COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP593-CR **Cir. Ct. No. 2004CF1135**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW C. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Andrew Robinson appeals from the judgment of conviction entered against him, and the order denying his motion for postconviction relief. He argues that the trial court erred when it denied his motion for a change of venue and when it rejected his challenge under ***Batson v.***

Kentucky, 476 U.S. 79 (1986), that he received ineffective assistance of trial counsel, and that he was denied his right to confront a witness against him under ***Crawford v. Washington***, 541 U.S. 36 (2004). Because we conclude that the trial court did not err, his trial counsel was not ineffective, and he does not have a right to confront a witness at a preliminary hearing, we affirm.

¶2 Robinson was charged with one count of attempted first-degree intentional homicide, one count of first-degree sexual assault, one count of kidnapping, and one count of mayhem, all with the use of a dangerous weapon and as an act of domestic abuse, and one count of first-degree attempted intentional homicide and one count of physical abuse of a child, both with the use of a dangerous weapon. He was charged with having stabbed his wife and stepdaughter.

¶3 At the preliminary hearing, the State moved to admit the hearsay statements of his stepdaughter on the grounds that her statements were excited utterances. The court granted the motion and admitted the statements. At the start of the trial, Robinson's counsel moved for a change of venue on the basis that Robinson had received prejudicial pretrial publicity. After conducting voir dire and empaneling the jury, the court denied the motion, finding that there had not been "any problem with pre-trial publicity interfering with selecting a fair and impartial jury."

¶4 During *voir dire*, the State used a peremptory strike to strike the only African-American juror from the panel. Robinson, who is African-American, argued that this violated his equal protection rights. The State explained that it struck the juror because she had been referred to the district attorney for physically assaulting her own child, one of the same charges brought against Robinson. The

court found that this was a valid race-neutral explanation for the strike, and denied Robinson's challenge.

¶5 A jury trial was held and Robinson was convicted of four of the six charges. The jury found him not guilty of kidnapping his wife and of first-degree attempted intentional homicide of his stepdaughter. The court sentenced him to a total of forty-five years of initial confinement and thirty-five years of extended supervision of all four counts. Acting *pro se*, Robinson then brought a motion for postconviction relief for a new trial in the circuit court. After a hearing on the motion, the circuit court denied it. Robinson appeals.

¶6 The first issue Robinson raises is whether the circuit court erred when it denied his motion for a change of venue based on prejudicial pretrial publicity.

> "We review [a circuit] court's denial of [a] change of venue motion under the erroneous exercise of discretion standard." ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). However, we independently evaluate the circumstances "'to determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or empaneled jurors.'" ***Id.*** (quoting ***State v. Messelt***, 178 Wis.2d 320, 327-28, 504 N.W.2d 362 (Ct. App. 1993)).

State v. Fonte, 2005 WI 77, ¶12, 281 Wis. 2d 654, 698 N.W.2d 594, *clarified by* 2005 WI 145, 286 Wis. 2d 77, 704 N.W.2d 912.

¶7 When evaluating the publicity alleged to be prejudicial, we consider:

> (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of

> peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id., ¶31(citation omitted).

¶8 Robinson argues that the pretrial publicity about the allegations of domestic abuse was so inflammatory that prejudice must be presumed. The trial court addressed the motion for change of venue after *voir dire* was completed. During *voir dire*, the trial court asked the potential jurors:

> This case, as I indicated, involves injuries inflicted with a knife; and it involves allegations that there were multiple stab wounds to the defendant's wife and child.
>
> With that information before you, any of you who did not raise your hand before, have you read or heard anything about this case? Does that jog your memory and cause you to believe that you have read or heard something about this case?

¶9 One juror raised her hand and said that she had. The court then asked if the information would cause her "not to be able to be fair and impartial?" and she replied "No." The court continued to ask if she would be able to keep an open mind and make a decision based on the evidence, and she responded that she would. The court then said:

> And all of you that looked at the newspaper, or I don't know whether it was on the radio or not, but any of you have heard or read anything about this case, it may not be factual. There are some things that appear in print that – they try to be accurate – but sometimes it is not. So is everybody here that has heard or read anything about this case, can you still – If you feel you cannot keep an open mind and if you can't wait to hear all of the evidence, would you raise your hand?

No one responded. Once the jury was empaneled, the court denied the motion for a change of venue finding that it "did not appear there was any problem with pre-trial publicity interfering with selecting a fair and impartial jury."

¶10 We conclude that the circuit court did not err in denying the motion for change of venue. "The mere fact that [pretrial] publicity has taken place, … does not establish prejudice." ***Turner v. State***, 76 Wis. 2d 1, 27, 250 N.W.2d 706 (1977). The court may examine the publicity to determine whether the articles were "calculated to form public opinion against the defendant." ***Id.*** Articles that discuss the facts of the case are merely informational, and not inflammatory. *See* ***id.*** "An informed jury is not necessarily a prejudicial one." ***Id.*** at 28 (citation omitted). In this case, the articles discussed the facts of the case and were not designed to influence public opinion against Robinson. The publicity was not inflammatory but was merely informational.

¶11 Further, the articles, most of which were published about four months before the trial, were sufficiently removed in time from the trial. *See* ***id.*** The trial court found that the publicity had not affected the ability to select a fair and impartial jury. Only one juror indicated that she remembered reading anything about the case, and she said it would not affect her ability to be fair. And Robinson has not argued that the State had any part in any adverse publicity. We conclude that Robinson has not established that he was prejudiced by the pretrial publicity the case received. The circuit court did not err when it denied his motion for change of venue.

¶12 The next issue Robinson raises is that the State's peremptory challenge resulted in racial discrimination because the only African-American juror was struck. Under ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986), a prosecutor

may not challenge potential jurors solely on account of their race. To be invalid, however, the action must be traced to a racially discriminatory purpose. ***State v. Lamon***, 2003 WI 78, ¶26, 262 Wis. 2d 747, 664 N.W.2d 607. The court established a three-step process for determining whether strikes violated equal protection. ***Id.***, ¶27. First, the defendant must establish a prima facie case by showing that he or she is a member of "cognizable group," and that the "facts and relevant circumstances raise an inference" that the State exercised a strike to exclude a person of that race from the jury. ***Id.***, ¶28. Once the defendant establishes a prima facie case, the burden shifts to the State to offer a "neutral explanation" for challenging the potential juror. ***Id.***, ¶29. The defendant may then prove that the State's reason was pretextual. ***Id.,*** ¶32. Once the State offers a race-neutral explanation, the trial court must consider the testimony and determine whether purposeful discrimination has been established. ***Id.***

¶13 In this case, the State's reason for striking was that the potential juror had previously been referred to the district attorney for one of the same charges for which Robinson was being tried. The trial court found that this was a race neutral explanation. We agree.

¶14 The next issue is whether Robinson received ineffective assistance of trial counsel. Robinson argues that his counsel was ineffective because counsel told the potential jurors during *voir dire* that Robinson was in custody. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Flores***, 183 Wis. 2d 587, 619-20, 516 N.W.2d 362 (1994). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need

not address the other prong. ***Strickland***, 466 U.S. at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶15 During *voir dire*, Robinson's trial counsel said to the jury:

> It's no secret, Ladies and Gentlemen, that my client is in custody. That's why we have this deputy sheriff here.
>
> Is there anyone on the jury panel, he or she, who believes that affects your ability to judge this case fairly and impartially, that you are concerned or frightened of the defendant because he's in custody?

No one responded. Robinson argues that because his attorney went through "extraordinary means" to obtain street clothes for him to wear at trial, the jury would not have known that he was in custody if his counsel had not made this statement.

¶16 We agree with the circuit court that Robinson has not established that he received ineffective assistance of trial counsel on this basis. At the ***Machner*** hearing,[1] counsel testified that he told the jury this because there was a deputy sitting in the courtroom, and he would "rather disarm the jury about that issue and find out if that caused some problem with them judging the case on the evidence" rather than having them judge the defendant because he is in custody.

¶17 First, we conclude that this did not constitute deficient performance, but was a reasonable trial strategy. Second, Robinson has not explained to the

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

court how he was prejudiced by this statement. The fact that the jury acquitted him of two of the six charges against him, shows that the jury was not prejudiced against him, but rather engaged in a careful deliberative process. Robinson has not undermined our confidence in the outcome. We conclude that he did not receive ineffective assistance of trial counsel.

¶18 The last issue Robinson raises is that he was denied his right to confront a witness under ***Crawford v. Washington***, 541 U.S. 36 (2004). Robinson argues that the trial court improperly allowed the State to read at the preliminary hearing the hearsay statement of his stepdaughter, the child victim. First, a challenge to a preliminary hearing must be brought by a petition for leave to appeal to this court. ***State v. Webb***, 160 Wis. 2d 622, 636, 467 N.W.2d 108 (1991). The failure to do so results in a waiver of the issue in a postconviction proceeding. ***Id.*** Since Robinson did not petition for leave to appeal on this issue before trial, it is waived.

¶19 Even had Robinson not waived it, however, he would not succeed on the merits. There is no constitutional or statutory right to confront witnesses at a preliminary hearing. ***State v. Padilla***, 110 Wis. 2d 414, 424-26, 329 N.W.2d 263 (Ct. App. 1982). The ***Crawford*** rule does not apply to a preliminary hearing in Wisconsin. Consequently, for the reasons stated we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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