COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0275-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD O. MATTINGLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

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

MYSE, P.J. Richard O. Mattingly appeals a judgment of conviction of first-degree reckless homicide and an order denying his postconviction motion for a new trial. Mattingly contends that he was denied the effective assistance of counsel when his attorney failed to move to strike a potential juror for cause and used a peremptory strike to remove the juror from the petit panel thereby denying

Mattingly his full complement of peremptory strikes. Because Mattingly has not proven that the juror was biased, we conclude that Mattingly was not prejudiced by his counsel's failure to move to strike the juror. Accordingly, we conclude that Mattingly received effective assistance of counsel and affirm the judgment and order.

Richard Mattingly was charged with first-degree reckless homicide in connection with the death of his three- and one-half-month-old son. During voir dire, prospective juror Joseph Maggle acknowledged that he had read an article about the case in the Door County Advocate and that he had heard customers who were law enforcement officers talking about the case in his barber shop. He denied that any specific facts in this case were discussed. Maggle affirmed, however, that he could set aside these matters and reach his determination as to Mattingly's guilt or innocence based solely on the evidence received during the trial.

Because Mattingly alleges that Maggle was not an impartial juror, we set forth the full colloquy between Mattingly's attorney and Maggle during the voir dire:

> MR. SOSNAY: And he also asked about if anyone had made any decisions about guilt or innocence. And I notice that you had kind of smiled when he asked that question.
>
> [MR. MAGGLE]: Um, in my shop there is a quite a few people that are, maybe myself even included, is quite opinionated on what should be done if I [sic] person is involved with the death of a child.
>
> MR. SOSNAY: Okay.

[MR. MAGGLE]: Maybe you don't want to hear it.

MR. SOSNAY: Well, because of that, can you fairly and honestly say you can set aside your feelings and just listen to the evidence when you have already discussed it, and perhaps not only discussed it, but maybe even thought what the penalty in this case should be?

[MR. MAGGLE]: Um, I would certainly try to give—

MR SOSNAY: We are not asking for tries. You only get one shot at this. All right?

[MR. MAGGLE]: If you don't feel that I should.

MR. SOSNAY: It is not what I feel. It is what you feel.

[MR. MAGGLE]: Okay. Probably, was one of them had given an opinion that if a person has been found responsible—you could hang them for all I care.

MR. SOSNAY: The—understand, the jury doesn't make decisions about penalties.

[MR. MAGGLE]: That's the Judge's decision, right.

MR. SOSNAY: Now, in these conversations, have you had them with people from law enforcement?

[MR MAGGLE]: Um, they mentioned different things. They didn't—none of them brought up specifically anything about the case.

MR. SOSNAY: Never went into the facts?

[MR. MAGGLE]: No, sir. No, sir.

MR. SOSNAY: You haven't prejudged this case at all?

[MR. MAGGLE]: Um.

MR. SOSNAY: Already sentenced somebody?

[MR. MAGGLE]: I do not know the facts of the case.

MR. SOSNAY: You can set aside all of those conversations, all of those feelings that you have, and sit here and fairly and impartially judge the evidence?

[MR. MAGGLE]: Perhaps not.

MR. SOSNAY: So it is—now, your opinion is that you can't—

[MR. MAGGLE]: Well, like I said, if I heard the evidence, and the evidence was that he is innocent, I certainly would find him innocent.

MR. SOSNAY: You understand that the burden of proof in this case is upon the State to prove him (indicating) beyond a reasonable doubt, the guilty beyond a reasonable doubt, and that a defendant doesn't have to prove anything? Do you understand that?

[MR. MAGGLE]: Yes, sir.

MR. SOSNAY: I mean, I don't have to, or a defendant doesn't have to, parade in 6 or 7 witnesses and get a smoking gun and then like on Perry Mason have someone seated in the corner at the end of the trial get up and say, I confess. You realize that doesn't happen?

[MR. MAGGLE]: Yes, sir.

> MR. SOSNAY: Everybody realize that there is, though [sic], burden of proof on Mr. Mattingly, Richard Mattingly. It is on the State. Anybody have any problems? Does anyone feel we have to prove his innocence?
>
> (No response)
>
> MR. SOSNAY: And, Mr. Maggle, thank you for coming out and being so forthright with me.
>
> [MR. MAGGLE]: No problem.

Following this discussion, Mattingly's attorney failed to challenge this juror for cause and the court did not excuse the juror on its own motion. During the jury selection process, however, Mattingly's attorney subsequently used a peremptory strike to remove Maggle from the jury panel. On appeal, Mattingly contends that he was prejudiced by his counsel's failure to move to strike Maggle for cause because his attorney was required to use a peremptory strike thereby depriving Mattingly of his statutory entitlement to a full complement of peremptory challenges.

A claim of ineffective assistance of counsel is reviewed under the two-pronged inquiry dictated by ***Strickland v. Washington***, 466 U.S. 668, 687, (1984). One of the prongs requires that defendant demonstrate that counsel's performance was deficient. ***Id***. The second prong requires that the defendant demonstrate that counsel's alleged deficiencies prejudiced defendant's defense. ***Id***. If we conclude that the defendant has failed to meet his burden as to either prong, we do not need to address the other. ***Id***. at 697. To establish prejudice, the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id***. at 687. "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694.

Whether there has been ineffective assistance of counsel is a mixed question of fact and law. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). We will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategies unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540 541-42 n.2 (1992). The final determination of whether counsel's performance was deficient and prejudiced the defense are questions of law, however, which we review independently. ***Id***.

Mattingly contends that his trial counsel was ineffective because he failed to move the trial court to strike Maggle for cause. Mattingly contends that Maggle was biased because during the voir dire, Maggle expressed uncertainty over his ability to fairly and impartially judge the evidence and because counsel's subsequent questioning failed to rehabilitate Maggle. Instead of moving the court to strike Maggle for cause, counsel used a peremptory strike to remove Maggle. Mattingly claims he is prejudiced because he was deprived of his statutory entitlement to a full complement of peremptory challenges relying on ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997).[1] We conclude that this case is distinguishable from ***Ramos*** because, for the reasons stated below, Mattingly cannot establish that Maggle should have been removed for cause. If the trial

[1] In ***Ramos*** defendant's counsel used a peremptory strike after the trial court *erroneously* failed to remove a juror for cause. The supreme court concluded that Ramos had been denied his right to exercise all of his entitled peremptory strikes as a result of the trial court's error. The supreme court held that the use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because Ramos was deprived of a statutorily granted right. ***State v. Ramos***, 211 Wis.2d 12, 23-25, 564 N.W.2d 328, 333-34 (1997).

court would not have removed Maggle for cause, counsel's use of a peremptory challenge to remove Maggle from the petit panel was a proper choice for counsel to make. ***State v. Brunette***, 583 N.W.2d 174 (Ct. App. 1998). Accordingly, we conclude that Mattingly's defense was not prejudiced by his counsel's failure to move the court to strike Maggle for cause.

We note that the State argues that Mattingly's claim of error cannot be raised in the guise of the ineffective assistance of counsel. The State contends that Mattingly, having been adjudged a fair and impartial jury, compels a dismissal of his claim because he has not been prejudiced under the ***Strickland*** criteria. Because we conclude that there was no basis to excuse Maggle for cause, we need not examine this contention.

It is not ineffective assistance of counsel to fail to bring futile motions. ***Quinn v. State***, 53 Wis.2d 821, 827, 193 N.W.2d 665, 668 (1972). Therefore, if the trial court would have properly denied a motion to excuse a juror for cause the defendant has not been prejudiced. Accordingly, we examine whether the trial court should have properly granted a challenge for cause against juror Maggle. This requires that we examine whether Maggle's voir dire responses demonstrate bias.

Jurors must be struck for cause if they express or form any opinion, or exhibit any bias or prejudice in a case. Section 805.08(1), STATS. Mere expressions of a predetermined opinion as to guilt, however, do not disqualify a juror per se. ***State v. Sarinske***, 91 Wis.2d 14, 33, 280 N.W.2d 725, 733 (1979). If a juror can lay aside his or her opinion and render a verdict based on the evidence presented in court, then he or she can qualify as an impartial trier of fact. ***Id***. at 33, 280 N.W.2d at 733-34. Prospective jurors are presumed impartial and the party

challenging that presumption bears the burden of proving bias. ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990).

The record fails to support Mattingly's claim. If one parses Maggle's responses, one could conclude that he had a misconception as to who bears the burden of proof and that he expressed some initial reluctance in regard to having formed an opinion as to Mattingly's guilt. However, considering the context of the entire voir dire discussion the substance of Maggle's responses were directed in more generalized terms that if an individual was found guilty of killing a child he should be dealt with harshly by the system. Maggle indicated that he had learned no specific facts about the case from overhearing conversations that occurred in his barber shop. Maggle also affirmed that he would make the decision as to guilt or innocence based solely upon the evidence received during the trial. He specifically indicated that if the evidence so indicated, he would find Mattingly innocent.

Mattingly argues that Maggle's failure to respond to the question inquiring whether he had prejudged the case with other than an "Um," and Maggle's misconception that the evidence would have to prove Mattingly's innocence constituted a proper basis for challenge.

We do not agree. First we note that Maggle's response was merely a layman's expression of his willingness to listen to the evidence in determining Mattingly's guilt or innocence, rather than an allocation of the burden of proof. Even if, however, there was such a misconception, the judge's instructions as to the burden of proof would properly have corrected such a misconception. The trial court specifically instructed the jury that the burden of proof was upon the State, that Mattingly need not prove his innocence and that if the State failed to

bear its burden they should find Mattingly not guilty. There is no reason to believe that the instructions as given by the court would not have been followed by Maggle as well as the balance of the jury panel. *See* ***State v. Pitsch***, 124 Wis.2d 628, 645 n.8, 369 N.W.2d 711, 720 n.8 (1985) (noting that jurors are presumed to follow the court's instructions). We additionally note that counsel explored the concept of burden of proof with Maggle during the voir dire. Maggle did not express reluctance, but rather agreed with the observations counsel made regarding the burden of proof. Accordingly, the allegation that Maggle's responses indicated that he appeared to place the burden of proof upon Mattingly to prove his innocence does not present a basis to support a challenge for cause.

We also disagree with the contention that Maggle's response of "Um" to the question whether he had prejudged the case indicates that he had done so. The response of "Um" is at best ambiguous because it could have been the beginning of a response, an acknowledgment that he understood the question or a verbalization without any specific meaning as well as an affirmative answer. Within the context of all of Maggle's responses, it is apparent that Maggle repeatedly asserted that he would decide Mattingly's guilt or innocence based solely upon the evidence received at the trial and that he would exclude from consideration information received from any other source, including the conversations overheard within his place of business or the newspaper article he had read. We conclude that nothing in Maggle's responses support Mattingly's assertion that Maggle was not willing and able to function as a fair and impartial juror.

Because we conclude that there was no basis for a challenge for cause, Mattingly's assertion that he was denied the effective assistance of counsel must fail. Because the court properly would have denied any such challenge,

Mattingly was not prejudiced by the failure to make a motion which would have been denied. ***Quinn v. State***, 53 Wis.2d 821, 827, 193 N.W.2d 665, 668 (1972). Accordingly, the judgment of conviction and motion denying a new trial are affirmed.

By the Court.—Judgment and order affirmed.

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