

FILED
04-04-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2022AP002001CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER L. WESTRICH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction entered in Jefferson County
Circuit Court, Case No. 2020CM000445 and the Order Denying
Postconviction Relief, The Honorable Robert F. Dehring, Jr., Presiding.

BRIEF OF PLAINTIFF-RESPONDENT

Respectfully submitted,

BROOKELLEN TEUBER
Assistant District Attorney
State Bar # 1032812
Attorney for Plaintiff-Respondent

District Attorney's Office
Jefferson County, Wisconsin
320 South Main Street, Room 225
Jefferson, Wisconsin 53549
(920) 674-7220

TABLE OF CONTENTS

STATEMENT OF THE ISSUES.....	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	4
STANDARD OF REVIEW	5
I. THE CIRCUIT COURT EXERCISED PROPER DISCRETION IN DENYING THE DEFENDANT’S MOTION FOR A NEW TRIAL DUE TO JUROR BIAS.....	6
II. WESTRICH CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE SHE CANNOT SHOW THAT SHE WAS PREJUDICED BY COUNSEL’S FAILURE TO OBJECT TO THE JUROR FOR CAUSE.	11
CONCLUSION.....	13
CERTIFICATION.....	14

TABLE OF AUTHORITIES

Supreme Court Case

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)..... 11

Wisconsin Cases

State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770 (1999).....

.....5, 6, 7, 8, 9, 10, 12

State v. Funk, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421.....5

State v. Johnson, 153 Wis. 2d 121, 449 N.W.2d 845 (1990)..... 5, 11, 12

State v. Lepsch, 2017 WI 27, 374 Wis. 2d 98, 892 N.W.2d 682 6, 12

State v. Lindell, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.... 8, 9, 10

State v. Louis, 156 Wis. 2d 470, 457 N.W.2d 484 (1990)..... 6, 12

State v. McMahon, 186 Wis. 2d 68, 519 N.W.2d 621 (Ct. App. 1994)...11

State v. Zurfluh, 134 Wis. 2d 436, 397 N.W.2d 154 (Ct. App. 1986).....6

STATEMENT OF THE ISSUES

Ms. Westrich argues that the circuit court exercised erroneous discretion in denying her Motion for Postconviction relief by finding that she failed to show that a juror was biased. She further argues that her trial attorney was ineffective for failing to object to the juror for cause.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. This case may be resolved by applying well-established legal principles, and the parties' briefs should adequately present the underlying facts.

STANDARD OF REVIEW

Objective bias is a mixed question of fact and law, and the circuit court's finding of facts will be upheld unless they are clearly erroneous. *State v. Funk*, 2011 WI 62, ¶ 30, 335 Wis. 2d 369, 799 N.W.2d 421. A reviewing court will “reverse a circuit court's determination in regard to objective bias ‘only if as a matter of law a reasonable judge could not have reached such a conclusion.’” *Id.* (citing *State v. Faucher*, 227 Wis. 2d 700, 720-21, 596 N.W.2d 770 (1999)).

Whether an attorney's actions constitute ineffective assistance is a mixed question of fact and law, and a trial court's determination regarding facts will not be overturned unless clearly erroneous. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990) (citations omitted). The determination of whether trial counsel's conduct constitutes ineffective assistance of counsel is a question of law and is subject independent review. *Id.*

ARGUMENT

I. THE CIRCUIT COURT EXERCISED PROPER DISCRETION IN DENYING THE DEFENDANT’S MOTION FOR A NEW TRIAL DUE TO JUROR BIAS.

“The concept of objective bias relates to the question of ‘whether [a] reasonable person in the individual prospective juror's position could be impartial.’” *State v. Lepsch*, 2017 WI 27, ¶ 24, 374 Wis. 2d 98, 892 N.W.2d 682 (citing *Faucher*, 227 Wis. 2d at 718). When assessing whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the *voir dire* and the facts involved in the case. *Lepsch*, ¶ 24. A court must make this determination based on what a “reasonable person in light of those facts and circumstances” would believe. *Faucher*, 227 Wis. 2d at 719. “[W]hether the juror should be removed for cause turns on whether a reasonable person in the prospective juror’s position could set aside the opinion or prior knowledge.” *Id.*

“A prospective juror's knowledge of or acquaintance with a participant in the trial, without more, is insufficient grounds for disqualification.” *State v. Louis*, 156 Wis. 2d 470, 484, 457 N.W.2d 484 (1990) (citing *State v. Zurfluh*, 134 Wis. 2d 436, 438, 397 N.W.2d 154 (Ct. App. 1986)).

In *State v. Faucher*, the Wisconsin Supreme Court affirmed a decision of the Court of Appeals that the trial court's decision to deny a new trial due to juror bias was in error. 227 Wis. 2d at 712, 735. This issue arose during the close of the State's case when one of the jurors realized he recognized a witness testifying against the defendant. *Id.* at 707. The trial court then conducted an individual *voir dire* with the juror and asked about the relationship the juror had with the witness. *Id.* The juror advised that she had been his next door neighbor, he knew her family very well, and that she was "a girl of integrity." *Id.* While the juror stated that he did not socialize with her personally, he advised, "I know she's a person of integrity, and I know she wouldn't lie." *Id.* at 708. However, when asked if he could put his feelings aside and weigh the witness's testimony the same as any other witness, the juror answered yes. *Id.* The defendant moved for a mistrial, which was denied. *Id.* at 710. In his motion for post-conviction relief, the defendant argued that the circuit court erred in refusing to strike the juror for cause. *Id.* at 711. The court denied the defendant's motion for a new trial. *Id.*

In affirming the Court of Appeals decision to reverse, the Wisconsin Supreme Court found that the juror's responses to the court's questions during *voir dire* indicated that he was not impartial towards this witness. *Id.* at 730. The court believed that the juror was sincere when he answered that he could put his opinion of the witness aside and make an impartial decision. *Id.* at 731. As such, the trial court was not in error when it found the juror

exhibited no subjective bias. *Id.* at 731-32. However, the trial court failed to consider whether an objective reasonable person in the juror's position would remain impartial. *Id.* at 732. Because of his answers indicating that the witness would not lie about anything and that he believed her to be a "girl of integrity", the Wisconsin Supreme Court found that a reasonable person in the juror's position would not set the opinion aside "despite the best intentions to do so." *Id.* at 733. As such, the juror was objectively biased. *Id.* at 735.

The defendant argues that this case is similar to *State v. Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. In *Lindell*, the Wisconsin Supreme Court found that juror D.F. was objectively biased and should have been struck for cause. *Id.* at ¶ 42. This was based on the fact that the juror knew the victim for approximately 20 years, and that her parents knew him for 47 years. *Id.* The juror described the victim as a "close friend." In addition, he was a distributor for her family's business. *Id.* at ¶ 43. The juror had seen the victim's partner not long before the victim's death. *Id.* at ¶ 44.

Ms. Westrich describes the relationship of the juror to the victim as "old high school friends" and stated that the juror expressed a "longstanding history of friendship with the victim". The State disagrees with this characterization of the juror's knowledge of the victim. The record shows that the relationship described by the juror in this matter bears no

resemblance to the relationships described by the jurors in *Faucher* and *Lindell*.

During *voir dire*, Attorney Teuber asked whether any jurors had a close personal or business relationship with any of the State's witnesses. (R. 86:20) The juror at issue responded, "I just –we were friends back in the day." (R. 86:20-21) The court asked, "You and who?" (R. 86:21) The juror answered, "Me and [the victim]." (R. 86:21) The juror further stated, "She was a grade ahead of me in high school." (R. 86:21) The Court asked, "Did you have any sort of friendship or acquaintanceship?" (R. 86:21) The juror responded, "Just friends." (R. 86:21) The Court asked, "Because of this relationship, do you feel that you'll be unable to be fair to one side or the other in this trial?" (R. 86:21) The juror stated, "I'm just letting you know." (R. 86:21) The Court asked, "To put it another way, will you be able to put your relationship aside and decide the case fairly and impartially upon the evidence, and based solely upon that evidence and under the Court's instructions as to the law render a just and true verdict?" (R. 86:21-22) The juror responded, "Yes." (R. 86:22)

At the Post-Conviction Motion Hearing, defense counsel argued that this case was similar to *Lindell* where a juror was on a first-name basis with one of the victims. (R. 110:8-9) The Court noted that in small town communities, it is more common that jurors would know witnesses. (R. 110:9) The court stated that it did not get the sense that the juror and the

victim were close friends. (R. 110:9) Rather, they had been at high school together and were friendly. (R. 110:9) The court noted this was a friendly relationship from the juror's past. (R. 110:9)

The court then made sure to review the exact exchange that occurred during *voir dire* between the court and the juror on November 8, 2021. (R. 110:12-13) After its review, the Court determined its original impression was correct, that this juror had known the victim in high school, and they had been friendly. (R. 110:13) The court concluded that it had fully developed the record regarding the nature of the relationship between the juror and the victim. (R. 110:15-16) Further, the juror advised that he could be fair. (R. 110:16) Under the circumstances, the Court found that there was no evidence that the juror's prior knowledge of the victim resulted in bias towards Ms. Westrich. (R. 110:15-16)

The record supports this court's decision. Unlike the jurors in *Faucher* and *Lindell*, the juror in this matter did not have a close personal relationship with the victim or her family. Further, the juror expressed no opinion on the victim's credibility. At the Postconviction Motion Hearing, the circuit court fully scrutinized the interaction with this juror during *voir dire*. Having done so, the court concluded that the relationship between the juror and victim, if it can be called one, was more of an acquaintance than that of close friends.

Ms. Westrich simply disagrees with the court's conclusion that this juror's past acquaintance with the victim did not cause the juror to be biased

against her. That is not sufficient to upset the trial court's determination that there was no bias considering the deference this court must show to that determination. As such, the court's denial of the defendant's request for a new trial due to juror bias was not in error.

II. WESTRICH CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE SHE CANNOT SHOW THAT SHE WAS PREJUDICED BY COUNSEL'S FAILURE TO OBJECT TO THE JUROR FOR CAUSE.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that he or she was prejudiced by the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). In evaluating an attorney's performance, courts look to whether an attorney's assistance was reasonable under the prevailing professional norms and considering all the circumstances. *Id.* at 688. Courts "do not look to what have been ideal, but rather to what amounts to reasonably effective representation." *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). In evaluating performance, courts should be highly deferential and must "avoid determinations of ineffectiveness based on hindsight." *See State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The court need not address both the performance and prejudice prongs of an ineffective assistance of counsel claim if the defendant fails to prove either one. *Id.* at 128.

If a defendant cannot show a juror was biased, he or she cannot

meet their burden in showing they were prejudiced by counsel's deficient performance. *Lepsch*, 2017 WI 27, ¶ 25. As such, he or she cannot meet their burden in showing ineffective assistance of counsel. *Johnson*, 153 Wis. 2d at 128. "Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias." *State v. Louis*, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990).

Westrich cannot meet her burden in showing the juror was biased, and as such, she cannot meet her burden in establishing counsel was ineffective for failing to object to this juror for cause. Westrich's claim that the juror was biased rests solely on the juror's admission that he knew the victim and was friendly with her in high school. However, when asked if they felt they could put aside their knowledge of the victim and decide the case fairly and impartially, the juror answered yes. Westrich does not point to anything in the juror's demeanor that might indicate they were biased. Unlike *Faucher*, where the prospective juror opined that he believed a witness to have unimpeachable credibility (227 Wis. 2d at 730), the juror in this matter expressed no opinion on the victim's credibility. Our courts have held that mere knowledge or acquaintance with a person at trial is insufficient grounds for disqualification. There is no allegation that the juror was related by blood or had a financial interest in the outcome of the case. Because Westrich cannot meet her burden in demonstrating juror bias, she was not prejudiced by defense counsel's

failure to object to the juror for cause. As such, she has failed to meet her burden in establishing ineffective assistance of counsel.

CONCLUSION

The circuit court in this case evaluated all the facts and surrounding circumstances regarding the questioning of the juror at issue and properly concluded that Westrich failed to show that the juror was biased. Further, because Westrich would not have been able to show that she was prejudiced by defense counsel's failure to object to the juror for cause, she cannot meet her burden in showing counsel was ineffective. Based on the foregoing, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 4th day of April, 2023 at Jefferson, Wisconsin.

Electronically Signed By,

Brookellen Teuber

BROOKELLEN TEUBER

Assistant District Attorney

State Bar # 1032812

Attorney for Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.50(1), Wis. Stats. for a brief produced with a proportional serif font. The length of this brief is 13 pages with 2,138 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12), Wis. Stats. and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 4th day of April, 2023 at Jefferson, Wisconsin

Electronically Signed By,

Brookellen Teuber

BROOKELLEN TEUBER
Assistant District Attorney
State Bar # 1032812
Attorney for Plaintiff-Respondent