COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2667-CR **Cir. Ct. No. 2004CF1119**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTEN V. WARNAKULASURIYA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER and ANTHONY G. MILISAUSKAS, Judges. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Kristen V. Warnakulasuriya appeals from a judgment convicting her of attempted first-degree intentional homicide and an order denying her motion for postconviction relief based on ineffective assistance of counsel. She contends her counsel did not follow up at voir dire with an unidentified juror who admitted being "sensitive" to mental illness issues, making it reasonably probable that a biased jury determined her responsibility during the mental disease or defect phase of the trial. We disagree and affirm.

¶2 Warnakulasuriya was charged with attempted first-degree intentional homicide contrary to WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a), and 939.32(1)(a) (2005-06),[1] and to aggravated battery, contrary to WIS. STAT. §§ 940.19(5) and 939.50(3)(e), for stabbing her boyfriend's wife in the back with a steak knife, puncturing a lung. She entered a special plea to both charges of not guilty by reason of mental disease or defect.

¶3 Before the guilt phase of the bifurcated jury trial, Warnakulasuriya pled guilty by reason of mental disease or defect to the attempted first-degree intentional homicide charge and the State dismissed the aggravated battery charge. At the mental responsibility phase, the jury returned a verdict that Warnakulasuriya had a mental disease or defect when she committed the crime but that she did not lack substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the law. The court sentenced her to fifteen years' initial confinement and twenty years' extended supervision.

¶4 Warnakulasuriya moved for postconviction relief, alleging ineffective assistance of trial counsel. Warnakulasuriya contended that trial

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

counsel should have questioned or challenged an unidentified juror who, during the portion of voir dire conducted by the court, admitted having formed an opinion "as far as I'm sensitive to the issue of mental illness." The colloquy leading to that comment unfolded as follows, after the court questioned whether anyone had read newspaper coverage of the event:

> THE COURT: Okay. I'll start in the back row …. The only phase that you are going to have to deal with is her mental condition. Do you believe, based upon what you read, you have formed an opinion in this regard?
>
> JUROR: No.
>
> …
>
> THE COURT: Anybody up in the front row?
>
> JUROR: No, I have not formed an opinion.
>
> JUROR: I formed an opinion as far as I'm sensitive to the issue of mental illness.
>
> THE COURT: All right.
>
> JUROR: So I do have—
>
> THE COURT: We'll get to that.

¶5 The court did not return specifically to the juror who expressed being sensitive to the issue of mental illness. It did, however, ask all potential jurors general questions about working in the mental illness field, whether they or family members had been treated for mental illness, and whether any who knew or were related to someone treated for mental illness still could be fair and impartial. Trial counsel did not request or conduct individual voir dire with any of the jurors. No juror was struck for cause.

¶6 At the postconviction ***Machner***[2] hearing, trial counsel testified that he had reviewed his voir dire file and was "pretty sure" he knew who the juror was. He testified he had notes for each juror and under Juror 21, a "Ms. Anderson," he had written and circled "sensitivity to issue of mental illness," that she had a brother with schizophrenia, and that she was a registered nurse at St. Catherine's, followed by "[what] looks like C-L-I-N." Counsel then had written "ST-4," which he testified meant "that's who the State struck as their fourth strike." Anderson did not sit on the jury.

¶7 The trial court concluded that Anderson was the unidentified juror, that she was an ideal defense juror, and that trial counsel's note-taking was thorough and his reasoning highly competent. By logical implication, counsel's competent representation did not prejudice Warnakulasuriya. The court denied the motion. Warnakulasuriya appeals.

¶8 Warnakulasuriya challenges "the appearance that a juror with a biased opinion remained on the jury." A defendant is entitled to an unbiased jury. *See* ***State v. Koller***, 2001 WI App 253, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838. A failure to object or to further question a juror may be raised as a claim of ineffective assistance of counsel. ***State v. Carter***, 2002 WI App 55, ¶14, 250 Wis. 2d 851, 641 N.W.2d 517. To prevail on the claim, a defendant must establish both that trial counsel rendered deficient performance and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We may address either component first, and an inadequate showing of either makes examination of the other unnecessary. *See* ***id.*** at 697. We accept the trial

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

court's findings of fact unless they are clearly erroneous, *see* ***State v. Adams***, 221 Wis. 2d 1, 6, 584 N.W.2d 695 (Ct. App. 1998), but review independently the trial court's determination whether counsel's performance was prejudicial. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶9 Showing prejudice requires Warnakulasuriya to show more than that the error merely "had some conceivable effect on the outcome" of the trial. ***Strickland***, 466 U.S. at 693. Rather, she must show actual prejudice, *see* ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999), a reasonable probability that but for counsel's unprofessional error the result of her trial would have been different. *See* ***Strickland***, 466 U.S. at 694; *see also* ***Koller***, 248 Wis. 2d 259, ¶9. The core question is whether trial counsel's failure to explore or object to the unidentified juror's admission of sensitivity to mental illness issues actually resulted in the seating of a biased juror—not whether a differently composed jury would have acquitted Warnakulasuriya. *See* ***Koller***, 248 Wis. 2d 259, ¶14.

¶10 The trial court found that the notes trial counsel took on his juror list, admitted into evidence at the postconviction hearing, were "pretty thorough." The notes, substantiated by the voir dire transcript, support that Juror 21, Anderson, was a clinic RN at St. Catherine's, had a brother with schizophrenia and expressed sensitivity to the issue of mental illness. The transcript also indicates that while two other jurors had relatives with forms of depression, the reference to sensitivity to mental illness appears only in relation to Anderson. The trial court stated that there was "no doubt in [its] mind" that Anderson was the unidentified juror and that in view of her profession and family history she was "probably sympathetic" to the defense such that "everything point[ed] to keeping [her] for the defense." Warnakulasuriya only speculates that counsel's decision not to pursue individual questioning would have revealed a negative bias or would have identified a juror

other than Anderson as the potentially biased juror. A showing of prejudice requires more than speculation; it must be affirmatively proved. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶11 We agree with the trial court. Warnakulasuriya's strongest argument is that there is "an appearance" that a potentially biased juror remained on the panel. We think it virtually certain that the juror who expressed the sensitivity was Anderson and was struck. In any event, Warnakulasuriya has not shown prejudice from trial counsel's decision not to individually question the juror, whoever it was. At the postconviction stage, Warnakulasuriya needed to establish that further questioning would have resulted in the discovery of bias on the part of a juror who actually decided her case. *See* ***Koller***, 248 Wis. 2d 259, ¶15. Warnakulasuriya could have called the suspect juror as a witness at the hearing and asked the questions she now claims her trial counsel should have asked. *See* ***id.*** She did not. Her argument for prejudice therefore depends on the assumption that had counsel questioned the juror, he would have uncovered a bias against her, which in turn would have led to striking the juror from the panel. Warnakulasuriya's assertion of juror bias thus remains speculation, not affirmative proof. *See* ***Wirts***, 176 Wis. 2d at 187. She has not met her burden. We affirm.

By the Court.—Judgment and order affirmed.

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