

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2009

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2429

Cir. Ct. No. 2003CF127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD MAX LEWIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Forest County:
JAMES R. HABECK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Edward Max Lewis, pro se, appeals an order denying his WIS. STAT. § 974.06¹ postconviction motion. He raises numerous

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

issues on appeal, most of which are wholly undeveloped and are based on factual claims that are refuted by the record. Contrary to WIS. STAT. RULE 809.19(1)(d), Lewis's brief makes no citation to the record for any facts. Therefore, we will confine our review to three issues: (1) whether WIS. STAT. § 974.06(3) requires the court to hold an evidentiary hearing when it allows but does not compel the State to file a response; (2) whether Lewis's trial counsel was ineffective in jury selection, for failing to introduce written reports prepared by the State's witnesses and failing to challenge the credibility of Lewis's brother, Orin; and (3) whether Orin's recantation provides a basis for a new trial. We reject Lewis's arguments and affirm the order.

BACKGROUND

¶2 Lewis was convicted of repeated sexual assault of his stepdaughter. The abuse came to light when Lewis told his wife he had molested the child and also molested his stepson. His wife believed Lewis wanted her to participate in sex acts with him and the children. She called the police. An officer testified that Lewis admitted having sexual contact with his stepdaughter twelve or more times. Two days later, Lewis recanted his confession. However, while in jail, he told a social worker of a "series of incidents, more than one incident" of sexual contact and sexual penetration of his stepdaughter. Lewis's stepdaughter testified and confirmed sexual contact and intercourse with Lewis. Orin also testified that he had witnessed the child performing oral sex on Lewis and that Lewis had engaged in sex acts with Orin on multiple occasions. Lewis testified, denying assaulting the child, and testified that Orin committed the assaults. Lewis said he wanted to die and, by taking the blame, his father-in-law would kill him. He also wanted to protect Orin from prison.

¶3 The jury convicted Lewis and this court affirmed the conviction. Lewis then filed the present postconviction motion. The court indicated the State could file a response to the motion, but was not required to do so. The court also granted the State's motion to extend the time for filing a response. When the State did not respond, the court examined the motion and denied it without a hearing.

DISCUSSION

¶4 WISCONSIN STAT. § 974.06(3) does not require the court to hold a hearing merely because it allowed the State an opportunity to respond. The trial court's invitation to respond was not made after any examination of the motion to determine whether it had arguable merit. The court later correctly decided the motion failed to present sufficient nonconclusory facts and allegations to establish any entitlement to relief. *See State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

¶5 Lewis's various claims of ineffective assistance of trial counsel fail because his motion does not establish deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish deficient performance, Lewis must show that his counsel's representation fell below an objective standard of reasonableness. *Id.* at 687. To establish prejudice, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

¶6 Lewis faults his trial counsel for failing to remove four jurors from the panel. The first juror, a teacher, did not know Lewis or any of his brothers or the victim or any of her family. Lewis identifies no bias by that juror. The second juror knew the victim's grandfather, but was not aware that he had any children or

grandchildren. Again, Lewis establishes no bias. The third juror said the victim's father was her husband's nephew. She never saw the victim's father and did not know he had a child. Again, there is no basis for excluding that juror. The fourth juror, Brian Retzlaff, was the son-in-law of the Crandon Police Chief who testified in this case. However, the police chief added nothing of significance to the case and was, in fact, arguably more favorable to the defense. He testified that Lewis reported to him that he found child pornography on his computer. The police chief turned the matter over to an investigator in Madison and never heard more about the incident. Lewis has established no prejudice from having the chief's son-in-law on the jury when the essence of the chief's testimony was that Lewis reported a crime in which he was not a suspect. Retzlaff stated he did not discuss police matters with his father-in-law and assured the court he could be fair and follow the court's instructions.

¶7 Lewis also contends Retzlaff showed subjective bias during voir dire. Another prospective juror said he had a "faint feeling" that a defendant might be "a little bit guilty" if he was charged, and "if there wasn't some reason for the police to be there to pick them up they wouldn't be in court," Retzlaff stated he agreed with what the other venireman said. Defense counsel then lectured the panel regarding the presumption of innocence and the requirement that the State prove guilt beyond a reasonable doubt. Retzlaff's adoption of the other venireman's equivocal statements does not establish subjective bias. A prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality. *See State v. Oswald*, 2000 WI App 3, ¶6, 232 Wis. 2d 103, 606 N.W.2d 238.

¶8 Lewis contends his trial counsel was ineffective because he failed to adequately cross-examine a sexual assault nurse and a doctor by introducing their

written reports. Lewis's trial counsel did cross-examine the witnesses, who admitted the victim's hymen was intact and there was no scarring, bleeding, discharge or lesions. The witnesses also explained why these findings were not inconsistent with the victim's allegations. Because the jury heard the doctor's and nurse's testimony, it was not necessary to introduce the written reports that confirmed their testimony. Lewis has established neither deficient performance nor prejudice from his counsel's failure to introduce the written reports.

¶9 Lewis next claims his counsel was ineffective for failing to attack Orin's credibility. The argument is based on the incorrect premise that Orin denied sexually assaulting the victim and her brother. Orin was asked whether he was charged with sexually assaulting the victim and her brother and he answered that he was. He was never asked and did not answer whether he committed the assaults. Orin later pled guilty to sexually assaulting the victim. Even if cross-examination by Lewis's counsel could have established that Orin also sexually assaulted the victim, that evidence would not exculpate Lewis. There is no reason to believe both of them did not assault the victim.

¶10 Orin has recanted his testimony. He now indicates he did not see Lewis sexually assaulting the victim, and he states he was not around during the time frame that Lewis allegedly assaulted her. Therefore, Orin has no direct evidence of Lewis's innocence. Lewis's defense was not that the victim was not sexually assaulted. Instead, he claimed he confessed to sexually assaulting the victim to cover for Orin who had really committed the crimes. This defense is not helped by Orin's recantation. Orin now says he lived in other homes at the time and had no knowledge of what was going on in Lewis's home.

¶11 The only significant part of Orin's recantation is that he withdraws his testimony that he saw Lewis sexually assault the victim. That testimony was not critical to the State's case. In addition to the victim's testimony, the jury heard that Lewis confessed to the sexual assaults to his wife and to the police. His version at trial, that he confessed because he knew Orin had sexually assaulted the victim, would not have been supported by evidence that Orin was not around and therefore was not responsible for the crime.

By the Court.—Order affirmed.

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

