

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0717-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LOUIS BEAULIEU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County:
JAMES H. TAYLOR, Judge. *Affirmed.*

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

PER CURIAM. Louis Beaulieu appeals his conviction for substantial battery, after trial by jury. During a four-man fist-fight, Beaulieu broke Keith Galen's jaw in two places. Beaulieu makes two arguments on appeal: (1) trial counsel ineffectively failed to remove a juror for cause and to challenge improper remarks the trial judge made during jury voir dire; and (2) the prosecution failed to prove venue beyond a reasonable doubt. On the first claim,

Beaulieu needed to show that his trial counsel's performance was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). On the second, Beaulieu needed to show that the State failed to prove venue beyond a reasonable doubt. *See State v. Dombrowski*, 44 Wis.2d 486, 501-02, 171 N.W.2d 349, 357 (1969); *Smazal v. State*, 31 Wis.2d 360, 363, 142 N.W.2d 808, 809-10 (1966). We see no merit to either of Beaulieu's claims and therefore reject his arguments and affirm his conviction.

First, Beaulieu raises his ineffective trial counsel claim for the first time on appeal. He never sought a trial court hearing under *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), at which trial counsel could explain his strategy during voir dire. Such testimony is a prerequisite to the proof of deficient performance prong of the *Strickland* standards. *Id.* Without the hearing, we have no way of knowing whether trial counsel had legitimate strategic reasons for failing to strike a juror or raise questions about the trial judge's remarks during jury voir dire. If trial counsel had legitimate strategic reasons, Beaulieu has no claim of ineffective trial counsel. We will not presume that trial counsel's inaction was the result of deficient performance. Beaulieu had the burden to make the case on that issue at the *Machner* hearing. In short, Beaulieu's failure to have a *Machner* hearing bars him from challenging his trial counsel's effectiveness.

Second, the State put in sufficient evidence of venue. It may prove venue with circumstantial evidence. *See Dombrowski*, 44 Wis.2d at 501-02, 171 N.W.2d at 357; *Smazal*, 31 Wis.2d at 363, 142 N.W.2d 809-10. Heidi Richard, a witness, testified that she encountered Beaulieu in a bar in Trego and that Trego was in Washburn County. They then drove to the Town of Springbrook, the site of the fight, which Keith Galen, the victim, estimated as five to ten miles from

Trego. This was enough to circumstantially prove venue. Further, Springbrook actually lies in Washburn County, on U.S. Highway 63 only fourteen miles west of the county seat and site of the trial. *See* § 4(3), STATS.; RAND MCNALLY ROAD ATLAS 106-07 (1996). We may assume that jurors from the county knew this and drew that obvious inference; one juror was from Trego and another from Springbrook. *See State ex rel. Cholka v. Johnson*, 96 Wis.2d 704, 713, 292 N.W.2d 835, 840 (1980) (jurors may rely on common knowledge). In short, we have no basis to overturn the conviction.

By the Court.—Judgment affirmed.

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

