

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2001

Cornelia G. Clark
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. 01-0716-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-523

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMER NINHAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. McKAY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Omer Ninham appeals a judgment convicting him of first-degree intentional homicide and physical abuse of a child. He also appeals an order denying his postconviction motion. He argues that the trial court erred when it *sua sponte* struck two members of the jury panel who indicated that they had felony convictions and that his trial counsel was ineffective for failing to

object to striking those jurors. Because we conclude that Ninham has not established any prejudice, we affirm the judgment and order.

¶2 The trial court erred when it dismissed the prospective jurors who had been convicted of felonies. *See State v. Mendoza*, 227 Wis. 2d 838, 852, 596 N.W.2d 736 (1999). Ninham argues that the judgment is therefore subject to automatic reversal under *State v. Ramos*, 211 Wis. 2d 12, 564 N.W.2d 328 (1997). Shortly after Ninham filed his brief, the supreme court overruled *Ramos*, concluding that errors in the jury selection process are subject to the harmless error statute, WIS. STAT. § 805.18(2).¹ *See State v. Lindell*, 2000 WI 108, ¶111, 245 Wis. 2d 689, 746, 629 N.W.2d 223. Because Ninham does not allege that the error in striking the prospective jurors denied him his right to an impartial jury, the error was harmless.

¶3 Likewise, the absence of any prejudice precludes reversal based on ineffective assistance of counsel. Even before *Lindell* was decided, errors relating to impaneling the jury were not grounds for automatic reversal if the defendant failed to object. *See State v. Erickson*, 227 Wis. 2d 758, 761, 596 N.W.2d 749 (1999). The error must be reviewed in terms of the effectiveness of trial counsel, which requires a showing of prejudice as well as deficient performance. *See id.* at 768. Prejudice occurs if the error is of such a magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Id.* at 769. It is not enough to show that the error had some conceivable effect on the outcome. *Id.* at 773. Because Ninham does not allege, and the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

record does not show, that the improper dismissal of prospective jurors had any effect on the outcome, he has not established any basis for relief.

By the Court.—Judgment and order affirmed.

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

