COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP957 **Cir. Ct. No. 2011CF3841**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTGOMERY EDWARD WALKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Montgomery Edward Walker, *pro se*, appeals from an order[1] of the circuit court that denied his postconviction motion without a hearing. Walker asserts that he is entitled to a ***Machner***[2] hearing and/or a new trial, based on claims of ineffective assistance of trial counsel and appellate counsel.[3] We reject Walker's arguments and affirm the circuit court.[4]

BACKGROUND

¶2 In August 2011, Walker was charged with one count of first-degree sexual assault of a child. The case proceeded to a jury trial in March 2012. The State's case against Walker was quite strong: the victim immediately reported the assault and was examined by a forensic nurse, who confirmed injuries consistent with sexual assault. Additionally, a DNA test linked semen found in the victim's underwear with Walker; trace amounts of semen taken from the victim's vagina and inner thighs were insufficient for testing.

¶3 Walker's defense was that the victim and her mother, Walker's step-daughter, set him up. Walker's wife's testimony somewhat supported this theory. She testified that her daughter hated Walker. She further testified that she and

[1] Walker, in his Notice of Appeal, incorrectly refers to the circuit court's order filed on April 18, 2016, as a final judgment. Accordingly, the only issue before this court is the circuit court's decision of said date.

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

[3] Walker was represented by the same attorney for both his postconviction motion and his appeal. Accordingly, for the purposes of this appeal, we will refer to this attorney as appellate counsel.

[4] We note that Walker's jury trial was before the Honorable Rebecca F. Dallet, his first postconviction motion was heard by the Honorable Jeffrey A. Wagner, and his second postconviction motion was heard by the Honorable Jonathan D. (J.D.) Watts. We refer to them all generally as the "circuit court."

Walker had sexual intercourse the morning after the assault, and that she had wiped herself with a sanitary napkin, throwing it in the bathroom garbage. She suggested that the victim, who she claimed she had previously caught playing in the garbage, might have taken the used sanitary napkin out of the bathroom garbage to play with, and that this would explain how Walker's semen was found in the victim's underwear. The jury apparently did not find this explanation credible, and Walker was convicted. He was sentenced to twenty-five years of initial confinement and seven years of extended supervision, for a total sentence of thirty-two years.

¶4 Walker subsequently filed two postconviction motions. Walker's first motion, filed in July 2013, alleged ineffective assistance of trial counsel based on a lack of effective communication. Specifically, he asserted that his trial counsel failed to inform him of the definition of sexual assault and that he was therefore unable to understand the strength of the State's case against him. Had this been more thoroughly explained to him, he claimed that he would have accepted the State's plea offer.

¶5 Walker also contended that the circuit court erroneously exercised its discretion by denying trial counsel's motion to withdraw as Walker's attorney of record. Trial counsel originally filed a motion to withdraw in November 2011 based on his assertion that there were irreconcilable differences between him and Walker. The circuit court denied that motion.

¶6 Based on these issues with trial counsel, Walker sought to have his conviction vacated. The circuit court denied Walker's postconviction motion without a hearing, and this court affirmed the same on appeal. *See* ***State v. Walker***, No. 2013AP2193-CR, unpublished slip op. ¶2 (WI App Aug. 26, 2014).

¶7 Walker, in his second postconviction motion, again alleged ineffective assistance of trial counsel, and sought a ***Machner*** hearing, a new trial, or other grant of relief as the court deemed appropriate. Additionally, in an apparent effort to avoid a procedural bar, Walker also alleged ineffective assistance of appellate counsel for failing to raise his claim regarding alleged juror misconduct in the original postconviction motion. The circuit court's denial of this motion without a hearing provides the basis for Walker's current appeal.

¶8 In his claim of juror misconduct, Walker alleges that one of the jurors, Juror 12, intentionally deceived the circuit court about knowing Walker, and was biased against him. During the course of voir dire, the circuit court made a general inquiry of the jury pool asking if anyone knew Walker, noting that it saw no hands. Walker admits that neither he nor his mother recognized Juror 12 during voir dire, either visually or after hearing his name called, because the juror had facial hair at the time of trial.

¶9 On the second day of trial, however, Walker's sister recognized Juror 12 as a former upstairs neighbor of Walker's mother. Walker explains that there was once a verbal altercation between Walker and Juror 12 regarding Juror 12's car, and that Juror 12 had allegedly threatened Walker during that argument. As a result, Walker contends that Juror 12 held a bias against him.

¶10 Walker's sister brought her identification of Juror 12 to Walker's attention and to that of his trial counsel. However, Walker asserts that trial counsel allegedly stated that it was too late to stop the trial, and therefore never brought the issue to the attention of the court. Walker also allegedly brought this to the attention of appellate counsel, who failed to raise this issue during the

course of his first postconviction motion and his direct appeal. Therefore, Walker claims that both trial counsel and appellate counsel were ineffective.

¶11 The circuit court denied Walker's second postconviction motion without a hearing. This appeal follows.

DISCUSSION

1. Standard of Review

¶12 Absent a sufficient reason, a defendant may not bring a claim under WIS. STAT. § 974.06 (2015-16),[5] if that claim could have been raised in a prior motion or direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); ***State v. Romero-Georgana***, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Ineffective assistance of appellate counsel may constitute a sufficient reason for not raising a claim in an earlier proceeding. ***Id.***, ¶36.

¶13 For an ineffective assistance claim, the test established under ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), requires that a defendant show that counsel's performance was deficient and that the deficiency was prejudicial in order to establish that an attorney rendered ineffective assistance. An attorney's conduct is deficient when it falls below an objective standard of reasonableness, and said performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶14 A claim of ineffective assistance of trial counsel must be preserved by a postconviction motion. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). In order to secure a hearing on a § 974.06 motion, a defendant must allege sufficient material facts (i.e. who, what, where, when, why, and how) that, if true, would show that the defendant was entitled to relief. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30, and ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Conversely, when a motion contains insufficient allegations or is conclusory, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. ***Romero-Georgana***, 360 Wis. 2d 522, ¶30. Whether the motion alleges sufficient facts is a question of law that we review *de novo*. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶15 Additionally, the ***Allen*** case suggests that a defendant must do more than simply identify an issue of arguable merit that trial counsel did not raise. *See* ***id.***, ¶¶ 21-22. Rather, pursuant to the "sufficient reason" standard, it is incumbent upon Walker to provide information that would undermine our confidence in the circuit court's decision by identifying a potential issue of merit for review. *See* ***id.***

¶16 Furthermore, when, appellate counsel is allegedly ineffective for failing to raise certain issues relative to the performance of trial counsel, as is argued in this case, the defendant must show that these non-frivolous issues were "clearly stronger" than the issues appellate counsel did raise. ***Romero-Georgana***, 360 Wis. 2d 522, ¶45 (citation omitted). The case law provides a methodology for reviewing courts to assess whether counsel performed deficiently, by comparing those arguments now advanced against those previously raised. ***Id.***, ¶¶45-46.

¶17 As to decisions of the circuit court, we review its discretionary decisions under the deferential erroneous exercise of discretion standard. ***Allen***, 274 Wis. 2d 568, ¶9.

2. *Juror Bias*

¶18 Walker argues that both his trial counsel and appellate counsel were ineffective for their failure to object to the presence of Juror 12 due to his alleged misconduct and supposed bias against Walker. As an initial matter, we note that while Walker did assert that his current claim regarding juror bias is "clearly stronger than the claims post[]conviction counsel actually brought," *see* ***State v. Starks***, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W.2d 146, he failed to allege that appellate counsel's failure to raise these issues cannot be explained or justified. *See* ***State v. Balliette***, 2011 WI 79, ¶69, 336 Wis. 2d 358, 805 N.W.2d 334. Further, while Walker correctly identified the "clearly stronger" test in his motion, he failed to apply it. His conclusory assertion at the close of his § 974.06 motion—that his issues or the "cumulative value" thereof constituted clearly stronger issues—is meaningless without comparison to the issues postconviction counsel originally raised. Walker fails to offer any support for his assertion that his § 974.06 claims are "clearly stronger" than those which he originally brought. On this basis alone, Walker is prohibited from advancing these claims.

¶19 However, in reviewing the merits of Walker's assertions we, like the circuit court, conclude that his claims fail in that respect as well. The law presumes that prospective jurors are impartial, and accordingly the party challenging a juror's impartiality bears the burden of rebutting this presumption and establishing a juror's bias. ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). In making an assessment with regard to juror bias, the appellate court

employs a two-step process in order to determine whether a new trial is warranted. This two-step assessment process was developed in ***State v. Wyss***, 124 Wis. 2d 681, 340 N.W.2d 745 (1985) *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), and requires that the defendant prove: "'(1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party.'" ***State v. Funk***, 2011 WI 62, ¶32, 335 Wis. 2d 369, 799 N.W.2d 421 (italics and citation omitted).

¶20 The ***Funk*** court indicates that "[u]nder the first step of the ***Wyss*** test when ... there is no factual dispute about what was asked and answered during voir dire, the issue we address is whether the question incorrectly or incompletely answered is material." ***Id.***, ¶33 (footnote omitted). The determination of what constitutes a material question looks not only at the response provided and whether it reveals a bias, but whether a defendant proves that the question and its correct answer would have precipitated further inquiry which would have likely uncovered bias. ***Id.***, ¶34. In that event, the court considers the initial question to be material. ***Id.***, ¶35.

¶21 In support of his position, Walker refers to the ***Wyss*** case. ***Wyss*** involved a homicide where the defendant was convicted by a jury of the first-degree murder of his wife. ***Wyss***, 124 Wis. 2d at 687. He appealed, arguing juror bias with regard to one particular juror who had not provided complete and accurate information to the court. For example, the juror neglected to inform the court that he was no longer living in Dane County at the time of the trial. ***Id.*** at 714. The juror also failed to disclose during voir dire that he was acquainted with law enforcement personnel through his employment at Waupun Correctional

Institution, and that he had previous contact with the district attorney's office relating to child support issues. ***Id.*** at 716. Wyss argued that he was prejudiced by this misinformation because he would have exercised his right to peremptory challenges had he known about these contacts. ***Id.*** at 715.

¶22 This court, while finding that there was no prejudicial error that had resulted from the inaccurate information from the juror, nevertheless reversed the conviction and granted Wyss a new trial, stating that "'justice probably has miscarried.'" ***Id.*** at 689 (citation omitted). Our supreme court reversed. In establishing and applying the two-part test for juror bias, it accepted the finding of the circuit court:

> "To suggest that the non-disclosures by the juror prejudiced the defendant is to speculate. It could be argued that each of the non-disclosures could have shown a pre-disposition against the State.
>
> In point of fact, on this record, I cannot find that the juror was prejudiced one way or the other. I find that his verdict, like those of the other eleven jurors, was based upon the evidence."

Id. at 732.

¶23 The supreme court further indicated that "[t]o adopt a per se rule and grant a new trial to a defendant in every instance in which a juror on voir dire answers a question dishonestly, would be to place a strain on the judicial system it could not long endure." ***Id.*** at 724-25 (italics omitted). In sum, it found that even though there had been some misrepresentations by the juror on the juror questionnaire regarding his background information, none of it had revealed any bias against the defendant. ***Id.*** at 732.

¶24 Moreover, the supreme court held that the court of appeals had erred as a matter of law in its exercise of discretion when it granted a new trial without first finding that there was a substantial degree of probability that the new trial would produce a different result, because the evidence was "more than sufficient to dispel any doubt regarding the defendant's guilt." ***Id.*** at 742. Therefore, a new trial in the interest of justice was not warranted. ***Id.***

¶25 ***Wyss*** does not support Walker's position. Walker and his mother both submitted affidavits explaining their connection to Juror 12: that Walker's mother lived in the same duplex as Juror 12 for approximately two years, in particular noting the altercation that occurred between Walker and Juror 12, including the alleged threat against Walker by Juror 12. However, Walker admits that neither Walker nor any member of his family immediately identified Juror 12 upon seeing him in court.

¶26 Additionally, Walker provides very few details relating to the altercation and threat. Walker repeatedly refers to Juror 12 as a "foe" based on an alleged single incident that occurred at some date in the past. However, the circuit court, in its decision, found that:

> The defendant does not allege when or how long his mother and Juror 12 were neighbors, how many total times he interacted with Juror 12, when (or how long ago) the dispute over the parking space took place or how long the dispute lasted. He also does not describe what happened with any particularity. The affidavit leaves open questions of whether the defendant and Juror 12 would have recognized each other at the time of the incident, whether they were in (or outside of) their vehicles at the time of the alleged dispute, or whether they had made eye contact. It is unclear from the facts alleged how (or if) the defendant identified Juror 12 at the time of the incident or whether Juror 12 had any reason to be able to identify the defendant.

¶27 The circuit court further found that Walker failed to allege sufficient material facts for the circuit court to assess whether Juror 12 knowingly deceived the court by failing to inform the circuit court that he knew Walker.

> The defendant himself admits that he did not recognize Juror 12 by name or appearance until the second day of trial, and then only recognized him … after being reminded of him by his family. He also alleged that Juror 12's appearance had changed in the unspecified amount of time that had passed since the parking spot dispute. Under these circumstances the defendant's assertion that Juror 12 knowingly lied to the court in order to hide his alleged bias is merely a conclusory allegation that is unsupported by the facts alleged.

¶28 As a result, the circuit court denied Walker's motion without a hearing, finding that his motion and supporting affidavits failed to "allege sufficient material facts for the court to meaningfully assess whether there is any reasonable probability that Juror 12 would have even remembered this incident, let alone held a bias against the defendant or his family." Additionally, the circuit court found that Walker failed to "provide sufficient material facts"—for example, who, what, where, when, why, and how—"that, if true, would entitle him to relief." Accordingly, the circuit court, in finding that he was not denied an impartial jury or the effective assistance of trial or appellate counsel, properly denied Walker's claim of juror bias.

¶29 Moreover, we point out that here, like in ***Wyss***, the evidence against Walker is overwhelming. Therefore, because the evidence was "more than sufficient to dispel any doubt regarding the defendant's guilt," *see* ***Wyss***, 124 Wis. 2d at 742, it would have been an error to find that there was a substantial degree of probability that a new trial would produce a different result in Walker's case.

¶30 As to the issue of ineffective assistance of counsel, Walker accurately sets forth the standard of review relative this issue, but other than his assertion that appellate counsel was ineffective for failing to address the current issue surrounding trial counsel's alleged ineffective assistance, he at no time discusses the substance of appellate counsel's original postconviction motion. Furthermore, the fact that there was overwhelming evidence against Walker defeats the prejudice prong of the ***Strickland*** test, because there is not a reasonable probability that, even without trial counsel's error in not advising the circuit court of the juror issue, the results of the Walker's trial would have been different. *See* ***Strickland***, 466 U.S. at 694. Therefore, this court agrees with the State's position that Walker did not adequately plead his § 974.06 claim and, accordingly, this court affirms the decision of the circuit court as to this issue.

¶31 Walker's postconviction pleadings fail to establish a non-speculative claim of ineffective assistance of trial counsel or appellate counsel, and his trial counsel and appellate counsel cannot be ineffective for not raising a meritless claim. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Accordingly, the postconviction court properly denied Walker's motion without a ***Machner*** hearing.

By the Court.—Order affirmed.

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