

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2017

Diane M. Fremgen
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. 2016AP1773-CR

Cir. Ct. No. 2012CF1306

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Steven Martinez appeals a judgment convicting him of disorderly conduct with a domestic abuse enhancer, misdemeanor bail

jumping, and felony bail jumping. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He argues his trial counsel was ineffective for three reasons: (1) counsel failed to strike juror S.Z. from the jury panel; (2) counsel failed to impeach witness J.G. with evidence of her fourteen criminal convictions; and (3) counsel failed to limit the State's evidence used to prove the bail-jumping charges. Martinez contends he is entitled to a new trial due to the cumulative prejudice arising from these alleged deficiencies, and he requests a new trial in the interest of justice. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In addition to the crimes for which Martinez was convicted, he was charged with battery with a domestic abuse enhancer. J.G. testified Martinez was present at her home when he overheard J.G. say she agreed to take a plea deal in a theft case that involved her and Martinez. He called her a snitch and then followed her from the living room to a bedroom, where they argued. He prevented J.G. from leaving, pushed her against the door and held her by her arms. He put her on the bed where they wrestled, with him on top of her, holding her down and pulling her hair. After two or three minutes she was able to escape. She told Martinez she had called the police, although she had not. Martinez then called the police to report the incident.

¶3 When the police arrived, J.G. answered the door. Martinez was sitting on a couch. The officers separately interviewed them and took photos of their injuries. The officers described bruises on J.G.'s arms and redness on her scalp as "fresh wounds." Martinez had scratches on his face, which the officers

found consistent with J.G.'s claim that she defended herself by scratching and clawing at Martinez's face.

¶4 Martinez initially told the officers the altercation occurred in the living room doorway. There was no sign of a disturbance there. The officers found evidence of a disturbance in the bedroom consisting of clothing strewn about and an ashtray spilled on the floor. Martinez also initially told an officer he was staying at the residence. He later retracted that statement and said he was not staying at the residence. Martinez also later told officers J.G. pushed him onto the bed.

¶5 To establish the bail-jumping charges, the State called the deputy clerk of the circuit court to testify regarding the conditions of Martinez's bail. She testified a condition of Martinez's bail in separate misdemeanor and felony complaints included no contact with J.G. In her testimony, the deputy clerk identified the charges in each of the complaints for which Martinez was released on bail, including charges of disorderly conduct and battery.

¶6 Martinez did not testify, and the defense presented no witnesses at trial. The jury found Martinez not guilty of battery but guilty of disorderly conduct and both bail-jumping charges.

DISCUSSION

¶7 A claim of ineffective assistance of counsel involves a two-pronged analysis. The defendant must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, he or she must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability

is one that undermines our confidence in the outcome. *Id.* If the defendant fails to show either deficient performance or prejudice, this court need not review the other prong. *Id.* at 697.

I. Counsel's failure to strike an allegedly biased juror

¶8 During voir dire, juror S.Z. said an officer's testimony is more believable or should be given greater weight than that of an average citizen. Martinez contends his trial attorney was ineffective for failing to strike S.Z. from the jury panel. That argument fails for two reasons.

¶9 First, a mere expression of a predetermined opinion does not disqualify a juror per se. *State v. Sarinske*, 91 Wis. 2d 14, 33, 280 N.W.2d 725 (1979). A person who can set aside a predetermined opinion can still qualify as an impartial juror. *Id.* Because S.Z. was never specifically asked whether he could set aside his opinion about the credibility of police witnesses, Martinez has not met his burden of establishing S.Z.'s inability to set aside his original opinion.

¶10 Second, and more significantly, Martinez fails to establish prejudice to his defense because the record conclusively refutes the argument that S.Z. would not be able to set aside his beliefs about police credibility. The jury acquitted Martinez on the battery count, the only count that depended on the officers' credibility. The other charges were established by evidence that did not require determination of the officers' credibility. Martinez's presence at J.G.'s residence violated the conditions of his bail. His own account of being present at her home and getting into an altercation with her, causing him to call the police to report the disturbance, established his guilt without consideration of the officers' credibility.

II. Counsel's failure to impeach J.G. with her fourteen criminal convictions

¶11 The State concedes Martinez's trial counsel performed deficiently by not establishing J.G.'s fourteen convictions. However, Martinez has not established prejudice sufficient to undermine this court's confidence in the outcome. The jury was informed that J.G. had been convicted of more than one theft charge. Martinez has not shown how advising the jury of the number of J.G.'s convictions would have appreciably impeached her credibility or made a difference in the outcome of the trial.

¶12 Martinez contends he was lawfully picking up his child, with no intent to violate the no-contact order. No evidence was presented that the child was at the residence. In addition, the no-contact order prohibited Martinez from going to J.G.'s house for any purpose. Therefore, J.G.'s credibility was not relevant to the bail-jumping charges.

¶13 Regarding the disorderly conduct, Martinez contends the jury could have believed J.G. was the one who created the disturbance in the bedroom and was disorderly. Even if the jury found J.G. was disorderly, that would not mean Martinez was not also disorderly. The account Martinez gave to the officers, his presence at J.G.'s residence in violation of the no-contact order, and the altercation in J.G.'s bedroom that led Martinez to call the police established his guilt without regard to J.G.'s credibility.

III. Counsel's failure to limit evidence regarding other charges pending against Martinez

¶14 Before the trial began, Martinez’s attorney drafted a stipulation, the effect of which would have been to prevent the State from presenting evidence of the pending charges that led to the no-contact orders. Martinez refused to sign the stipulation. As a result, the State was compelled to present evidence that Martinez was on bond for a misdemeanor offense and a felony offense with conditions that he have no contact with J.G. Without objection, the deputy clerk identified the three misdemeanor counts in Brown County case No. 2011-CM-1624, including battery and disorderly conduct, as well as ten counts in Brown County case No. 2012-CF-104, including four counts of felony theft. Martinez contends his trial counsel was ineffective for failing to limit the State’s evidence to show only that no-contact provisions were included in the bail conditions. Martinez characterizes the deputy clerk’s testimony as “other acts evidence.”

¶15 Because Martinez refused to sign his counsel’s stipulation, the State was allowed to directly prove the elements of the bail-jumping charges, which included evidence that he was charged with a felony and a misdemeanor in separate complaints. To the extent the deputy clerk’s testimony provided additional detail regarding multiple offenses, Martinez has not established sufficient prejudice to undermine our confidence in the outcome. Regardless of his motive for going to J.G.’s home, Martinez violated the conditions of his bail by being there. There was also little dispute about the fact that Martinez was disorderly, regardless of whether J.G. was as well. The only charge about which there was any real factual dispute was the battery charge for which Martinez was acquitted. Therefore, we conclude informing the jury of the other pending charges did not affect the verdicts.

¶16 Because Martinez had no viable defense to the disorderly conduct and bail-jumping charges, and because the jury acquitted him of the battery charge, we conclude Martinez failed to establish prejudice from his counsel's performance. Whether considered individually or cumulatively, counsel's performance does not undermine our confidence in the outcome.

¶17 Finally, Martinez requests a new trial in the interest of justice, contending the real controversy was not fully tried. Our discretionary reversal power is exercised only in exceptional cases, and Martinez has not established that this is an exceptional case. *See State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60. The acquittal on the battery charge shows juror S.Z. was not biased in favor of police testimony. That acquittal also shows J.G.'s credibility was impeached regardless of counsel's failure to inform the jury of the number of her convictions. The jury's knowledge of Martinez's other pending crimes did not result in a guilty verdict on the battery charge, and Martinez had no viable defense to the charges for which he was convicted. Therefore, we conclude the real controversy was fully tried.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

