COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 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. 98-2470-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JUERGEN HUEBNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

FINE, J. Juergen Huebner appeals from a judgment convicting him of battery, *see* § 940.19(1), STATS., and criminal damage to property, *see* § 943.01(1), STATS. He was convicted by a six-person jury, to which he did not object. The jury returned its verdict on February 18, 1998; the trial court sentenced Huebner on February 27, 1998. On June 19, 1998, the supreme court released its opinion in ***State v. Hansford***, 219 Wis.2d 226, 580 N.W.2d 171

(1998), which held that § 756.096(3)(am), STATS., 1995–96 ("A jury in misdemeanor cases shall consist of 6 persons."), violated Article I, § 7 of the Wisconsin Constitution. Huebner filed his notice of appeal on August 25, 1998. The only issue presented by this appeal is whether Huebner may assert ***Hansford***'s invalidation of § 756.096(3)(am) as a ground to get a new trial. He may not. Accordingly, we affirm.

As noted, ***Hansford*** held that a statute requiring that misdemeanor cases be tried before six-person juries violated the Wisconsin Constitution. Huebner contends that ***Hansford*** must be applied retroactively and that he is, therefore, *ipso facto* entitled to a new trial even though he did not object to the six-person jury. Although we agree that under ***State v. Koch***, 175 Wis.2d 684, 694, 499 N.W.2d 152, 158 (1993), which held that "'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past'" (quoting ***Griffith v. Kentucky***, 479 U.S. 314, 328 (1987)), ***Hansford*** applies to all cases "pending on direct review," ***Hansford*** only applies to those cases where the issue was raised before the trial court.

Griffith's rationale for mandating that new rules for criminal prosecutions be applied to all cases pending on direct review was that for a new rule announced by an appellate court to apply to only the lucky case chosen to have the issue decided would be unfair to all those other appellants who had similarly preserved the issue but who were not first in the appellate queue:

> As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet

> final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."

Id., 479 U.S. at 323 (quoted source omitted). To be a "similar" case, of course, the issue must have been preserved in the trial court—as it was in ***Griffith***, 479 U.S. at 317, 319, ***Koch***, 175 Wis.2d at 692, 499 N.W.2d at 157 (preserving claim to which subsequently announced ruling by United States Supreme Court applied), and ***Hansford***, 219 Wis.2d at 232, 580 N.W.2d at 174. By seeking reversal based on an argument that he did *not* make before the trial court, Huebner seeks not parity with Hansford, Koch, and Griffith, but an advantage that would ignore the general rule that, except for unusual circumstances, even constitutional issues must be raised in the trial court before they will be considered on appeal. *See* ***State v. Caban***, 210 Wis.2d 597, 604, 563 N.W.2d 501, 505 (1997).[1] Although undoubtedly there is an advantage to a defendant to have more rather than fewer jurors, because that increases the numerical chance for a hung jury, that advantage does not warrant overturning a fair, error-free trial on a ground Huebner did not raise before the trial court.[2]

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[1] One of those unusual circumstances justifying appellate relief even though the issue was not raised before the trial court is where the defendant has been convicted of a substantive crime that an appellate court later decides is beyond the legislature's constitutional power to create. *See* ***State v. Benzel***, 220 Wis.2d 588, 592–593, 583 N.W.2d 434, 436–437 (Ct. App. 1998). This is not such a case, however. Rather, to use the words of ***Benzel***, this case concerns the application of a constitutional principle that "does not affect the basic accuracy of the factfinding process at trial." ***Id.***, 220 Wis.2d at 592, 583 N.W.2d at 436.

[2] In an essentially undeveloped argument, Huebner argues that his trial lawyer gave him ineffective assistance of counsel if the lawyer's failure to object to the six-person jury waived Huebner's right to argue that the six-person jury deprived him of rights under the Wisconsin Constitution. It is black-letter law, however, that a defendant claiming ineffective assistance of trial counsel must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to satisfy the burden under the prejudice prong, the defendant claiming ineffective-assistance of trial counsel "'must show that there is a reasonable probability (continued)

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

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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.'" ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (quoting ***Strickland***, 466 U.S. at 694). This is true even where the defendant complains about a trial lawyer's failure to preserve a right guaranteed by the constitution. Thus, ***Kimmelman v. Morrison***, 477 U.S. 365, 374–375 (1986), recognized that although a defendant appealing the improper denial of a Fourth-Amendment suppression motion "need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue," a defendant asserting an ineffective-assistance-of-counsel claim must prove "that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice."