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DISTRICT II

May 6, 2026

To:

Hon. Jennifer R. Dorow
Circuit Court Judge
Electronic Notice

Lisa E.F. Kumfer
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Jill Marie Skwor
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2024AP311-CR

State of Wisconsin v. Mack E. Malone, Jr. (L.C. #2019CF140)

Before Neubauer, P.J., Gundrum, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mack E. Malone, Jr., appeals from a judgment of conviction and an order denying his postconviction motion. Malone raises two related issues: (1) whether the circuit court was objectively biased and should have recused itself from presiding over his jury trial after making statements during his codefendant's bench trial; and (2) whether trial counsel was ineffective for failing to seek recusal. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).¹ We affirm.

The State charged Malone and his codefendant with repeated physical abuse of a child, as a party to a crime. The codefendant proceeded to a bench trial before Judge Jennifer Dorow and was acquitted. In explaining that decision, the court found insufficient evidence that the codefendant was involved and indicated the abuse was likely committed by someone else, “[m]ost likely Mack Malone.”

Malone elected a jury trial, which was also presided over by Judge Dorow. Prior to trial, defense counsel acknowledged concern about the court’s prior exposure to the case but explicitly stated that the defense was “not asking the Court to recuse itself.” The jury found Malone guilty.

Malone later filed a postconviction motion alleging judicial bias and ineffective assistance of counsel based on counsel’s failure to seek recusal. The circuit court denied the motion without a hearing.

Malone argues that the circuit court was objectively biased and should have recused itself. However, Malone did not raise this issue in the circuit court. To the contrary, trial counsel expressly declined to seek recusal despite being aware of the court’s prior statements. A defendant must timely raise objections to preserve issues for appellate review. *State v. Coffee*, 2020 WI 1, ¶19, 389 Wis. 2d 627, 937 N.W.2d 579. When a defendant fails to do so, the claim is forfeited and may be reviewed only through the lens of ineffective assistance of counsel. *State*

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

v. Klapps, 2021 WI App 5, ¶29, 395 Wis. 2d 743, 954 N.W.2d 38. Malone forfeited his judicial bias claim by failing to seek recusal in the circuit court. Accordingly, we do not address whether the court should have recused itself. Malone’s claim is therefore properly analyzed as a claim of ineffective assistance of counsel for failing to move the court for recusal.

To prevail on an ineffective assistance claim, a defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Malone must show a reasonable probability that, but for counsel’s alleged error, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

We address prejudice and conclude Malone has not met his burden of showing a reasonable probability that the result of the proceeding would have been different. Malone’s argument rests entirely on statements the circuit court made during the codefendant’s bench trial. However, Malone does not identify any instance during his own trial in which the circuit court demonstrated bias, treated him unfairly, or conveyed an opinion about his guilt to the jury. Importantly, Malone was tried before a jury, which served as the factfinder. Malone does not point to any evidence that the circuit court influenced the jury or otherwise affected the verdict. Because Malone has not demonstrated that the alleged error affected the fairness or reliability of the proceeding, he has not established prejudice.

Malone also argues that the circuit court should have held an evidentiary hearing on his postconviction motion. A court must hold an evidentiary hearing only if the postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Because Malone failed to allege

facts that, if true, would show prejudice under *Strickland*, the circuit court properly denied his motion without a hearing.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals