COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2672-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EMMANUEL O. OKORONTA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 DYKMAN, J. Emmanuel Okoronta appeals from a judgment of conviction for violating a domestic abuse injunction and for bail jumping. He argues that he is entitled to a new trial because his attorney erroneously used a peremptory strike to remove a biased juror rather than moving to strike the juror for cause. Because we conclude that Okoronta has failed to demonstrate he was

prejudiced by his attorney's failure, we disagree and affirm the judgment of the trial court.

I. Background

¶2 The State charged Okoronta with three counts of violating a domestic abuse injunction, in violation of WIS. STAT. § 813.12(8)(a) (1997-98),[1] and three counts of bail jumping, in violation of WIS. STAT. § 946.49(1)(a). He pleaded not guilty, and a jury trial ensued. During voir dire, the prosecutor asked potential jurors if they knew any of the State's potential witnesses. One stated that he was "best friends" with Al Rickey, who was an investigator for the State, and that he and Rickey had each been the best man at the other's wedding. However, the juror also stated that his friendship "wouldn't affect" his ability to be fair and impartial. Okoronta's attorney never moved to strike the juror for cause, but instead used a peremptory challenge to remove him.

¶3 The jury found Okoronta guilty of two counts of violating a domestic abuse injunction and two counts of bail jumping. Okoronta filed a motion for postconviction relief under WIS. STAT. § 809.30, alleging that the jury's verdict was based on insufficient evidence and that he had been denied his right to effective assistance of counsel because his attorney had failed to move to strike a juror based on an erroneous view of the law. Further, Okoronta claimed this error was prejudicial "because it deprived the defense of its right to use its full complement of peremptory challenges on prospective jurors who were not subject to removal for cause."

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 The trial court agreed that there was insufficient evidence for conviction on two of the four counts and dismissed these charges. However, the court denied Okoronta's motion for a new trial because it did not believe that he had been prejudiced by his attorney's deficient performance. Okoronta appeals.

II. Analysis

¶5 In determining whether a defendant was denied effective assistance of counsel, Wisconsin follows the standard of the United States Supreme Court, announced in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996). A defendant has the burden to show both that his attorney performed below an objective standard of reasonableness and that he was prejudiced by counsel's deficiency. ***Strickland***, 466 U.S. at 687; ***State v. Adams***, 221 Wis. 2d 1, 6, 584 N.W.2d 695 (Ct. App. 1998). A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. Franklin***, 2001 WI 104, ¶12, ___ Wis. 2d.___, 629 N.W.2d 289. The trial court's findings of fact will not be overturned unless they are clearly erroneous. ***Id.*** Whether counsel's performance was deficient and prejudicial is a question of law that we review de novo. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Counsel is presumed to have acted properly; a defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment. ***Strickland***, 466 U.S. at 690.

¶6 Okoronta contends that his attorney performed deficiently when she decided not to move to strike the juror because her decision was not a result of a tactical decision, but rather her unfamiliarity with ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), and other recent Wisconsin case law setting forth

and applying the standard for when jurors may be removed for cause. We need not decide, however, whether Okoronta's attorney performed deficiently, because we conclude that Okoronta has failed to make the required showing regarding prejudice. *See* ***Strickland***, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

¶7 To satisfy the prejudice component of the ***Strickland*** test, a defendant generally must show that "there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (quoting ***Strickland***, 466 U.S. at 694). Okoronta concedes that he cannot meet this standard, but he claims it should not be applied in this case. Relying on ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), Okoronta claims that he is entitled to an automatic reversal if he can demonstrate that the juror *should have* been removed, had his attorney moved to do so.[2]

¶8 Okoronta's argument is now academic. After the parties briefed this case, the supreme court decided ***State v. Lindell***, 2001 WI 108, ___ Wis. 2d ___, 629 N.W.2d 228, which overruled ***Ramos***. In ***Lindell***, the trial court had erroneously denied the defendant's motion to strike a juror for cause, thus requiring him to use a peremptory strike to remove the juror. ***Id.*** at ¶29. The defendant argued that, under ***Ramos***, he must be granted a new trial. ***Id.*** at ¶2. In overruling ***Ramos***, the court in ***Lindell*** reasoned that requiring a new trial was

[2] ***Ramos*** held that a new trial must be granted when a defendant uses a peremptory strike to correct a trial court's erroneous failure to remove a juror for cause. ***Id***. at 14.

"counterintuitive" in situations where "there is no serious argument that the defendant did not commit the offenses of which he was convicted, or that he did not receive a fair trial by an impartial jury." ***Id.*** at ¶51. Rather than automatic reversal, ***Lindell*** applied the standard of WIS. STAT. § 805.18(2), which allows for a new trial when an error "has affected the substantial rights" of the defendant.[3] ***Id.*** at ¶111.

¶9 Applying the standard to the case before it, the ***Lindell*** court held "[t]he substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error." ***Id.*** at ¶113. That holding is directly applicable to Okoronta. Okoronta is not claiming that any of the jurors ultimately chosen were biased. He was able to remove the juror in question, but he had to use a peremptory challenge to do it. Okoronta also does not claim that he was forced to exhaust all of his peremptory challenges because of his attorney's ineffectiveness. Rather, he takes issue with only one. Therefore, if we were to analyze Okoronta's claim as if his attorney had actually moved to strike the juror for cause and the trial court denied his motion, he would not benefit from it.

[3] WISCONSIN STAT. § 805.18(2) provides:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

¶10 Okoronta also asserts, however, that even under an ineffective assistance of counsel analysis, he should not be required to show that there is a reasonable probability that the outcome would be different. It is true that ***Strickland*** recognized that, in some instances, prejudice could be presumed in cases of ineffective assistance of counsel. 466 U.S. at 692. When the defendant has been denied actual or constructive assistance of counsel altogether, or when counsel "is burdened by an actual conflict of interest," prejudice is presumed. ***Id.***; *see also* ***State v. Smith***, 207 Wis. 2d 258, 280-81, 558 N.W.2d 379 (1997) (extending list in ***Strickland*** to include attorney's failure to object to the prosecution's breach of a plea agreement). In such cases, the "overriding interest in fundamental fairness" is threatened so a showing of prejudice is not required. ***Williams v. Taylor***, 529 U.S. 362, 392 (2000).

¶11 Okoronta has not suggested his attorney's performance was so poor as to be a constructive denial of assistance, or that his attorney breached her duty of loyalty. Instead, Okoronta refers us to ***Davidson v. Gengler***, 852 F. Supp. 782 (W.D. Wis. 1994). There, the district court concluded that when an ineffective assistance of counsel claim is based upon counsel's failure to make a ***Batson***[4] objection during jury selection, ***Strickland*** does not require the defendant to show the outcome of the *trial* might have been different. ***Id.*** at 787. Rather, it is only necessary to show that the outcome of the *jury selection process* would have been different. ***Id.***

[4] ***Batson v. Kentucky***, 476 U.S. 79 (1986), held that the government violates a defendant's right to equal protection of the laws if it attempts to exclude a juror based on an individual's race. ***Id.*** at 89. This holding was extended to gender in ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. 127, 129 (1994).

¶12 We disagree that ***Davidson*** supports Okoronta's claim. First, the reason the district court hesitated to apply ***Strickland*** in a traditional manner was that to do so would have threatened the guarantees of the Fourteenth Amendment and undermined the holding in ***Batson***. ***Davidson***, 852 F. Supp. at 786 ("To require proof that the racial composition of a jury altered the result of the trial would do violence to ***Batson***'s premise that a person's race is not relevant to his qualification to serve as a juror."). Although defendants have a constitutional right to be tried by a jury that has been chosen without consideration of race or gender, there is no such right to peremptory challenges. *See* ***United States v. Martinez-Salazar***, 528 U.S. 304, 307 (2000). "[R]ather, they are one means to achieve the constitutionally required end of an impartial jury." ***Id.***

¶13 Furthermore, when jurors are removed because of their race or gender, this "'cast[s] doubt on the integrity of the judicial process.'" ***Davidson***, F. Supp. at 788 (quoting ***Powers v. Ohio***, 499 U.S. 400, 411 (1991)). No such claim can be made when a defendant chooses to remove a juror with a peremptory strike when he or she cannot do so for cause. Finally, even if we were to apply a rule similar to ***Davidson***, the result would be no different. Unlike the defendant in ***Davidson***, Okoronta is not claiming that someone was impermissibly precluded from being on the jury or that someone was on the jury who should not have been. He claims only that he had one less peremptory strike, not that the actual selection of the jury would have been different.

¶14 Finally, we note that Okoronta was not denied any of his peremptory challenges, either by the trial court or his attorney; he received the full number granted him under WIS. STAT. § 972.03. Although he complains he had one less to use because of his attorney's alleged error, this does not mean he was prejudiced or that his rights were violated. "'Rather, he used the challenge in line

with a principal reason for peremptories: to help secure the constitutional guarantee of a trial by an impartial jury.'" ***Lindell,*** 2001 WI 108 at ¶89 (quoting ***Martinez-Salazar***, 528 U.S. at 316).

¶15 Okoronta protests that a rule requiring him to show prejudice beyond that the juror was in fact biased would prevent defendants from ever succeeding on an ineffective assistance of counsel claim when the basis for the claim is that the attorney failed to move to strike a juror for cause. This is not necessarily true. What Okoronta and any other defendant ultimately must show in an ineffective assistance of counsel claim is that their trial was "fundamentally unfair" because of their attorney's deficiency. ***Strickland*** at 696 ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."); *see also* ***State v. Damaske***, 212 Wis. 2d 169, 199, 567 N.W.2d 905 (1997). In a situation where an attorney fails to move to strike a biased juror for cause *or* use a peremptory challenge (either because the attorney chooses not to or has already exercised all the available peremptory challenges), this could result in fundamentally unfair trial. In such a case, the defendant could also challenge the conviction based on a violation of the right to an impartial jury. ***Lindell***, 2001 WI 108 at ¶117-18. We need not consider, however, all the situations in which fundamental unfairness could result because Okoronta has not alleged his trial was unfair. In sum, because he has not shown fundamental unfairness, we reject Okoronta's claim that he received ineffective assistance of counsel. We therefore affirm his judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.