

¶8 In July 2011, Boose filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. He argued that his postconviction counsel provided ineffective assistance by not alleging that trial counsel performed ineffectively in

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

numerous ways. The postconviction court considered Boose's claims in the context of ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).[6] The postconviction court denied Boose's motion. This appeal follows.[7]

LEGAL STANDARDS

¶9 Our review of the denial of a WIS. STAT. § 974.06 motion requires application of a mixed standard of review:

> First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review *de novo*. If the motion raises such facts, the [postconviction] court must hold an evidentiary hearing. However, 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 [postconviction] court has the discretion to grant or deny a hearing. We require the [postconviction] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a [postconviction] court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted; italics added).

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[6] In ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), we held that the ineffective assistance of postconviction counsel may provide a sufficient reason for failing to raise an issue in a previous postconviction motion or appeal, such that the motion may not be subject to the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *See* ***Rothering***, 205 Wis. 2d at 682.

[7] Boose filed a motion for reconsideration that was denied "[f]or the reasons set forth" in the postconviction court's earlier order. Boose has not appealed from the order denying his motion for reconsideration and we do not discuss it.

¶10 Where, as here, a defendant alleges that his postconviction counsel provided constitutionally deficient representation by failing to allege that the defendant's trial counsel performed deficiently, the defendant must first establish that trial counsel's representation was constitutionally deficient. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not discuss both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶11 A claim for ineffective assistance of counsel presents a mixed question of fact and law. ***State v. Doss***, 2008 WI 93, ¶23, 312 Wis. 2d 570, 754 N.W.2d 150. We defer to the trial court's or postconviction court's factual findings unless they are clearly erroneous. ***Id.*** The conclusions as to whether an attorney's performance was deficient or prejudicial, however, are questions of law that we review independently. *See* ***id.***

DISCUSSION

¶12 At issue is whether postconviction counsel performed deficiently by not alleging trial counsel ineffectiveness on a variety of bases. Boose presents four primary arguments related to trial counsel's performance, which we consider in turn.[8] We conclude that Boose has not proven that his trial counsel provided ineffective assistance or that he has a right to a hearing on his allegations. It

[8] Boose's appellate brief has rephrased and reordered many of the issues and subissues from his postconviction motion. In addition, he raises some issues that were not raised below. We do not consider arguments that are raised for the first time on appeal. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (appellate court generally does not review an issue raised for the first time on appeal). Further, to the extent this court does not address a particular subissue, it is rejected because we have determined that it lacks merit.

follows that he has failed to prove that his postconviction counsel was ineffective. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. Accordingly, we affirm the postconviction court's order denying Boose's WIS. STAT. § 974.06 motion without a hearing.

I. Sufficiency of the evidence.

¶13 Boose argues that his trial counsel performed ineffectively when he failed to move to dismiss the case on grounds that the evidence at trial showed that Boose "demonstrated a conscious regard for human life before and during the crime."[9] Boose contends that because there was testimony that he fired the gun as he was trying to back away from the victim and another man, he was entitled to be acquitted. This court considered a related challenge to the sufficiency of the evidence in Boose's direct appeal.[10] In the course of addressing that challenge, we analyzed the elements of the crime and concluded that based on the testimony of three particular witnesses, "the jury could reasonably find Boose guilty as charged." *See* ***Boose***, No. 2009AP848-CR, unpublished slip op., ¶6. We are not persuaded that conclusion was erroneous. We agree with the State:

> No single factor is determinative in the utter-disregard calculus. Instead, in every case the jury must consider the "totality of the circumstances." ***State v. Burris***, 2011 WI 32, ¶41, 333 Wis. 2d 87, 797 N.W.2d 430. The factfinder must give each factor "the weight it deems appropriate under the circumstances." ***Id.*** Evidence of some regard for human life is considered, but it does not "'preclude' a finding of utter disregard" and does not "require the reversal of the fact-finder's determination that

[9] We note that trial counsel did, in fact, move to dismiss at the close of the State's case, but he did not specifically identify the reason Boose asserts now.

[10] In his direct appeal, Boose argued that the evidence concerning how Richardson was shot was "'patently incredible.'" *See* ***State v. Boose***, No. 2009AP848-CR, unpublished slip op., ¶5 (WI App March 2, 2010) (quoting Boose's direct appeal brief).

> [the defendant's] conduct as a whole evinced utter disregard." ***Id.***, ¶34.

(Citations omitted; bracketing supplied by the State.) Here, the eyewitness's testimony, as well as testimony from others who spoke with Boose before and after the shooting, supported the jury's finding that Boose's "conduct as a whole evinced utter disregard," *see* ***Burris***, 333 Wis. 2d, ¶34, as the State explains in its lengthy analysis. We reject Boose's argument that there was insufficient evidence to convict him of first-degree reckless homicide. It follows that postconviction counsel was not ineffective for failing to make the particular argument Boose now raises, because it would have been properly rejected. *See* ***id.***

II. Failure to request instructions on lesser-included offenses.

¶14 In his *pro se* postconviction motion, Boose asserted that trial counsel was ineffective for not asking the trial court to instruct the jury on the lesser-included offenses of second-degree reckless homicide and homicide by negligent use of a firearm. What Boose failed to mention or discuss in his postconviction motion is that trial counsel made a strategic decision not to seek a lesser-included offense instruction and Boose explicitly concurred with that decision. In open court, trial counsel told the trial court that he did not want a lesser-included instruction given because "what happens if you have a lesser-included in addition to the charge … is that, in effect, in my opinion, a jury can drop to that." Trial counsel said he had discussed the issue with Boose and suggested that the trial court talk with Boose about it. The trial court asked Boose multiple questions about Boose's discussion with his trial counsel and whether he agreed with trial counsel's advice. Boose's answers all indicated that he agreed with trial counsel and did not want lesser-included instructions given.

¶15 We agree with the State's analysis of this issue when it states: "[A]n objectively reasonable strategic decision not to request such an instruction does not constitute deficient performance." *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752 (discussing why an attorney's strategic decision to avoid a lesser-included instruction can be "imminently reasonable"). Here, Boose's postconviction motion did not acknowledge that he and his trial counsel made a strategic decision not to request the lesser-included instructions, much less discuss why Boose believes trial counsel's strategic decision was or became unreasonable. It was not until the State raised this issue in its appellate brief that Boose asserted that trial counsel's strategy *became* unreasonable because trial counsel "abandoned the all or nothing approach when he o[b]tained the self defense instruction at trial." We decline to analyze Boose's attack on trial counsel's strategy because it was never raised in Boose's postconviction motion or opening brief. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (appellate court generally does not review an issue raised for the first time on appeal); ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995) (It is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief.).

III. Alleged errors concerning the self-defense instruction.

¶16 Boose presents three arguments related to the fact that his trial counsel ultimately stipulated to giving the self-defense jury instruction. First, he contends that trial counsel failed to properly advise Boose about "the availability and feasibility" of a self-defense claim, and he asserts that if he had been properly advised, "he would've testified" in support of a self-defense claim. He submitted an affidavit with his postconviction motion in which he admits—apparently for the

first time—that he was present for the shooting and had a gun in his hand. He wrote: "I started backing away from them [as] they followed me from the front of the house all the way to the alley where Sam [Sanders] trys [sic] to take the gun from me and we struggle for the gun and it discharged once and we both ran."

¶17 Boose's affidavit does not indicate that he ever told his trial counsel that he was present when the gun was fired. His statement to the police indicated that he was not at the crime scene, and even at sentencing he continued to proclaim his innocence. We fail to see how trial counsel's advice to Boose about testifying in support of a self-defense claim could have been constitutionally deficient where Boose never indicated that he would be able to testify that he fired the gun in self-defense. More importantly, the issue before this court is whether *postconviction* counsel performed deficiently. Boose's affidavit does not indicate that he ever told his postconviction counsel that he was present for the shooting and would have testified in support of a self-defense claim if he had been advised differently by trial counsel. We see no reason to fault postconviction counsel for not raising this issue where there is no indication that Boose even alerted him to the fact that Boose would have considered admitting his involvement in the shooting in order to claim self-defense.

¶18 Boose's second argument related to the self-defense jury instruction is that postconviction counsel should have argued that trial counsel performed deficiently when he requested the self-defense jury instructions where there was

no support for them in the evidence.[11] Specifically, Boose argues, the self-defense jury instructions should not have been given as a matter of law where there was no testimony from Boose to support a self-defense claim.

¶19 In response, the State argues that Boose has failed to prove that his trial counsel performed deficiently. The State disputes Boose's claim that the self-defense instruction could not be given without Boose having testified. It explains: "Boose's ineffectiveness argument rests on a false legal premise. He has cited no legal authority from Wisconsin that supports his assertion that a self-defense claim requires the defendant to testify. The State has researched the issue, and has found no Wisconsin authority on point." The State notes that Boose cites ***Lee v. Murphy***, 41 F.3d 311 (7th Cir. 1994), a federal case that concluded a defendant's testimony was necessary before he could "assert self-defense as an absolute defense" in a first-degree intentional homicide case. This reliance is misplaced, the State argues, for two reasons:

> First, Seventh Circuit precedent is not binding authority on this court. *See* ***In re Jane E.P.***, 2005 WI 106, ¶6, 283 Wis. 2d 258, 700 N.W.2d 863. Where, as here, the Seventh Circuit makes a declaration of Wisconsin law without providing a single Wisconsin citation (and where no such citations seem to exist based on the State's research), the Seventh Circuit's statement of Wisconsin law should not even provide persuasive authority to this court. Second, ***Lee*** involved a prosecution brought under the first degree intentional homicide statute, which provides for the "mitigat[ion]" of first-degree homicide to second-degree homicide under certain circumstances, including "[a]dequate provocation" and "[u]nnecessary defensive

[11] Postconviction counsel in fact argued in the first postconviction motion that trial counsel was ineffective for requesting self-defense jury instructions without first presenting evidence or argument in support of a self-defense theory. However, postconviction counsel did not argue, as Boose does here, that the self-defense instruction could not be given as a matter of law where the defendant did not testify.

> force." [WIS. STAT. §] 940.01(2). To the extent Lee relied on Wisconsin law, it relied on the law of [] § 940.01(2), which is not at issue in this case.

(Bolding and final two sets of brackets added.) The State concludes that trial counsel "did not perform deficiently because he did not make a legal error." We agree with this analysis. Boose has not shown that his trial counsel performed deficiently, or that his postconviction counsel erred when he failed to allege trial counsel ineffectiveness for stipulating to the self-defense instruction without testimony from Boose.

¶20 Boose's third argument related to self-defense is that trial counsel's decision to stipulate to the self-defense instructions "prevented the real controversy from being fully tried" and that Boose should receive a new trial in the interest of justice. Boose's one-paragraph argument provides no details concerning why the decision was made to request the self-defense instructions, even though Boose was present in court when the jury instructions were discussed and Boose said he agreed with the instructions. Further, Boose asserts that there was "no factual or legal basis" to request the self-defense instructions, but Boose ignores the fact that the eyewitness testified that she saw Richardson and another man walking toward Boose as he backed away. It is possible trial counsel concluded that even if the jurors rejected the defense theory that Boose was not at the crime scene, they could find, based on that eyewitness testimony, that Boose was acting in self-defense when he fired the gun. We decline to develop Boose's argument for him and will not discuss his inadequate argument further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we need not consider undeveloped arguments).

IV. Alleged errors concerning a juror.

¶21 Boose argues that his trial counsel performed deficiently by not objecting to the continued service of Juror 2, who Boose alleges was statutorily, subjectively, and objectively biased. It is undisputed that after the jury was impaneled, Juror 2 received a telephone call about the case. The next day, the parties met with the trial court in chambers to discuss what occurred. They interviewed Juror 2, who explained that she got a call from her ex-husband's sister, who is the sister-in-law of the victim's mother. Juror 2 said her ex-husband's sister told her that the victim's mother was "distraught" because Juror 2 was serving on the case.

¶22 The trial court initially indicated it thought Juror 2 could be struck, but trial counsel said he did not want to do that because "[t]hen a call to a juror pays off." The trial court and the parties interviewed Juror 2 again. They ascertained that she believed she could still act fairly as a juror. Trial counsel also questioned Juror 2 about whether she knew the victim's mother. Juror 2 said that she had seen her at Juror 2's ex-husband's house in the past, but chose not to associate with her. Juror 2 said she never knew the victim and would not be influenced by her opinion of the victim's mother. She explained: "I block all of it." Finally, she said she would not be afraid to return a "not guilty" verdict.

¶23 Trial counsel told the trial court that he was "satisfied that she can still serve." The trial court and the parties then interviewed the victim's mother, who said that during jury selection, she thought she recognized Juror 2 and mentioned it to her sister-in-law. The victim's mother, through counsel, indicated that she did not ask her sister-in-law to reach out to Juror 2 in any way. The victim's mother said she was concerned that the trial could be affected by the fact

that she knew Juror 2, so she told a detective the next day that she recognized Juror 2.

¶24 Trial counsel again told the trial court that he did not want Juror 2 struck. He explained: "[M]y assessment of that lady is that she's able to withstand any type of little pressure there might have been off of that conversation. So I'm not asking that she be the alternate. I'm not asking that she be replaced, and she's not asking to get out." Trial counsel said he had discussed the matter with Boose, which the trial court confirmed with Boose. When asked whether he would like Juror 2 to "stay on" the jury, Boose replied: "Yeah."

¶25 Despite agreeing with trial counsel's decision to keep Juror 2, Boose now argues that his trial counsel provided ineffective assistance when he allowed "a bias[ed] juror to serve on the jury panel." He contends that Juror 2 was statutorily, subjectively, and objectively biased. The postconviction court rejected this argument, as do we.

¶26 "Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias." ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). Whether a potential juror should be dismissed from the panel is committed to the trial court's discretion. ***Id.*** Before dismissing a juror, a trial court "must be satisfied that it is more probable than not that the juror was biased." ***Id.*** The State, applying those standards here, concludes that Boose has not proven that Juror 2 was statutorily, subjectively, and objectively biased. Therefore, the State reasons, Boose was not prejudiced by his trial counsel's decision not to move to dismiss Juror 2.

¶27 We agree with the State's thorough analysis. First, with respect to statutory bias, the State notes that the statutory bias statute, WIS. STAT.

§ 805.08(1), "applies only to relationships between the prospective juror and a party or attorney in the case."[12] The State continues: "The victim is not a party or an attorney and is therefore not covered by the statute." In addition, the State notes, Juror 2 "was not currently related to the victim by blood or marriage. She *may* have been related to him at one time in the past by marriage, but she was definitely not related to him at the time of trial." Boose has not shown statutory bias.

¶28 With respect to subjective bias, the State argues:

> Juror 2 was not subjectively biased. As the circuit court explained in denying Boose's juror bias claim, "neither her words nor her demeanor demonstrated bias of any kind. She stated she could be fair and said she would not be afraid to find the defendant not guilty (if the evidence supported it) 'because of [the victim's mother].'" Boose observes that subjective bias exists when "a juror's statements or demeanor … show the juror would be unable to set aside some pre-existing opinion or prejudice and decide the case based on the evidence." [Quoting Boose's brief.] Nothing in Juror 2's statements or demeanor show either (1) that she had "some pre-existing opinion or prejudice," or (2) that she would be unable to put these aside and decide the case on the evidence. On the contrary, Juror 2 stated that she would be able to decide the case on the evidence alone. Furthermore, she said she intended to "block" any further efforts by [the victim's mother or the caller] to contact her.

(Record citations omitted.) We agree. Boose has not proven that Juror was subjectively biased.

¶29 Finally, in order to prove objective bias, Boose had to prove that Juror 2 was exposed to "extraneous, prejudicial information." *See* ***State v.***

[12] WISCONSIN STAT. § 805.08(1) states that a trial court must consider "whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case."

Faucher, 227 Wis. 2d 700, 719, 596 N.W.2d 770 (1999) (to determine whether there was objective bias, the court must consider "whether 'there is a reasonable possibility that the information in [the juror's] possession would have a prejudicial effect upon a hypothetical average juror.'") (bracketing supplied by ***Faucher*** and citation omitted). The postconviction court concluded that Boose had not proven objective bias, stating: "[T]here is no question that a reasonable person in her position could be impartial. She said she didn't even really know [the victim's mother], didn't know her last name, didn't hang around her, and wouldn't let her presence influence her verdict." The State agrees, explaining:

> The [postconviction] court's analysis is correct. Juror 2's relationship with [the victim's mother] was remote, and her relationship with the victim, whom she had never met, was non-existent. Her relationship with [the victim's mother] was not and never had been warm, so there is zero likelihood that it would have prejudiced her against Boose. Indeed, Juror 2 no longer had a relationship with the family. She acquired no "extraneous, prejudicial information" from either her past relationship with [the victim's mother] or her telephone conversation with [the caller] that could have affected her deliberations in Boose's case. All she learned was that, not surprisingly, [the victim's mother] was "distraught[.]" This was not information that could have been prejudicial to Boose's case. Beyond [the victim's mother's] distress, Juror 2 told the court repeatedly that she knew nothing about case.

(Record citations omitted.) We agree with the State and the postconviction court. Boose has not proven objective bias.

¶30 Because Boose has not proven that Juror 2 was statutorily, subjectively, or objectively biased, he has not proven that his trial counsel's decision not to challenge Juror 2's continued service was prejudicial. It follows that Boose was not prejudiced by postconviction counsel's decision not to allege trial counsel ineffectiveness based on Juror 2's service.

By the Court.—Order affirmed.

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