

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 5, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 97-1362-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**PARRISH C. PAYNE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and DIANE S. SYKES, Judges.  
*Affirmed.*

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

PER CURIAM. Parrish C. Payne appeals from a judgment of conviction entered by the trial court after a jury found him guilty of kidnapping, as a party to a crime, contrary to §§ 940.31(1) & (2), and 939.05, STATS., and first-degree sexual assault, directly and as a party to a crime, contrary to

§§ 940.225(1)(c) and 939.05, STATS. Payne also appeals from a trial court order denying his motion for postconviction relief without a *Machner*<sup>1</sup> hearing. Payne claims: (1) the trial court erred by finding that there was sufficient evidence to support the jury's verdicts; (2) the trial court erroneously exercised its discretion by excluding evidence of the victim's subsequent acts; and (3) the trial court erred in denying his postconviction motion without a *Machner* hearing. We disagree with Payne's first and third claims, and, due to waiver, we decline to address Payne's second claim. Therefore, we affirm Payne's judgment of conviction and the order denying Payne's postconviction motion.

### I. BACKGROUND.

Payne's convictions are a result of his participation, along with his co-defendant, Timothy Tuitt, in the kidnapping and sexual assault of Kelly B., on August 18, 1995. Kelly testified at Payne's trial that, around 11:00 p.m. on August 17, 1995, she was sitting on the porch of a house located at 2932 North Fifth Street in the City of Milwaukee. Kelly testified that a car pulled up and parked in front of the house, and that two males, later identified as Payne and Tuitt, stepped out of the car. Kelly did not know either Payne or Tuitt. Payne and Tuitt urinated on the ground in front of the house, and then, upon seeing Kelly, apologized. Payne and Tuitt then walked away from the house and entered the Tapp I tavern, located on the corner of Fifth and Locust Street.

Kelly testified that after Payne and Tuitt had entered the Tapp I bar, Kelly's then boyfriend, Dale Newell, broke into Payne's and Tuitt's car. Kelly walked to the corner of Fifth and Locust while Newell was breaking into the car,

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<sup>1</sup> See *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

and then returned to the porch. Newell told Kelly that he had stolen a car radio from the car, and he then drove away alone for ten to fifteen minutes. When Newell returned, both Kelly and Newell left in Newell's car. They drove to two different houses, and then returned to 2932 North Fifth Street and parked in the back of the house.

Kelly testified that, as she and Newell were walking through the back yard of the house, Mildred Grove, who lived immediately north of 2932 North Fifth Street, was standing on her porch. Kelly testified that Grove told her and Newell that "two guys were looking for [her] and said they were going to kill [her]." Kelly then saw Payne and Tuitt walking south on Fifth street, and both Kelly and Newell began to run away through Grove's backyard. Kelly and Newell split up, and although Newell kept going through the yard, Kelly stopped and hid in the bushes in Grove's back yard.

Kelly testified that, as she was hiding in the bushes, Tuitt found her and grabbed her arm and told her to come with him. Tuitt then grabbed the back of Kelly's pants and her arm and forced her to walk to the front of the house at 2932 North Fifth Street, where Payne was waiting. Kelly testified that as Tuitt forced her to the front of the house, he was yelling, "Where's my stuff?" She told him that she didn't have it. When Kelly reached the front of the house Payne grabbed her other arm and tightly grabbed her around her neck, and both Payne and Tuitt forced her to walk down Fifth Street towards Fifth and Chambers Street. Kelly testified that as Payne grabbed her neck he told her, "shut up and don't say anything else." As Payne, Tuitt and Kelly reached Payne and Tuitt's car, a marked police squad car drove by. As the police car passed by, Payne grabbed Kelly and "stood up against her," acting like he was her boyfriend. Kelly testified that she did not try to yell or flag down the police car because she was scared.

Kelly testified that Tuitt then opened the trunk of the car, and that Payne and Tuitt ordered her to get into the trunk. Kelly then got into the trunk and Payne and Tuitt closed the hood of the trunk and drove off. Kelly testified that she noticed a hole about twelve inches long in the trunk through which she could see the road as the car was moving. Detective Kim Engelbert, who inspected Payne and Tuitt's car following their arrest, corroborated this testimony by testifying at trial that she (Detective Engelbert) located an approximately foot-long rusty spot of holes in the trunk through which Kelly could have seen the ground.

Kelly testified that after driving for about fifteen minutes, the car stopped and the trunk opened. Payne and Tuitt then told her to get out of the car, and put some type of black cloth over her head. Kelly testified that the black cloth was draped over her head so that she could only see down, but that she was able to tell the difference between Payne and Tuitt by their clothing. Payne and Tuitt then made Kelly sit in the front seat of the car between the two of them.

Kelly testified that while she and Payne and Tuitt were in the front seat of the car, Payne and Tuitt sexually assaulted her orally, vaginally and anally. Kelly testified that during the sexual assaults, Payne and Tuitt drove to two or three different locations but that she was not able to remember exactly when, or at which location, each sexual assault occurred. Kelly testified, however, that while she was in the car with Payne and Tuitt: (1) both Payne and Tuitt forced her to perform oral sex; (2) Payne put his penis in her vagina; and (3) both men put their fingers in her rectum and Tuitt put his penis in her anus. Kelly testified that, during the sexual assaults, Payne and Tuitt hit her in the back of the head and threatened to break her fingers and to kill her.

Kelly testified that, following the sexual assaults, Payne and Tuitt said that they were going to make her “sell her body” to repay them for the theft from their car. Kelly testified that they then drove to an apartment building on 20th Street, where Payne got out and entered the apartment building. Payne returned to the car with a red dress and Kelly and Tuitt got out of the car. Kelly testified that Payne and Tuitt told her to take her clothes off and change into the red dress, which she did. Kelly testified that as she was changing into the dress, Payne and Tuitt were saying that “the bitch going to make us some money back.” Payne then tore the shoulder pads out of the dress and threw them on the ground. Payne and Tuitt then drove Kelly to a Taco Bell restaurant on Wisconsin Avenue.

When they reached Wisconsin Avenue, Kelly testified that Tuitt had fallen asleep in the car. Kelly testified that she and Payne got out of the car and walked towards Michael’s restaurant. Payne then told her to walk up and down Wisconsin Avenue so she could “get a date” and make some money for him. While Payne stood in front of Michael’s restaurant, Kelly began walking up and down Wisconsin Avenue near the Ambassador Hotel. Kelly testified that she told a security guard at the Ambassador Hotel that she had been kidnapped and asked him to call for help, but that she didn’t think that the security guard believed her and that she ended up walking away from him. Kelly then returned to Michael’s restaurant and told Payne that she was dizzy. Kelly then fell on the ground and hurt her knee. Payne then started slapping Kelly and told her that he was going to buy her a soda, and that she should go into the restaurant bathroom and fix her hair. Kelly then went into the restaurant. Kelly testified that, although there were customers in the restaurant, she didn’t ask anyone for help because she was afraid that Payne might have a gun.

Kelly then left the restaurant and saw a man, later identified as David Washington, pull up in a red car. Kelly told Washington she had been kidnapped, beaten and raped, and showed him the bruises on her arm. Kelly testified that at first, Washington did not believe her, but that he then agreed to take her to the police station. Payne then walked over to Washington's car and Washington indicated to Payne that he wanted to have sex with Kelly for money. Payne then allowed Kelly to leave with Washington in his car, and Washington drove Kelly to the Third District Police Station. When Kelly arrived at the station, she told the police what had happened, and the police told her that she had been reported as being missing and that the police had two suspects in custody. The police then drove Kelly back to the area of Fifth and Locust Street where the police had apprehended Payne and Tuitt. Kelly then identified Payne and Tuitt as the men who had kidnapped and raped her, and identified their car. Kelly also took the police to the apartment building where she was forced to change into the red dress, and the police recovered the shoulder pads at that location. Kelly was then taken to the hospital where she was examined.

Grove, the woman who lived in the house immediately north of 2932 North Fifth Street, also testified at trial. Grove testified that, on the night of August 17, 1995, as she was walking home from a friend's house, she was stopped by two men in a car, one of whom she identified as Payne. Grove testified that the men were speaking to each other about a theft from their car, and that they made threatening remarks about the people who had broken into the car, and about the house at 2932 North Fifth Street. Payne and the other man then left in their car.

Later, Grove saw Kelly walking through her back yard and warned her that the two men were looking for her and were talking about hurting her. Grove then saw Kelly and Newell run, and Grove saw Tuitt run after them. Grove

then saw Tuitt bringing Kelly back to the front of the house while holding onto her head. Grove saw Kelly holding onto a post on a metal fence, and watched Payne and Tuitt pull her away from the post. Payne then grabbed Kelly's neck, and Tuitt grabbed her arm, and they walked towards Chambers Street. Grove then lost sight of Payne, Tuitt and Kelly. Grove also testified that she saw, a bit later, Payne and Tuitt drive past her house in the same car they had been driving earlier, but she did not see anyone else in the car, in either the front or back seats. Grove then told a neighbor what had happened, and the neighbor flagged down a police car. Later, as Grove was being questioned by police officers on the scene, she spotted Payne's and Tuitt's car, and she told the police who then chased and stopped the car.

Washington, the man who drove Kelly to the police station, also testified at trial. Washington testified that when Kelly asked him for help she appeared "hysterical" and repeatedly asked, "Could you please help me?" Washington testified that although he wanted to leave, he stayed and helped Kelly because it seemed like something was wrong. Washington testified that Kelly told him that she been kidnapped, placed in a trunk, beaten and raped, and that although she was "hysterical" she did not appear intoxicated or high on drugs. Washington then drove Kelly to the police station and later identified Payne's picture from a photo array.

At trial, in addition to the testimony given by Kelly, Grove, and Washington, the State presented: (1) photos of Kelly's injuries taken after the incident, showing bruises on her arms, marks on the top of her hands, an injury to her knee, and a black eye; (2) black shorts found in the back of Payne's and Tuitt's car which Kelly testified felt similar to the cloth which was draped over her head; (3) a T-shirt which Kelly was wearing the night she was abducted, which was

found in the back seat of Payne's and Tuitt's car, and which was torn during the abduction; (4) a pair of shorts which Kelly was wearing the night she was abducted, also found in the back seat of Payne's and Tuitt's car; (5) the red dress which Kelly was forced to wear, and the shoulder pads that were torn out of the dress and recovered at the apartment building on 20th Street; (6) a Vaseline jar which was recovered from the glove compartment of Payne's and Tuitt's car; and (7) medical reports which were introduced by stipulation, which show injuries to Kelly's face and body, including injury to Kelly's anus.

At trial, Payne's theory of defense was that Kelly, when confronted about the theft from Payne's and Tuitt's car, volunteered to help them recover their stolen property and willingly accompanied them in their car in order to lead them to the stolen radio. According to Payne, after Kelly was unable to recover the radio, she freely offered to prostitute herself in order to reimburse Payne and Tuitt for their loss. Payne also contended that no sexual assaults occurred. Payne's theory was based primarily on an attack on Kelly's credibility and was supported by the following facts: (1) on cross-examination, Kelly admitted to using cocaine not only around noon on August 17, but also shortly before being abducted; (2) the medical examination of Kelly produced no physical evidence of semen, pubic hair, etc., linking Payne or Tuitt to the sexual assaults; (3) although Detective Engelbert testified that she saw a hole in the trunk, police photographs of the car did not show a hole; (4) Kelly admitted to lying to police about matters in her case, and to falsely accusing a former boyfriend of assaulting her; and (5) the security guard at the Ambassador Hotel testified that Kelly did not seem to have been beaten up, did not ask to use a phone to call for help, and did not seem to be in danger.



After hearing all of the evidence, the jury found Payne guilty of both kidnapping, as a party to a crime, and sexual assault, directly and as a party to a crime. Payne was then sentenced to a total of fifty years in prison. Payne filed a motion for postconviction relief alleging ineffective assistance of trial counsel, which the trial court denied without holding a *Machner* hearing. Payne now appeals.

## II. ANALYSIS.

### *A. Sufficiency of the evidence.*

Payne claims that the evidence was insufficient to support the jury's verdicts finding him guilty of kidnapping and sexual assault.

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

*State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citation omitted). We conclude that the evidence was sufficient to support the jury's verdicts.

First, there was sufficient evidence to support the jury's verdict finding Payne guilty of kidnapping, as a party to a crime. Kelly testified that Payne and Tuitt had abducted her, described the abduction in detail, and testified that throughout the abduction she had been repeatedly threatened and beaten. Although Payne argued that Kelly willingly accompanied Payne and Tuitt, Kelly testified that she was basically dragged to their car, with Tuitt grabbing her arm,

and Payne holding her arm and tightly grabbing her throat. Photos of Kelly taken after the abduction showed bruises on her arms, where she testified she was grabbed and held by her abductors, in addition to injuries to other parts of her body. The injuries shown on the medical reports which were admitted by stipulation also corroborated Kelly's testimony.

Grove's testimony also supported Kelly's claim that she was abducted. Grove testified that both Payne and Tuitt had made threatening remarks about the people they believed had broken into their car. Grove also testified that she saw Payne and Tuitt grabbing Kelly by her throat and her arms, and forcibly pulling Kelly away from a post she was clinging to. Grove then saw Payne and Tuitt drive away from the scene, but testified that she did not see anyone else in the car, in either the back or the front seats. This testimony in particular significantly corroborated Kelly's claim that she had been placed in the trunk of the car. Kelly's testimony that she was placed in the trunk of the car was also corroborated by Detective Engelbert's testimony that there was a foot-long hole in the trunk of the car which Kelly could have seen through, as she claimed. Finally, Washington's testimony that Kelly was "hysterical" and claimed to have been abducted, thrown in a car trunk, beaten and raped, also corroborated her testimony.

Second, there was also sufficient evidence for the jury to find that Payne had sexually assaulted Kelly, both directly and as a party to a crime. First and foremost, Kelly testified in detail that Payne and Tuitt had both sexually assaulted her, orally, vaginally, and anally. Payne argues that, because "there was significant evidence that tended to rebut or was inconsistent with [Kelly's] version of events" Kelly's testimony was "incredible as a matter of law." Payne is wrong. For testimony to be incredible as a matter of law, it must be in conflict with the uniform course of nature or with fully established or conceded facts. *Chapman v.*

*State*, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975). Although the jury could have chosen to disbelieve Kelly's testimony for various reasons, it was not in conflict with the uniform course of nature or with any fully established or conceded fact. Therefore, the jury had a right to believe Kelly's testimony and to rely on it as a basis for their verdict.

Kelly's testimony that she had been sexually assaulted, moreover, was also corroborated by other evidence. Although there was no evidence of pubic hair or semen linking Payne and Tuitt to the crimes, there was circumstantial evidence supporting Kelly's claim that she had been anally assaulted. First, the medical reports showed injury to Kelly's anus. Second, a jar of Vaseline was found in Payne and Tuitt's car which corroborates Kelly's claim that Payne and Tuitt had applied a lubricant to her rectum with their fingers. In addition, Kelly's clothes were found in the back seat of Payne and Tuitt's car, and her T-shirt had been torn. Also, Washington's testimony that Kelly had been hysterical and had told him she had been raped corroborated Kelly's claims of sexual assault.

As the supreme court stated in *Poellinger*,

If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

*Poellinger*, 153 Wis.2d at 507, 451 N.W.2d at 758 (citation omitted). For the reasons articulated above, we conclude that there was more than sufficient evidence to support the jury's verdicts.

*B. Exclusion of evidence of victim's subsequent acts.*

On August 25, 1995, a week after the kidnapping incident involving Payne and Tuitt, Kelly was involved in another auto burglary near the Tapp I tavern. During that incident, Newell and another man, Mark Benion, broke into a car parked near the Tapp I and stole a car stereo. Kelly was seen leaving the scene with Newell, and was later taken into custody by the police. When questioned by the police, Kelly told the police where she thought the stolen items were located. The State brought a motion in limine to exclude evidence of this incident, on the grounds that it was not relevant, and the trial court granted the motion. At the hearing on the motion, Payne, while not clearly articulating a reason to admit the evidence, argued that the evidence should have been admissible as “a type of reverse *Whitty* evidence,” i.e., as permissible “other-acts” evidence under § 904.04(2), STATS.<sup>2</sup> In Payne’s brief in chief, however, Payne does not explicitly rely on any statute, and does not clearly articulate the theory he is advancing in favor of the evidence’s admission. Understandably, because of the stance taken by Payne during the motion hearing, the State, on appeal, presents arguments solely related to § 904.04(2), STATS. Payne, however, in his reply brief, makes it clear that, on appeal, he is contending that the evidence should have been admitted as “habit” evidence, pursuant to § 904.06, STATS.

Although the two are often confused, “habit” evidence is different than “character” or “other-acts” evidence. *See Steinberg v. Arcilla*, 194 Wis.2d 759, 766-67, 535 N.W.2d 444, 446-47 (Ct. App. 1995). “Habit” evidence is evidence of a person’s habit which is admissible, under § 904.06(1), STATS., to prove that “the conduct of the person ... on a particular occasion was in

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<sup>2</sup> *See Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d 557 (1967) (seminal Wisconsin decision regarding “other acts” evidence).

conformity with the habit ....” “Habit” evidence “may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed ....” Section 904.06(2), STATS. By contrast, evidence of a person’s “other acts” is “not admissible to prove the character of a person in order to show that the person acted in conformity therewith,” but can be admitted if offered for a permissible purpose, such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Section 904.04(2), STATS.

Although Payne argued at the motion hearing that the evidence of Kelly’s subsequent acts was “reverse *Whitty* evidence,” i.e., that it was admissible for some permissible purpose under § 904.04(2), STATS., he has failed to make that argument on appeal. Therefore, we conclude that Payne has waived that argument, and we decline to address it. Additionally, by failing to argue at the motion hearing that the evidence of Kelly’s subsequent acts should have been admitted as “habit” evidence, pursuant to § 904.06, STATS., and by failing to clearly state the nature of his appellate argument until his reply brief, Payne has waived the right to argue the evidence was admissible as “habit” evidence. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review issue raised for the first time on appeal), *and see Swartwout v. Bilsie*, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981) (arguments not raised in main brief may not be raised in reply brief). Therefore, we decline to address, on either theory, Payne’s claim that the trial court erroneously exercised its discretion in excluding evidence of Kelly’s subsequent acts.

*C. Denial of postconviction motion without a **Machner** hearing.*

Payne claims that the trial court erred by denying, without a **Machner** hearing, his postconviction motion for relief which alleged ineffective assistance of trial counsel. We disagree.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. **Strickland v. Washington**, 466 U.S. 668, 687 (1984); **State v. Johnson**, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* **State v. Sanchez**, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding **Strickland** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were “outside the wide range of professionally competent assistance.” **Strickland**, 466 U.S. at 690. A defendant will fail if counsel’s conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel’s conduct. *Id.* We will “strongly presume” counsel to have rendered adequate assistance. *Id.*

To prove prejudice, a defendant must show that counsel’s errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.* at 687. In order to succeed, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. If this court concludes that the defendant has not proven one prong, we need not address the other prong. *See id.* at 697. On appeal, the trial court’s findings of fact will be upheld unless they are clearly erroneous. **State v. Pitsch**, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice

prong is a question of law which this court reviews *de novo*. *Id.* at 634, 369 N.W.2d at 715.

If a motion alleging ineffective assistance of counsel on its face alleges facts which would entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary *Machner* hearing. *See State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law which we review *de novo*. *Id.*

However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

*Id.* at 309-10, 548 N.W.2d at 53. The trial court's decision to deny an evidentiary hearing will only be reversed if the trial court erroneously exercises its discretion. *See id.* at 311, 548 N.W.2d at 53-54.

In his postconviction motion, Payne claimed that he received ineffective assistance of trial counsel because his counsel: (1) insufficiently questioned a juror during voir dire and/or failed to exercise a peremptory strike to remove her from the jury; (2) failed to cross-examine Kelly with regard to inconsistencies between her trial testimony and her testimony at a prior revocation hearing; and (3) failed to adequately discuss with Payne his right to testify before Payne waived that right. The trial court correctly concluded that none of these claims raised sufficient facts to warrant a *Machner* hearing.

Payne claims that his trial counsel was ineffective for failing to sufficiently question a juror on voir dire or for failing to use a peremptory strike to remove the juror from the panel. During voir dire, the juror stated that ten years earlier she had been battered and sexually abused by her first husband. In response, Payne's counsel said to the juror: "Ten years. There is going to be some evidence clearly of some sexual abuse, and there is going to be some evidence that comes in about this woman being struck a number of times. Is any of that evidence going to impact?" The juror then responded, "I don't think it will be a problem." Payne's counsel then asked the juror about her status as a student, and the juror indicated that she was studying to be a paralegal. Payne's counsel did not use a peremptory strike to remove the juror, and she served on the final panel which convicted Payne.

As Payne argues, in *State v. Traylor*, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992), this court held that the defendant's trial counsel was deficient for failing to ask jurors who had admitted bias appropriate follow-up questions. *See id.* at 399-400, 489 N.W.2d at 628. Payne fails to acknowledge, however, that in *Traylor* this court also stated, "Counsel should have asked the appropriate follow-up questions to assess whether the juror would follow the instructions of the court and, *if counsel failed to receive a satisfactory answer*, should have moved to reject the juror for cause." *Id.* (emphasis added). In the instant case, Payne's trial counsel asked the juror the follow-up question, "Is any of that evidence going to impact?" and the juror answered, "I don't think it will be a problem." Thus, after the juror indicated a possible source of bias, Payne's counsel asked the juror an appropriate follow-up question and received a satisfactory answer. According to *Traylor*, Payne's counsel need not have done any more. Therefore, because the record conclusively demonstrates that Payne



was not entitled to relief as a result of his counsel's voir dire of the juror, the trial court properly denied this aspect of Payne's claim without a *Machner* hearing. See *Bentley* at 309-10, 548 N.W.2d at 53.

Payne also argues that his trial counsel was ineffective for failing to "sufficiently confront the victim in cross examination with additional inconsistencies between her trial testimony and her previous testimony in a revocation hearing." Payne's postconviction motion alleged, in conclusory fashion, that "there were a number of significant inconsistencies between [Kelly's] trial testimony and [her testimony] at the revocation hearing." As the trial court noted, however, "Payne has not identified any specific testimony which trial counsel purportedly should have utilized for impeachment purposes." Therefore, because Payne's motion, with respect to his trial counsel's cross-examination of the victim, made only conclusory allegations unsupported by specific facts, the trial court properly denied this aspect of Payne's motion without a *Machner* hearing. See *id.*

Finally, Payne claims that his trial counsel was ineffective for failing to "sufficiently discuss" with him the decision whether or not to testify. Payne admits that "the court did conduct a colloquy that on its face appears to document a voluntary waiver of the defendant's right to testify." Nevertheless, Payne claims that, although his counsel had discussed waiver of his right to testify before the close of the State's case, his counsel did not "fully review" with him the decision whether or not to testify following the close of the State's case, and preceding his waiver of that right. Payne does not support his motion, however, with specific factual assertions regarding what additional steps his trial counsel should have taken in order to "fully" or "adequately" discuss with Payne the decision whether to testify. To the contrary, Payne's motion contains only conclusory allegations

that his counsel did not “adequately” discuss with him waiver of his right to testify. Therefore, the trial court properly denied this final aspect of Payne’s postconviction motion without holding a *Machner* hearing. *See id.*

### III. CONCLUSION.

In sum, we conclude that: (1) there was sufficient evidence to support the jury’s verdicts; and (2) the trial court properly denied Payne’s motion alleging ineffective assistance of counsel without a *Machner* hearing. Further, we decline to review Payne’s claim that the trial court erred by excluding evidence of the victim’s subsequent acts. Therefore, we affirm Payne’s judgment of conviction and the trial court order denying postconviction relief.

*By the Court.*—Judgment and order affirmed.

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

